Civil Law and Practice Section MCLE Program
Webinar
June 10, 2020

12:00 PM – 1:00 PM

Welcome/Announcements and Introductions
Azam Nizamuddin – Civil Law and Practice Section Chair

Program – Let Go of My Alter Ego: A Guide to Piercing the Corporate Veil

Speaker
John J. Pcolinski Jr., Guerard, Kalina & Butkus and Azam Nizamuddin, Allied Asset Advisors

Speaker Bios – see attached

Presentation Summary
John and Azam will discuss the equitable doctrine of piercing the corporate veil. By attending this program, you will learn the law involved with piercing the corporate veil, become familiar with specific case analysis of recent cases and learn ways to defend against "piercing the corporate veil" with regard to limited liability entities.

Link to Evaluation

The evaluation must be completed in order to receive CLE credit.
https://www.surveymonkey.com/r/CivilLaw06102020

Next Meeting: September 2020

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LET GO OF MY ALTER EGO:

UNDERSTANDING THE DOCTRINE OF PIERCING THE CORPORATE VEIL

- Azam Nizamuddin - General Counsel – American Trust Corporation / NAIT ; Chief Compliance Officer - Allied Asset advisors
- John Pcolinski - Guerard, Kalina & Butkus

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ITS ALL ABOUT THE EQUITIES

Equity	Law
• Declaratory Judgment • TRO • Injunctions • Rescission • Specific Performance • Accounting • Mandamus • Reformation • Quo Warranto	• Damages • Special Damages • Consequential Damages • Punitive Damages • Attorneys Fees

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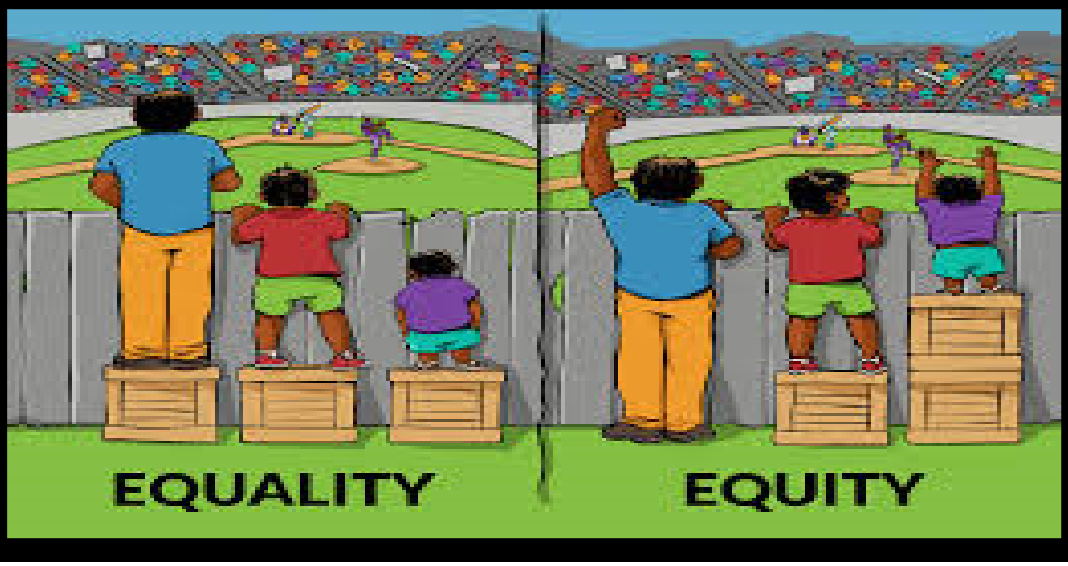
Its all about the Equities



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WHEN TO USE THE PCV ?

1) Do I include a claim in my complaint now? Or

2) Do I wait until I obtain a judgment ?

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THE ELEMENTS OF PIERCING THE CORPORATE VEIL

1) a unity of interest and ownership such that the separate personalities of the corporation and defendant do not exist (i.e. alter ego) ; and

2) The adherence to the fiction of a separate corporate existence would promote an injustice or inequitable consequences.

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1. UNITY OF INTEREST & OWNERSHIP

- (1) inadequate capitalization;
- (2) failure to issue stock;
- (3) failure to observe corporate formalities;
- (4) nonpayment of dividends;
- (5) insolvency of the debtor corporation;
- (6) nonfunctioning of the other officers or directors;
- (7) absence of corporate records;
- (8) commingling of funds;
- (9) diversion of assets from the corporation by or to a stockholder or other person or entity to the detriment of creditors;
- (10) failure to maintain arm's-length relationships among related entities; and
- (11) whether, in fact, the corporation is a mere facade for the operation of the dominant stockholders

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2. FRAUD, INJUSTICE OR INEQUITABLE

- circumstances must exist such that adherence to the fiction of a separate corporate existence would sanction a fraud, promote injustice, or promote inequitable consequences.

- "[s]ome element of unfairness, something akin to fraud or deception, or the existence of a compelling public interest"

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WHAT IS AN ALTER EGO?

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THE ALTER EGO THEORY

- **Is the Corporation merely an "alter ego" of an individual owner? Setting up a flimsy organization or many organizations just to escape personal liability?**

- **Fontana v. TLD Builders – (2nd Dist – 2005)**
  - ❑ **Absence of Corp. Resolution authorization repayment for loans**
  - ❑ **TLD never had an employee**
  - ❑ **No financial records for any payments made to subcontractors**
  - ❑ **No or doubtful initial capitalization**
  - ❑ **Failure to pay dividends**
  - ❑ **Commingling of corporate and personal assets**
  - ❑ **Wife director was non-functioning and not active**
  - ❑ **Wife director had no knowledge of loans of $500,000 owed to her;**
  - ❑ **DiCosola was the dominant force behind the corporation**
  - ❑ **Diversion of Assets from the corporation by or to a stockholder or other person or entity to the detriment of creditors**

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ALTER EGO CONTINUED:

Kreisman v. Mayer, 1st Arlington Nat. Bank., – [2nd Dist. 1980]

Dominant SH or Officer

- ❑ Oral contract for services and equipment – unpaid in the amount of $208,249.43
- ❑ Officer was the dominant force controlling the transaction with Kreisman and the restaurant construction.
- ❑ She was the principal beneficiary of the trust holding legal title to the restaurant property which the trustee furnished as security for the construction loan from which the improvements and equipment costs were to have been paid.
- ❑ She also entered into the escrow agreement on behalf of the trustee under which all disbursements of funds required her approval.
- ❑ Here corporation filed for Ch. 11 bankruptcy
- ❑ She filed a counterclaim in the underlying breach of contract seeking personal damages.

❖ No discussion of fraud or inequity

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ALTER EGO CONTINUED:

Fiumetto v. Garret Enterprises – [2nd Dist. 1981]

- Employee terminated after she filed for unemployment benefits after reduced hours. (Retaliatory Discharge)
- Garret was the sole shareholder and President of the Corporation.
- For adequate capitalization, Court looked to the amount of capital to the amount of business to be conducted & obligations to be fulfilled
  - 5 initial employees
  - $1,000 initial capitalization through loans
- No directors meeting were held
- Corporate documents were filed and ratified after litigation initiated.
- After litigation, Garret sold all the assets of the corporation and then paid personal debts with the proceeds.

❖ No discussion of fraud or *inequity*

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DO YOU REALLY WANT TO SUE US NICE FOLKS ?

Buckley v. Abuzir – [1st Dist – 2014] - Unity of Interest Analysis

1) **Grant of Motion to Dismiss reversed;**
2) **Judgment against Silver Fox Pastries;**
3) **Subsequent suit against Defendant ; Defendant had no formal role Co. ;**
4) **Sister and brother-in-law were owners/officer/agent;**
5) **SFP never filed any annual reports;**
6) **SFP never had any directors;**
7) **SFP did not have any stock records / or any annual meetings;**
8) **Court concluded after survey of jurisdictions, a non-SH or D can be held personally liable under PCV equitable theory.**

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FRAUD, INJUSTICE OR INEQUITABLE ANALYSIS

Fontana v. TLD Builders – (2nd Dist – 2005)

- **Defendant placed wife in nominal role to shield himself from liability;**
- **After lawsuit was filed, Defendant began selling off assets to the detriment of potential creditors & created new corp. without any explanation;**
- **Corp had $1.8 m assets, yet made profit in only 2 of 5 years, with no employees;**

Buckley v. Abuzir – [1st Dist – 2014]

- **Defendant operated SFP initially as a supplier to Plaintiff;**
- **Defendant made all business decisions ; hired Plaintiff's head baker;**
- **Through the baker and supply chain, D had access to Plaintiff's recipes and customer lists;**
- **D's supplier customers were also customers of Plaintiff.**

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WHAT ABOUT A NOT-FOR-PROFIT CORPORATION? CAN PCV APPLY?

Macaluso v. Jenkins – [2nd Dist. – 1981]

- Not for profit professional association for security guards.
- Breach of Contract for printing material with Plaintiff.
- Jenkins was founder, treasurer, chairman of the board.
- No salaried employees ; sharing of office space with other individuals
- No evidence indicating whether any directors or officers played any role in the management of the organization; Jenkins indicated he made most or all of the decisions concerning the I. P. A.
- No elections or consultations with the board of directors to appoint officers or to create or dissolve a satellite office in another state.
- No books or financial records & commingling of funds and services with other entities

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FORSYTHE V. CLARK USA - IL SCT - 2007

- Issue of holding a parent company liable for the conduct of a subsidiary
- Concept of Direct Participant Liability
- Question of holding a parent corporation for a violation of the Workers Compensation Act.
- Trial Court granted Parent Co.' Motion for SJ; Appellate Court reversed; S. Ct. affirmed.
- The IL Supreme Court referenced a 1929 law journal article by Justice Douglas and a case out fo the 2nd Circuit by Judge Learned Hand in 1929.
- Yes: If there is "sufficient evidence to prove that a parent company mandated an overall business and budgetary strategy and carried that strategy out by its own specific direction or authorization."

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DOES PCV APPLY TO LLCS?

Maghsoudi Enterprises v Tufenkian Ventures- 2009 **US Dist. Lex 107266**

- In Illinois, members of the an LLC may be personal liability for the conduct of an LLC if the factors of piercing the corporate veil exist.
- Court found insufficient facts to state of claim for Piercing the Corporate Veil

In general, members and managers not liable for debts of the LLC. IL LLC Act Section 10-10. However, a Member or Manager may incur personal liability based on their own personal actions of fraud, misconduct etc.

Illinois LLC Act: Section 10-10 language: (a-5) removes effect of Dass and Carollo cases. LLC Act mentions "wrongful acts or omissions" . It seems piercing is allowed in IL for wrongful acts. Some litigators have argued that some language in 10-10 would prevent piercing.

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DOES PCV APPLY TO LLCS?

Illinois LLC Act Sec. 10-10. Liability of members and managers.

(a) Except as otherwise provided in subsection (d) of this Section, the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager.

(a-5) Nothing in subsection (a) or subsection (d) limits the personal liability of a member or manager imposed under law other than this Act, including, but not limited to, agency, contract, and tort law. The purpose of this subsection (a-5) is to overrule the interpretation of subsections (a) and (d) set forth in Dass v. Yale, 2013 IL App (1st) 122520, and Carollo v. Irwin, 2011 IL App (1st) 102765, and clarify that under existing law a member or manager of a limited liability company may be liable under law other than this Act for its own wrongful acts or omissions, even when acting or purporting to act on behalf of a limited liability company. .....

(c) The failure of a limited liability company to observe the usual company formalities or requirements relating to the exercise of its company powers or management of its business is not a ground for imposing personal liability on the members or managers for liabilities of the company.

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2018 IL App (1st) 171087-U

FIRST DIVISION
June 18, 2018

No. 1-17-1087

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

JOHN BUCKLEY and MAMA GRAMM'S BAKERY, INC., an Illinois Corporation, Plaintiffs-Appellants, v. HAITHAM ABUZIR a/k/a MIKE ABUZIR, Defendant-Appellee.	))))))))))	Appeal from the Circuit Court of Cook County No. 10 CH 27736 The Honorable Anna H. Demacopoulos, Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Mikva and Griffin concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's orders granting summary judgment in favor of defendant and denying plaintiffs' motion for leave to file an amended complaint are affirmed. Plaintiffs failed to establish any genuine issue of material fact on plaintiffs' corporate veil-piercing claim as to whether adhering to the corporate fiction would promote an injustice. The circuit court did not abuse its discretion in denying plaintiffs' motion to amend the complaint, as the request was untimely, and the proposed amendments were prejudicial and would not have cured any defects in the pleading.

¶ 2 Plaintiffs John Buckley and Mama Gramm's Bakery, Inc. (Mama Gramm's), obtained a default judgment against Silver Fox Pastries, Inc. (Silver Fox), for alleged violations of the

Illinois Trade Secrets Act (765 ILCS 1065/1 *et seq.* (West 2016)) (the underlying action). Plaintiffs subsequently initiated this action seeking to pierce Silver Fox's corporate veil and collect on the default judgment directly from defendant Haitham Abuzir. The circuit court granted defendant's motion for summary judgment and denied plaintiffs' subsequent motion for leave to file a second amended complaint. Plaintiffs appeal. For the following reasons, we affirm the circuit court's judgment.

¶ 3 BACKGROUND

¶ 4 The underlying dispute in this case spans more than a decade and is before this court for the third time. In 2007, plaintiffs obtained a default judgment against Silver Fox in the amount of $421,582.50 for Silver Fox's alleged violation of the Illinois Trade Secrets Act (765 ILCS 1065/1 *et seq*. (West 2016)). Plaintiffs alleged that Silver Fox wrongfully obtained Mama Gramm's bakery recipes and customer lists by hiring Mama Gramm's head baker and obtaining recipes, processes, techniques, formulas, and a customer list from her, and then producing and selling bakery goods that were identical to those of Mama Gramm's to some of Mama Gramm's former customers. Plaintiffs initiated postjudgment citation proceedings but were unable to collect from Silver Fox because it had gone out of business. During the citation proceedings, plaintiffs learned that defendant had loaned $45,000 to Silver Fox during its formation, of which Silver Fox repaid defendant $15,000 from proceeds from the sale of Silver Fox's assets.

¶ 5 In 2011, plaintiffs initiated this action seeking to pierce Silver Fox's corporate veil and hold defendant liable for the default judgment. Plaintiffs alleged that defendant's sister Suna Abuzir held herself out as being Silver Fox's "owner," and her husband, Ali Alsahli (Ali), as the president and registered corporate agent, but that defendant was the one who made all of Silver Fox's business decisions and exercised such control over Silver Fox that the corporation did not

exist separately. Plaintiffs alleged that defendant personally "headhunted" Sherry Sloan, Mama Gramm's head baker, and Betty Jenkins, Mama Gramm's cake decorator, for the sole purpose of stealing Mama Gramm's recipes and customer lists.

¶ 6 Defendant moved to dismiss plaintiffs' complaint under section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2010)), asserting that plaintiffs' complaint failed to allege sufficient facts to establish a unity of interest between defendant and Silver Fox because defendant was not an officer, director, or shareholder of Silver Fox. The circuit court granted defendant's motion and plaintiffs appealed. We reversed and remanded, finding that defendant's motion was incorrectly styled as section 2-619 motion and that plaintiffs were prejudiced by the motion's incorrect designation. *Buckley v. Abuzir*, 2012 IL App (1st) 112246-U, ¶¶ 14-15, 20 (*Buckley I*).

¶ 7 After remand, defendant again moved to dismiss the complaint pursuant to section 2-615 of the Code. The circuit court granted defendant's motion and plaintiffs appealed. We again reversed and remanded for further proceedings. *Buckley v. Abuzir*, 2014 IL App (1st) 130469 (*Buckley II*). We concluded that "the lack of shareholder status—and indeed, lack of status as an officer, director, or employee—does not preclude veil-piercing," and that plaintiffs had alleged sufficient facts to establish a unity of interest and ownership between defendant and Silver Fox. *Id.* ¶¶ 29, 32. We observed that many of plaintiffs' allegations were conclusory and that plaintiffs had not explained precisely how defendant allegedly used Silver Fox to perpetrate a violation of the Trade Secrets Act or otherwise engage in fraud or deception. We found that plaintiffs had not explained "*why* [a]dherence to the fiction of a separate corporate existence would sanction a fraud, promote injustice, and/or promote inequitable consequences; *how* defendant perpetrated an injustice; or *what* 'injuries' were alleged in the underlying complaint." (Emphases in original and

internal quotation marks omitted.) *Id.* ¶ 39. We concluded, however, that plaintiffs' allegation that defendant "created and started [Silver Fox] and hired [Sloan] for the express purpose of switching over accounts, taking customer lists, and using the trade secrets and recipes belonging to and owned by [p]laintiffs," sufficiently alleged an unfairness or inequity that would result from adhering to the fiction of Silver Fox's separate corporate existence. *Id.* ¶¶ 36-40. We could infer from that allegation—for the purpose of a section 2-615 motion to dismiss—that defendant hired Sloan to obtain Mama Gramm's customer list and recipes in violation of the Trade Secrets Act. *Id.* ¶ 40.

¶ 8 After our remand in *Buckley II*, the parties engaged in discovery. Plaintiffs did not seek leave to amend the complaint. Defendant subsequently moved for summary judgment pursuant to section 2-1005 of the Code (735 ILCS 5/2-1005 (West 2016)). Defendant argued that there were no facts from which plaintiff could "satisfy the second prong of the alter ego test," because defendant "has not engaged in an unfair act sufficient to justify piercing the corporate veil." Defendant's motion was accompanied by his own affidavit and an affidavit from Suna.

¶ 9 Defendant averred that he merely helped Suna and Ali start Silver Fox because of defendant's close relationship with his sister. Although he loaned money to Silver Fox and aided Suna with various business-related aspects of the corporation, defendant did not work for Silver Fox and was not an owner, officer, or director of Silver Fox. Defendant asserted that he did not know either Sloan or Jenkins, did not recruit or interview them, and had no participation in Suna's decision to hire them. Defendant further averred that he later learned that Sloan and Jenkins previously worked for Mama Gramm's but maintained that he did not know it at the time Suna hired them and that he never met them or had ever spoken with them. Defendant asserted that he "did not cause Silver Fox to be formed to steal Mama Gramm's customers, customer lists,

or recipes," that he had "no knowledge of Sloan or Jenkins taking trade secrets from Mama Gramm's" and "never saw such materials in the possession of Silver Fox," and "never tried to obtain business for Silver Fox by asking a customer of Mama Gramm's to breach a contract that it had with Mama Gramm's."

¶ 10 Suna averred that in the spring of 2006, she and a woman named Selma decided to open a bakery together. Suna had no prior experience in baking or managing a bakery, and she asked defendant for help. Suna specifically sought defendant's help in securing a lease for Silver Fox because of defendant's business experience. Suna averred that she was responsible for ordering supplies, baking and selling goods, and hiring and supervising employees. Suna stated that she handled some of Silver Fox's paperwork but that Ali handled most of it, including payroll. Suna averred that defendant never worked or helped in any capacity with running Silver Fox's day-to-day operations. Shortly after opening, Selma left the business, leaving Silver Fox without a baker. Suna averred that she considered closing the bakery, but she was persuaded to stay in business after defendant loaned Silver Fox money and a vehicle and agreed to help promote Silver Fox by having restaurants that defendant owned buy baked goods from Silver Fox. Suna then met Claudia Massell, a baker and representative from Dawn Baking Company. Massell taught Suna how to cook and provided Suna with recipes. Suna averred that she placed an ad in a local paper seeking help and that Sloan and Jenkins responded to the ad. Suna interviewed them and ultimately hired them without asking for or checking any references. Suna averred that she "did not hire Jenkins or Sloan to switch over accounts, take customer lists, and use trade secrets and recipes owned by Mama Gramm's" because when she hired them, she "did not even know they had worked for Mama Gramm's." She further averred that defendant "played no role in [the] hiring of Jenkins and Sloan," as "[she] alone placed the ad," and defendant "did not

interview Jenkins or Sloan" nor was he ever consulted prior to Suna hiring them. Suna stated that she obtained her recipes from Massell, obtained her customers from defendant by word-of-mouth, and trained Sloan and Jenkins based on what Massell had taught her. Finally, Suna averred that that she did not know that Jenkins and Sloan previously worked for Mama Gramm's, she never discussed with defendant that Sloan and Jenkins previously worked for Mama Gramm's, and she did not know that defendant's restaurants previously bought bakery goods from Mama Gramm's.

¶ 11 Defendant's motion for summary judgment was fully briefed. The circuit court conducted a hearing at which it heard oral argument. There is no transcript of the summary judgment hearing in the record. On March 17, 2017, the circuit court entered a written order granting summary judgment in favor of defendant. The circuit court found that defendant presented uncontroverted evidence that he was not involved in hiring Sloan and had never met her, was not aware Sloan or Jenkins ever worked for Mama Gramm's, never formed Silver Fox for the express purpose of stealing Mama Gramm's trade secrets, and that Suna was solely responsible for hiring Sloan and Jenkins without any knowledge that either worked for Mamma Gramm's. The circuit court explained that for plaintiffs to rebut defendant's claims, they would have to rely on affidavits or other direct evidence because the only witnesses who may have personal knowledge of plaintiff's allegations—Sloan, Jenkins, and Mrs. Buckley, who ran Mama Gramm's—were deceased.The circuit court observed that there were no affidavits, deposition testimony, or other direct evidence created prior to their deaths. Accordingly, plaintiffs would have to rely on hearsay, which would be inadmissible. The circuit court concluded that plaintiffs failed to identify any evidence to rebut defendant's evidence that he had no involvement in the decision to hire Sloan and Jenkins. The circuit court also observed that Buckley had no personal

knowledge of whether defendant hired Sloan or attempted to obtain Mama Gramm's recipes. Therefore, the circuit court concluded that that defendants failed to create any genuine issue of material fact that would preclude the entry of summary judgment in favor of defendant.

¶ 12 Plaintiffs filed a timely motion to reconsider and a motion for leave to file a second amended complaint asserting a veil-piercing claim against defendant under a theory of *respondeat superior*. Defendant responded to the motions and the circuit court held a hearing at which it heard oral argument. There is no transcript of the circuit court's hearing on plaintiffs' motions to reconsider and for leave to file a second amended complaint. The circuit court denied both of the motions in a written order that did not set forth its reasoning. Plaintiffs timely filed a notice of appeal.

¶ 13 ANALYSIS

¶ 14 Plaintiffs raise two arguments on appeal. First, plaintiffs argue that the circuit court erred in granting defendant's motion for summary judgment because genuine issues of material fact exist as to whether defendant engaged in fraud or deception such that a public interest justifies piercing Silver Fox's corporate veil. Second, plaintiffs argue that the circuit court abused its discretion by denying plaintiffs' postjudgment motion for leave to file a second amended complaint seeking to hold defendant liable for the default judgment under a theory of *respondeat superior*. We address these arguments in turn.

¶ 15 Summary judgment is appropriate if the pleadings, depositions, affidavits, and other admissions on file establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2016); *Cohen v. Chicago Park District*, 2017 IL 121800, ¶ 17. An issue is "genuine" if there is a factual dispute as to the material facts or, if the material facts are undisputed, if reasonable persons could draw

different inferences from those undisputed facts. *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 518 (1993). A material fact is one that "might affect the outcome of the suit" under the applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The purpose of summary judgment is not to try a question of fact, but rather to determine whether one exists. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002). "In determining whether a genuine issue of material fact exists, the court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the nonmovant." *West Bend Mutual Insurance Co. v. DJW-Ridgeway Building Consultants, Inc.*, 2015 IL App (2d) 140441, ¶ 20. A party moving for summary judgment bears the initial burden of production and may satisfy it by either showing that some element of the case must be resolved in its favor or that there is an absence of evidence to support the nonmoving party's case. *Nedzvekas v. Fung*, 374 Ill. App. 3d 618, 624 (2007). Once the moving party satisfies that initial burden, the burden shifts to the nonmoving party to come forward with some factual basis that would entitle it to a favorable judgment. *Id.* We review a circuit court's ruling on summary judgment *de novo*. *Standard Mutual Insurance Co. v. Lay*, 2013 IL 114617, ¶ 15.

¶ 16 In Illinois, courts will pierce the corporate veil when "(1) there is such a unity of interest and ownership that the separate personalities of the corporation and the parties who compose it no longer exist, and (2) circumstances are such that adherence to the fiction of a separate corporation would promote injustice or inequitable circumstances." *Tower Investors, LLC v. 111 East Chestnut Consultants, Inc.*, 371 Ill. App. 3d 1019, 1033-34 (2007).

¶ 17 Here, defendant moved for summary judgment on the second prong, which requires showing that adherence to the fiction of Silver Fox as a separate corporation would promote an injustice or inequitable circumstances. The parties' arguments on appeal relate solely to whether

there was any genuine issue of material fact on the second prong, and we limit our analysis accordingly. Under this prong, we must ask whether there is some unfairness, such as fraud or deception, or whether some other compelling public interest exists that might justify piercing Silver Fox's corporate veil. See *Fontana v. TLD Builders, Inc.*, 362 Ill. App. 3d 491, 507 (2005). In this case, the second prong turns on whether there is any evidence that defendant engaged in wrongdoing with respect to allegedly obtaining Mama Gramm's customer lists, recipes, and trade secrets.

¶ 18 Plaintiffs contend that there are numerous "contradictions and inconsistencies" between defendant's and Suna's summary judgment affidavits and the testimony given by defendant, Suna, and Ali in connection with the citation proceedings and their depositions. Plaintiffs argue that these alleged contradictions and inconsistencies create genuine issues of material fact as to whether defendant "controlled and ordered everything occurring in [Silver Fox's] business from its beginning, including directing his employee, [Suna], to hire Sloan and Jenkins to steal trade secrets, recipes and customer lists." We conclude, however, that plaintiffs have failed to establish that any of the alleged inconsistencies or contradictions create a genuine issue of material fact on the issue of whether adhering to Silver Fox's separate corporate existence would promote an injustice because plaintiffs failed to present any evidence that defendant participated in or had any knowledge of Suna's decision to hire Sloan and Jenkins.

¶ 19 Plaintiffs first contend that there were discrepancies as to who actually started Silver Fox and the degree to which defendant, Suna, and Ali participated in the business. Plaintiffs contend that Suna averred that she and Selma decided to start the bakery while defendant averred that he helped Suna and Ali start the bakery. Plaintiffs further contend that defendant averred that he and his accountant helped prepare the paperwork to form Silver Fox, but that during a citation

examination, defendant denied any involvement in setting up the corporation. Plaintiffs contend that defendant and his accountant created numerous companies together but Silver Fox was the only business the two created in which defendant was not listed as the president or registered agent. Plaintiffs further contend that there is conflicting testimony surrounding Suna's statement in her affidavit that Ali handled most of the paperwork, including paying bills. Plaintiffs assert that Ali testified in the citation proceedings that he had nothing to do with Silver Fox's business and that he handled some bills but that Suna ran the business. Plaintiffs, however, fail to explain how these alleged contradictions are material or what inferences should be drawn in plaintiffs' favor from these allegedly conflicting statements. Furthermore, these statements are irrelevant to the issue of whether defendant ever had any contact with Sloan or whether defendant created Silver Fox in order to take over Mama Gramm's customer list, trade secrets, or recipes.

¶ 20 Plaintiffs further contend that Suna averred that she ordered supplies and hired and supervised employees, which allegedly contradicts her citation testimony that she let defendant take care of the business and that she entrusted everything to him. Plaintiffs, however, take Suna's citation testimony out of context. During the citation proceedings, Suna was asked a series of questions about the officers and directors of Silver Fox, whether there were any shareholders, and whether she knew "of any corporate books that were ever there at" Silver Fox. Suna responded that she did not know any of that information and that she entrusted that side of the business to defendant. We fail to see how Suna's averment that she was responsible for ordering supplies and hiring and supervising employees conflicts with her prior statement that she left the management of the corporate details of the business to defendant.

¶ 21 Plaintiffs argue that Suna's statement in her affidavit that she received recipes from Massell is contradicted by Massell's deposition testimony. At her deposition, Massell testified

that she could only recall one recipe that she gave Suna, and testified that Suna was using recipes from other sources including from Dawn Baking Company, a "bakery provider" that placed recipes on its bags. We find that there is nothing inconsistent or contradictory about Suna's averment and Massell's deposition testimony. Plaintiffs do not identify any evidence in the record in which Suna claimed that the only source of her recipes was Massell, and Massell did not offer any testimony to suggest that she had personal knowledge of all of the recipes that Suna used. Furthermore, plaintiffs' complaint in the underlying action alleged that Silver Fox sold a number of different bakery goods that were "identical in appearance to items baked and sold" at Mama Gramm's, but plaintiffs fail to direct our attention to any evidence in the record as to what bakery items Silver Fox actually sold. Therefore, there are no facts from which we might draw any inferences as to the source or sources of Suna's recipes.

¶ 22 Plaintiffs further assert that defendant "would have this [c]ourt believe that it was just a coincidence that the only [two] people who responded to [Suna's] newspaper ad had previously been [p]laintiff's employees," that Suna admitted that she had no business or bakery experience, and that Suna never previously interviewed prospective employees. Suna stated in her affidavit and at her deposition that she placed an ad in a newspaper seeking help, that Sloan and Jenkins responded to the ad, and that Suna alone interviewed and hired them. Plaintiffs do not identify any evidence in the record that contradicts Suna's assertions. At his deposition, Buckley stated that he had no knowledge of whether defendant contacted, interviewed, or spoke to Sloan, and did not know who hired Sloan on behalf of Silver Fox. Instead, plaintiffs suggest that an inference must be drawn in plaintiffs' favor that because Suna was so inexperienced and her statements are so unbelievable that defendant must have played some role in the hiring of Sloan and Jenkins, despite both Suna and defendant's unequivocal statements to the contrary.

Plaintiffs' incredulity is not enough to create such an inference, and neither we nor the circuit court are "required to entertain unreasonable inferences raised in opposition to a motion for summary judgment." *West Bend Mutual Insurance*, 2015 IL App (2d) 140441, ¶ 26. Plaintiffs further argue, "It is simply absurd that [Suna] alone would be involved in the decision to hire [Sloan and Jenkins] when [d]efendant was involved in every other decision along the way and allegedly put $50,000 of his own money into the business." Plaintiffs, however, have not adduced any facts to contradict defendant and Suna's statements that Suna alone made the decision to hire Jenkins and Sloan.

¶ 23 In sum, we find that plaintiffs have failed to identify any evidence tending to show that defendant was involved in Suna's decision to hire Sloan and Jenkins, or that Silver Fox hired Sloan and Jenkins in order to steal Mama Gramm's customer list, trade secrets, and recipes. Even if there were facts tending to show defendant's involvement in the corporate aspects of Silver Fox's business, those facts do not give rise to any inference that defendant knew Sloan worked for Mama Gramm's or that defendant directed Suna to hire Sloan for the purpose of stealing trade secrets. Plaintiffs did not identify any evidence that contradicted defendants' evidence submitted in support of his motion for summary judgment. Plaintiffs needed to come forward with some evidence linking defendant to the hiring of Sloan for the purpose of obtaining Mama Gramm's recipes and customer lists. Plaintiffs have not done so. We therefore affirm the circuit court's order granting summary judgment in favor of defendant.

¶ 24 Plaintiffs next argue that the circuit court erred in not granting their motion for leave to file a second amended complaint. Plaintiffs' main contention is that they should be allowed to conform their pleadings to the proofs based on Suna's citation testimony in 2009 in which she stated that she was an employee of Silver Fox. Plaintiffs argue that if this were true, defendant

could be held liable under *respondeat superior* for Suna's decision to hire Sloan and Jenkins, and therefore the circuit court erred by denying leave to amend.

¶ 25 Amendments may be made "[a]t any time before final judgment *** on just and reasonable terms," and may also be amended before or after judgment "to conform the pleadings to the proofs." 735 ILCS 5/2-616 (a), (c) (West 2016). Motions to amend under section 2-616 are to be "liberally construed to allow cases to be decided on their merits rather than on technicalities." *Lawry's The Prime Rib, Inc. v. Metropolitan Sanitary District of Greater Chicago*, 205 Ill. App. 3d 1053, 1058 (1990). The circuit court's decision whether or not to allow an amendment is within its sound discretion, "and the test for determining whether it has abused that discretion is whether its decision furthers the ends of justice." *Id.* See also *In re Estate of Hoover*, 155 Ill. 2d 402, 416 (1993) (abuse of discretion standard for reviewing denials of section 2-616 motions). In order to determine whether the circuit court abused its discretion in denying a party leave to file an amended pleading, we consider whether (1) the proposed amendment would cure the defective pleading, (2) other parties would sustain prejudice or surprise by virtue of the proposed amendment, (3) the proposed amendment is timely, and (4) previous opportunities to amend the pleading could be identified. *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992).

¶ 26 Here, the circuit court's order denying plaintiffs' motion for leave to file a second amended complaint did not set forth the circuit court's reasoning and there is no transcript of the hearing on the plaintiffs' motion. Plaintiffs advance no argument on appeal to explain how the proposed second amended complaint satisfies any of the factors we consider when determining whether the circuit court should have allowed leave to replead. It is clear, however, that based on

the allegations set forth in the proposed second amended complaint, the circuit court properly exercised its discretion in denying plaintiffs leave to amend.

¶ 27 First, the proposed amendment would not cure any defects in the first amended complaint. According to plaintiffs, the only amendment they intended to make was the addition of a *respondeat superior* theory of liability based on Suna's statement that she was an employee of Silver Fox. Under *respondeat superior* liability, "an employer may be liable for the negligent, willful, malicious or even criminal acts of its employees when such acts are committed in the course of employment and in furtherance of the business of the employer." *Webb v. Jewel Companies, Inc.*, 137 Ill. App. 3d 1004, 1006 (1985). Here, the proposed second amended complaint alleges that defendant "created and started [Silver Fox] and hired [Sloan] for the express purpose of switching over accounts, taking customer lists, and using the trade secrets and recipes belonging to and owned by [p]laintiffs." It further alleges that Suna was an employee of Silver Fox and that Suna "interviewed and hired [Sloan] for the express purpose of switching over accounts, taking, customer lists, and using the trade secrets and recipes belonging to and owned by [p]laintiffs." It alleges that defendant knew that Sloan was employed by Mama Gramm's and then asserts "[defendant] alone was directly involved in hiring [Sloan]."

¶ 28 The uncontroverted evidence at summary judgment showed that Suna had no knowledge of Sloan or Jenkins's previous employment with Mama Gramm's and plaintiffs identified no evidence tending to show that Suna hired Sloan and Jenkins in order to obtain plaintiffs' customer list, recipes, or trade secrets. As the circuit court noted in its order, Sloan, Jenkins, and Mrs. Buckley were the only people that might have knowledge of whether Suna hired Sloan and Jenkins with knowledge of their previous employment at Mama Gramm's and for the purpose of obtaining Mama Gramm's recipes and customer lists. Those three individuals, however, are all

deceased and did not give any testimony prior to their deaths that might create a genuine issue of material fact in light of defendant and Suna's affidavits and Buckley's deposition testimony. Plaintiffs' proposed second amended complaint contains substantially similar factual allegations to those in the first amended complaint, which plaintiffs failed to substantiate during the summary judgment proceedings. The proposed second amended complaint therefore does not cure the defects in plaintiffs' first amended complaint. This factor weighs against allowing plaintiffs leave to replead.

¶ 29 As to the second factor, defendant would be prejudiced by allowing plaintiffs leave to amend the complaint to assert a new legal theory based on facts that have been known to plaintiffs since 2009. Plaintiffs could have pursued a *respondeat superior* theory from the beginning, but instead chose to only pursue defendant directly. Furthermore, plaintiffs elected to stand on their first amended complaint following our decision in *Buckley II* in which we identified a number of deficiencies in the first amended complaint. Under these circumstances, allowing plaintiffs to pursue a new legal theory based on factual allegations that have already been shown to be unsupported by the factual record, and which would undoubtedly be disposed of through a nearly identical motion for summary judgment, would result in prejudice to defendant. Finally, plaintiffs had ample time to amend the complaint but only sought to do so after the circuit court entered judgment in favor of defendant. This factor weighs against allowing leave to replead.

¶ 30 Third, plaintiffs' motion was untimely. Suna's testimony was made in 2009, which was prior to plaintiffs initiating this action. Following our remand in *Buckley II*, the parties engaged in nearly two years of discovery. Plaintiffs did not seek leave to replead, however, until after the circuit court granted summary judgment in favor of defendant and after the circuit court

concluded that plaintiffs had failed to identify any facts to show that defendant had any involvement in hiring Jenkins or Sloan. There are simply no facts to show that plaintiffs' motion for leave to file a second amended complaint was timely. This factor weighs against granting leave to replead.

¶ 31 Finally, plaintiffs were previously granted leave to amend the complaint in 2011 and had ample opportunity to seek leave to amend following our remand in *Buckley II*, but did not do so. This factor also weighs against granting leave to replead.

¶ 32 In consideration of all four factors, we conclude that the circuit court did not abuse its discretion in denying plaintiffs leave to file the proposed second amended complaint.

¶ 33 CONCLUSION

¶ 34 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 35 Affirmed.

362 Ill.App.3d 491 (Ill.App. 2 Dist. 2005)

840 N.E.2d 767, 298 Ill.Dec. 654

Joseph L. FONTANA and Angela D. Fontana, Plaintiffs-Appellees and Cross-Appellants,

v.

TLD BUILDERS, Inc., Defendant

Nicola DiCosola, Defendant-Appellant and Cross-Appellee.

No. 2-05-0045.

Court of Appeals of Illinois, Second District.

December 16, 2005

[840 N.E.2d 768] [Copyrighted Material Omitted]

[840 N.E.2d 769] [Copyrighted Material Omitted]

[840 N.E.2d 770]

Terry A. Ekl, Vincent C. Mancini, Connolly, Ekl & Williams, P.C., Clarendon Hills, for Nicola DiCosola, TLD Builders, Inc.

William T. Dwyer, Jr., O'Rourke, Hogan, Fowler & Dwyer, Chicago, for Angela D. Fontana, Joseph L. Fontana.

OPINION

KAPALA Justice:

Defendant-appellant and cross-appellee,

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Nicola DiCosola (DiCosola), appeals the $1,271,816.10 judgment entered against him personally in the circuit court of Du Page County after a trial without a jury. DiCosola contends that the trial court erred when it pierced the corporate veil of defendant, TLD Builders, Inc. (TLD), and held him personally liable for the obligations of the corporation. Plaintiffs-appellees and cross-appellants, Joseph L. Fontana and Angela D. Fontana (the Fontanas), cross-appeal, contending that the trial court erred in failing to grant their motion for attorney fees. For the reasons [362 Ill.App.3d 494] that follow, we reject DiCosola's appellate **[840 N.E.2d 771]** contentions and affirm the trial court's judgment against DiCosola personally. In the cross-appeal, we reverse that portion of the trial court's order denying the Fontanas' request for attorney fees, and we remand the cause.

I. BACKGROUND

This lawsuit was originally filed on September 4, 2001, naming as defendants TLD [1] and architect Stanley L. Glodeck [2] . On July 16, 2003, the Fontanas were given leave to file an amended complaint naming DiCosola as an additional defendant. In the amended complaint filed on July 30, 2003, the Fontanas alleged that they owned a parcel of real property commonly known as 347 Ruby Street, Clarendon Hills, Illinois (the property). The Fontanas alleged further that on September 24, 1999, they and TLD entered into a written construction contract in which TLD agreed to construct a single-family residence (the home) on the property for the sum of $1,475,800. In count I of the amended complaint, the Fontanas sought a declaration that they were excused from further performance of their obligations under the construction contract, as a result of TLD's material breach of the construction contract. In count II of the amended complaint, the Fontanas alleged that TLD breached the terms of the construction contract by failing to construct the home in accordance with the construction contract and by abandoning all work on the home in February 2001, leaving the home incomplete and uninhabitable. As a result of the breach, the Fontanas alleged, the costs and expenses necessary to correct the defects and deficiencies in the construction performed by TLD, and to complete the construction of the home, exceeded the fair market value of the home had it been completed in accordance with the architect's drawings. The Fontanas alleged further that, as of September 2002, the home had no value and could not be economically repaired or completed, so it was demolished in November 2002. As a result of the damages due to the breach, the Fontanas prayed for a judgment against TLD in an amount in excess of $2 million, and also prayed for interest, costs, and reasonable attorney fees.

In count III of the amended complaint, the Fontanas alleged that the architect breached the terms of the contract that he entered into with the Fontanas. In count IV of the amended complaint, titled "Piercing the Corporate Veil," the Fontanas alleged that DiCosola was

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the alter ego of TLD and is thereby liable for the damages sought from TLD in count II of the amended complaint. The Fontanas alleged further that since the commencement of the instant lawsuit against TLD, DiCosola has caused TLD to cease its business operations such that the

corporation has no funds or income with which to compensate them for the damages resulting from the breach of the construction contract. The Fontanas alleged that adherence to the fiction of the separate corporate existence of TLD would promote injustice by denying them any recovery of the losses resulting from the direct actions of DiCosola.

At the conclusion of the bench trial of this cause, the trial court held that TLD materially breached the construction contract and failed to cure the breach. The trial court also found that the evidence was **[840 N.E.2d 772]** sufficient to establish that the amount of money the Fontanas paid to TLD, together with the cost to complete the unfinished home according to the plans and specifications referenced in the construction contract, would exceed the $2.2 million value of the home were it completed pursuant to the plans and specifications. As such, the trial court held that it was appropriate under the circumstances to demolish the unfinished home, and it calculated the Fontanas' damages to be $1,271,816.10. The trial court entered judgment in that amount in favor of the Fontanas and against TLD and DiCosola, jointly and severally.

The trial court's determination that TLD materially breached the construction contract and its calculation of the resulting damages have not been challenged on appeal. Instead, DiCosola contends that the trial court erred in piercing the corporate veil and holding him personally liable for the obligations of TLD. As such, we discuss only the evidence presented at trial that is necessary to the disposition of DiCosola's appeal.

The Fontanas called Theresa DiCosola, who testified that she believed that she and DiCosola, her husband, were equal owners of TLD until she learned that a corporation's president is not equal to a corporation's director. When asked if she was the incorporator of TLD, Theresa said, "[w]hatever my lawyer did." Theresa did not recall the date that TLD was incorporated, how many shares TLD issued, or the amount paid for the shares. After reviewing the articles of incorporation, Theresa recalled that she incorporated TLD and that 1,000 shares were issued to her at a price of $1 per share. Theresa agreed that on January 26, 2004, the date she gave her deposition in the instant case, she did not know that she was the sole shareholder of TLD. When asked if she wrote a $1,000 check to TLD for the 1,000 shares of TLD stock, the following exchange ensued:

"[THERESA]: I did check that with my lawyer and he did say that a thousand dollars was for a thousand shares.

[PLAINTIFFS' COUNSEL]: Did you write a check to TLD Enterprises for a thousand dollars?

[THERESA]: From what I understand, a thousand dollars went in the company to start it.

[PLAINTIFFS' COUNSEL]: That's not my question.

[THERESA]: Well, the money was taken from our personal account.

[PLAINTIFFS' COUNSEL]: The question is, did you write a check to TLD Enterprises--

[THERESA]: Well, I am going to say yes.

[PLAINTIFFS' COUNSEL]: Okay. Fine. Do you have the check?

[THERESA]: I have moved three or four times. I really don't--I didn't realize I had to save all of these personal checks from my personal account, so I am going to say no.

[PLAINTIFFS' COUNSEL]: Well, when is it that you remembered that you wrote a check to TLD Enterprises?

[THERESA]: Actually, I talked to my lawyer after the deposition, Bob Borla, because I did not--I remember signing papers, but it wasn't as though I remembered how it came about.

[PLAINTIFFS' COUNSEL]: Well, during your deposition, you didn't remember whether you wrote a check for a thousand dollars; and you said you would have to check your checkbook and find out. Did you check your checkbook?

[840 N.E.2d 773]

[THERESA]: I told you, I don't have any--do not have any of the return[ed] checks.

[PLAINTIFFS' COUNSEL]: So the only knowledge you have about paying for the stock of the company is what your lawyer told you?

[THERESA]: Yes.

[PLAINTIFFS' COUNSEL]: And who is that lawyer?

[THERESA]: Robert Borla. He said we did it in the office."

Theresa also testified that she signed the annual corporate minutes of TLD as sole shareholder and director, but she said that DiCosola handled all the financial matters related to TLD. Theresa said that she and DiCosola loaned money to TLD in the past, including 13 loans in 1999. She did not know how the money was transferred into the company because she did not handle the financial end of the operation. Theresa testified that she did not know that TLD

owed her $572,000 as of December 31, 2002, but she testified that the $572,000 loaned to TLD came from her and DiCosola's personal account. At the time of her deposition, Theresa did not know that TLD was a "sub-chapter S corporation," what a K-1 form was, or whether she ever

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received a paycheck from TLD. Theresa said that she has never received a dividend from TLD and did not know if TLD had profits or losses in the years 1998, 1999, 2000, 2001, and 2002. However, Theresa did sign TLD's income tax returns for those years. Theresa admitted that TLD reported $1,818, 213 in assets as of January 1, 2002, and zero assets as of December 31, 2002. Theresa did not know where the assets went.

Theresa testified further that she, DiCosola, and their lawyer decided who the officers of TLD would be. It was a running joke in her family that she owned the company, that "mom was the boss." Theresa said that she and DiCosola decided together what properties to purchase to build speculative (spec) homes on, and that she relied on her husband to determine the sale prices. Theresa acknowledged that resolutions of the board of directors of TLD, of which she is the only director, showed that TLD sold seven properties for prices totaling $3,234,000 between October 29, 2001, and February 4, 2002, but that she did not participate in deciding the selling prices of those properties and did not know the amounts TLD received for the properties. Theresa denied paying her and DiCosola's personal bills through TLD, and then the following exchange ensued:

"[PLAINTIFFS' COUNSEL]: Let me ask you, if you were asked this question and gave this answer at your deposition on page 7 starting at line three:

'Do you receive a paycheck from any business?

Answer: Do I receive a paycheck? I didn't receive--we pay our bills that way through the business, but I never--there was never a paycheck in my name.'

Were you asked the question and did you give that answer?

[THERESA]: You asked the question and I answered it. I was very nervous.

[PLAINTIFFS' COUNSEL]: As a matter of fact, Mrs. DiCosola, you don't know how funds are deposited in your joint checking account; do you?

[THERESA]: No.

[PLAINTIFFS' COUNSEL]: You don't know where the money comes from?

[THERESA]: I know that we cut a check from the business."

Theresa testified further that TLD has never had any employees and does not pay a salary to anyone. Theresa and DiCosola **[840 N.E.2d 774]** have no sources of income other than TLD, and DiCosola has worked exclusively for TLD since 1998. When asked where she and her husband got money to live on if they did not draw salaries or wages from TLD and the company had net losses in excess of $1 million from 1998 through 2002, Theresa said they lived off the proceeds of the sales of two personal homes that they "did very well on."

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During questioning by counsel for DiCosola, Theresa said that her duties with respect to TLD were office work, filing, answering the telephone, babysitting children when they would come into the office, cleaning, and doing all the "spec work." By "spec work" Theresa meant selecting the windows, roofs, brick, cabinetry, floors, paint, moldings, lighting, and appliances for the spec homes that TLD built. Theresa testified that TLD is still in existence. Theresa explained that TLD never paid her and DiCosola's personal mortgage, electric bill, or gas bill but, rather, they have always paid those bills through their personal account and never through the business.

The Fontanas also called DiCosola, who testified that he is the president of TLD. He acknowledged that TLD has never had an employee. He said that TLD is in the business of building homes as a general contractor. TLD was the general contractor on the Fontana home at 347 Ruby Street in Clarendon Hills. DiCosola said that he has never had a written contract with a subcontractor and never takes bids from subcontractors. DiCosola agreed that he never issues written change orders to his subcontractors and does not keep written work schedules for projects because "the job pretty much tells itself how to run it." TLD keeps no financial records for any payments that it makes except for draw schedules filed with title companies. DiCosola kept no written records of the changes the Fontanas requested to be made to the home. DiCosola explained that there was no need to keep records of the changes because none of the money went through TLD. DiCosola testified that he has no record of the cash the Fontanas paid to him for changes made to the home, and no records of any payments made to any subcontractors performing the work on the changes. DiCosola explained that any money given to him by the Fontanas for changes was forwarded to the subcontractors who performed the work. DiCosola admitted that he has another company, NTK Enterprises. NTK has built two spec homes since the instant lawsuit was filed; one has been

sold. DiCosola admitted that TLD went from approximately $1.8 million in assets on January 1, 2002, to zero assets on December 31, 2002. When asked where the $1.8 million went, DiCosola said that it went to pay down the money borrowed on the line of credit to build the properties that were sold. DiCosola related that TLD's 2002 federal income tax return showed $1,472,388 in liabilities in the form of mortgages, notes, bonds, and payables; $388,157 in other liabilities; and $663,989 in liabilities in the form of loans from shareholders.

The Fontanas successfully moved into evidence TLD's filings with the Illinois Secretary of State's Office and TLD's stock certificate. These documents indicated that TLD was incorporated on November

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10, 1998, and that Theresa was the sole shareholder. Other documents admitted into evidence showed shareholder action appointing DiCosola as president and secretary of TLD. The tax returns of TLD showed a loss of $182 in 1998, a loss of $203,403 in 1999, a profit of $139,765 in 2000, a loss of $451,997 in 2001, and a loss of $254,042 in 2002.

After considering all the evidence, and finding the breach of contract and resulting **[840 N.E.2d 775]** damages in the amount mentioned above, the trial court held that DiCosola's status as a nonshareholder of TLD did not preclude holding him liable for the obligations of TLD pursuant to the equitable remedy of "piercing of the corporate veil." The trial court found this court's decision in *Macaluso v. Jenkins,* 95 Ill.App.3d 461, 50 Ill.Dec. 934, 420 N.E.2d 251 (1981), instructive on the issue. The trial court noted that in *Macaluso* this court affirmed a personal judgment against the chairman of the board of a not-for-profit corporation even though not-for-profit corporations do not have shareholders. With respect to the factors used to determine whether piercing the corporate veil is appropriate, the trial court found that the following factors weighed in favor of piercing the corporate veil: inadequate capitalization of TLD (the trial court determined that Theresa's testimony regarding the $1,000 check "cast doubt" on whether any initial capitalization occurred), failure to observe certain corporate formalities, failure to pay dividends, operation of the corporation without a profit, commingling of corporate and personal assets, a non-functioning officer or director in Theresa, insolvency of the corporation, and absence of corporate records. The trial court found that the actual issuance of stock was the only factor that weighed in favor of not piercing the corporate veil. Based on the foregoing, the trial court ruled as follows:

"I think that all of these factors taken together are clear and convincing that Mr. DiCosola is the dominant force behind this corporation, that the corporation is little more than a shell which was established to shield him from liability. I think the fact that he signed the contract with his own individual signature in two places, while it is certainly not dispositive, its just one more indication that this business is Mr. DiCosola and that the corporation in the words of the Macaluso case should be disregarded and the veil of limited liability pierced because it would be an obstacle to the protection of private rights and because the corporation is merely the alter ego or business conduit of Mr. DiCosola who is the governing and dominating personality in this business enterprise.

For that reason, I will find that Mr. DiCosola is the alter ego of the business, that TLD Enterprises is a business conduit of his dominating personality so that the judgment will enter against Mr. DiCosola personally and against the corporation jointly and severally in the amount that I set forth before and that will be a final order."

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DiCosola timely appeals and the Fontanas cross-appeal. TLD has not appealed.

II. ANALYSIS

A. DiCosola's Appeal

A corporation is a legal entity that exists separately and distinctly from its shareholders, officers, and directors, who generally are not liable for the corporation's debts. *Peetoom v. Swanson,* 334 Ill.App.3d 523, 526, 268 Ill.Dec. 305, 778 N.E.2d 291 (2002). A primary purpose of doing business as a corporation is to insulate stockholders from unlimited liability for corporate activity. *Peetoom,* 334 Ill.App.3d at 526, 268 Ill.Dec. 305, 778 N.E.2d 291. Limited liability will ordinarily exist even when the corporation is closely held or has a single shareholder. *Peetoom,* 334 Ill.App.3d at 526, 268 Ill.Dec. 305, 778 N.E.2d 291. "However, a court may disregard a corporate entity and pierce the veil of limited liability where the corporation is merely the alter ego or business conduit of another person or entity." *Peetoom,* 334 Ill.App.3d at 527, 268 Ill.Dec. 305, 778 N.E.2d 291. This doctrine imposes liability on the individual or entity that uses a **[840 N.E.2d 776]** corporation merely as an instrumentality to conduct that person's or entity's business. *Peetoom,* 334 Ill.App.3d at 527, 268 Ill.Dec. 305, 778 N.E.2d 291. "Such liability arises from fraud or injustice perpetrated not on the corporation but on third persons dealing with the corporation." *Peetoom,* 334 Ill.App.3d at 527, 268 Ill.Dec. 305, 778 N.E.2d 291. "The doctrine of piercing the corporate veil is an equitable remedy; it is not itself a cause of action but rather is a means of imposing liability on an underlying

cause of action, such as a tort or breach of contract." *Peetoom,* 334 Ill.App.3d at 527, 268 Ill.Dec. 305, 778 N.E.2d 291.

"A party seeking to pierce the corporate veil has the burden of making 'a substantial showing that one corporation is really a dummy or sham for another' [citation], and courts will pierce the corporate veil only reluctantly [citation]." *In re Estate of Wallen,* 262 Ill.App.3d 61, 68, 199 Ill.Dec. 359, 633 N.E.2d 1350 (1994). We employ a two-prong test in order to determine whether to pierce the corporate veil: (1) there must be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist; and (2) circumstances must exist such that adherence to the fiction of a separate corporate existence would sanction a fraud, promote injustice, or promote inequitable consequences. *People ex rel. Scott v. Pintozzi,* 50 Ill.2d 115, 128-29, 277 N.E.2d 844 (1971); *Wallen,* 262 Ill.App.3d at 68-69, 199 Ill.Dec. 359, 633 N.E.2d 1350. A reviewing court will not reverse the finding of the trial court regarding piercing the corporate veil unless it is against the manifest weight of the evidence. *Wallen,* 262 Ill.App.3d at 68, 199 Ill.Dec. 359, 633 N.E.2d 1350; *Ted Harrison Oil Co. v. Dokka,* 247 Ill.App.3d 791, 796, 187 Ill.Dec. 441, 617 N.E.2d 898 (1993).

1. *Imposition of a Liability of a Corporation on a Nonshareholder*

DiCosola's first appellate contention is that the trial court erred in finding him personally liable under a veil-piercing theory because no Illinois authority allows piercing the corporate veil to impose liability on a nonshareholder. Because he was never a shareholder in TLD, DiCosola maintains, the "unity of interest and ownership" element of piercing the corporate veil was not satisfied. We reject this contention.

In *Macaluso,* this court rejected the argument that because the defendant, who was the chairman of the board and treasurer of a not-for-profit corporation, did not and could not own shares in the not-for-profit corporation, he could not be held liable for the corporation's debt. *Macaluso,* 95 Ill.App.3d at 465, 50 Ill.Dec. 934, 420 N.E.2d 251. We noted that the "unity of interest and ownership" requirement of piercing the corporate veil could not technically be met. *Macaluso,* 95 Ill.App.3d at 465, 50 Ill.Dec. 934, 420 N.E.2d 251. However, after noting further that the equitable remedy of piercing the corporate veil looks to substance rather than form (*Macaluso,* 95 Ill.App.3d at 465, 50 Ill.Dec. 934, 420 N.E.2d 251), we concluded that "even though [the defendant] did not and could not own shares of [the not-for-profit corporation], he did exercise ownership control over the corporation to such a degree that separate personalities of [the corporation and the defendant] did not exist, and that [the corporation] was a business conduit of [the defendant]." *Macaluso,* 95 Ill.App.3d at 466, 50 Ill.Dec. 934, 420 N.E.2d 251. Contrary to DiCosola's contention, *Macaluso* is Illinois authority for holding a nonshareholder liable for a corporation's debts **[840 N.E.2d 777]** through the equitable remedy of piercing the corporate veil.

We disagree with DiCosola's characterization of our holding in *Macaluso* as applying an exception to the rule of stock ownership because the plaintiffs sought the piercing of a not-for-profit corporation's veil as opposed to an ordinary corporation's veil. The bases of our holding in *Macaluso* for imposing the liability of the corporation upon the nonshareholder defendant were his exercise of ownership control over the corporation such that their separate personalities did not exist and that the corporation was a business conduit of the defendant. *Macaluso,* 95 Ill.App.3d at 465-66, 50 Ill.Dec. 934, 420 N.E.2d 251.

Our holding in *Macaluso* is consistent with the decisions of courts in other jurisdictions that have considered the issue and have concluded that equitable ownership in a corporation, demonstrated by control exercised by an individual sought to be held liable for corporate debts, may satisfy the "unity of interest and ownership" element of piercing the corporate veil. See *Freeman v. Complex Computing Co.,* 119 F.3d 1044, 1051 (2d Cir.1997) (applying New York law, held that "New York courts have recognized for veil-piercing purposes the doctrine of equitable ownership, under which an individual who exercises sufficient control over the corporation may be deemed an 'equitable owner', notwithstanding the fact that the individual is not a

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shareholder of the corporation"); *Lally v. Catskill Airways, Inc.,* 198 A.D.2d 643, 645, 603 N.Y.S.2d 619, 621 (3d Dep't 1993) (nonshareholder defendant may be, "in reality," the equitable owner of a corporation where the nonshareholder defendant "exercise[s] considerable authority over [the corporation] ... to the point of completely disregarding the corporate form and acting as though [its] assets [are] his alone to manage and distribute"); *In re MacDonald,* 114 B.R. 326, 332-33 (D.Mass.1990) (piercing the corporate veil in bankruptcy case to establish debtor as the equitable owner of corporate stock that ostensibly was owned by debtor's father, and therefore finding stock subject to turnover order); *Angelo Tomasso, Inc. v. Armor Construction & Paving, Inc.,* 187 Conn. 544, 556-57, 447 A.2d 406, 412 (1982) ("[S]tock ownership, while important, is not a prerequisite to piercing the corporate veil but is merely one factor to be considered in evaluating the entire situation. Similarly, we have never required that an individual be an officer or director of the pierced corporation in order to hold him liable for the debts

of the corporation. It is clear that the key factor in any decision to disregard the separate corporate entity is the element of control or influence exercised by the individual sought to be held liable over corporate affairs. [Citations.] Thus, while the usual case does involve a director, officer or shareholder of a corporation, the lack thereof, in an unusual case such as this, would not prevent us from imposing liability upon an individual by piercing the corporate veil if the evidence demonstrated the requisite level of control and otherwise satisfied the instrumentality or other applicable test"); *Establissement Tomis v. Shearson Hayden Stone, Inc.*, 459 F.Supp. 1355, 1366, n. 13 (S.D.N.Y.1978) (declining to find that under no set of circumstances could defendant husband be shown to be an alter ego of corporation simply because 100% of the corporation's stock was held in his wife's name instead of his).

The only case law DiCosola cites in support of his argument that he cannot be held liable under a veil-piercing theory because he is not a shareholder is *Hystro Products, Inc. v. MNP Corp.*, 18 F.3d 1384, 1388-89 (7th Cir.1994). *Hystro*

[840 N.E.2d 778]*Products* does not so hold. In *Hystro Products*, the creditor of a subsidiary corporation sought to pierce the corporate veil of the subsidiary corporation and hold the parent corporation liable for the debt of its subsidiary corporation. *Hystro Products*, 18 F.3d at 1386. In discussing the "unity of interest and ownership" element of piercing the corporate veil, the court in *Hystro Products* wrote: "Stock control and the existence of common officers and directors are *generally* prerequisites to the piercing of the corporate veil although these factors alone will not suffice." (Emphasis added.) *Hystro Products*, 18 F.3d at 1389. The foregoing is a recognition that where the alleged alter ego

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of a parent corporation is the subsidiary corporation, stock ownership by the parent is ordinarily one of the elements that is required to show unity of interest and ownership. However, *Hystro Products* is not authority for the proposition that the alter ego of a corporation can never be a nonshareholder. Cases involving parent and subsidiary corporations will not address the issue of whether actual stock ownership is *always* required to meet the "unity of interest and ownership" element of piercing the corporate veil. This is because, by definition, a parent corporation is a corporation that has working control of the subsidiary corporation through stock ownership. See 18 Am.Jur.2d *Corporations* § 41 (2004). Consequently, the issue of establishing the "unity of interest and ownership" element through equitable ownership rather than through actual ownership of stock did not arise in *Hystro Products.*

Consequently, based on the foregoing, we reject DiCosola's first appellate contention. We hold that DiCosola's status as a nonshareholder in TLD does not preclude piercing TLD's corporate veil and imposing personal liability upon DiCosola for TLD's liability to the Fontanas.

2. *The Propriety of Piercing TLD's Corporate Veil*

DiCosola's second appellate contention is that the trial court's decision to pierce TLD's corporate veil was against the manifest weight of the evidence because the Fontanas failed to make a substantial showing as to each prong of the piercing test. A decision is against the manifest weight of the evidence when the opposite conclusion is clearly evident or where it is unreasonable, arbitrary, or not based on the evidence. *Maple v. Gustafson*, 151 Ill.2d 445, 454, 177 Ill.Dec. 438, 603 N.E.2d 508 (1992).

a. "Unity of Interest and Ownership" Prong

In determining whether the "unity of interest and ownership" prong of the piercing-the-corporate-veil test is met, a court generally will not rest its decision on a single factor, but will examine many factors, including: (1) inadequate capitalization; (2) failure to issue stock; (3) failure to observe corporate formalities; (4) nonpayment of dividends; (5) insolvency of the debtor corporation; (6) nonfunctioning of the other officers or directors; (7) absence of corporate records; (8) commingling of funds; (9) diversion of assets from the corporation by or to a stockholder or other person or entity to the detriment of creditors; (10) failure to maintain arm's-length relationships among related entities; and (11) whether, in fact, the corporation is a mere facade for the operation of the dominant stockholders. *Jacobson v. Buffalo Rock Shooters Supply, Inc.*, 278 Ill.App.3d 1084, 1088, 215 Ill.Dec. 931, 664 N.E.2d 328 (1996); *Estate of Wallen*, 262 Ill.App.3d at 69, 199 Ill.Dec. 359, 633 N.E.2d 1350.

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DiCosola argues that the trial court's findings as to inadequate capitalization, the **[840 N.E.2d 779]** failure to observe corporate formalities, the nonfunctioning of other officers or directors, the absence of corporate records, and the commingling of funds were against the manifest weight of the evidence. DiCosola does not challenge the trial court's findings that TLD's insolvency and failure to pay dividends weighed in favor of piercing the corporate veil, and he makes no argument regarding the above-marked (2), (9), (10), and (11) factors.

The consideration of whether a corporation is adequately capitalized is based on the policy that shareholders should in good faith put at the risk of the business unencumbered

capital reasonably adequate for the corporation's prospective liabilities. *Fiumetto v. Garrett Enterprises, Inc.*, 321 Ill.App.3d 946, 959, 255 Ill.Dec. 510, 749 N.E.2d 992 (2001). It is inequitable to allow shareholders to set up a flimsy organization just to escape personal liability. *Fiumetto,* 321 Ill.App.3d at 959, 255 Ill.Dec. 510, 749 N.E.2d 992. "To determine whether a corporation is adequately capitalized, one must compare the amount of capital to the amount of business to be conducted and obligations to be fulfilled." *Fiumetto*, 321 Ill.App.3d at 959, 255 Ill.Dec. 510, 749 N.E.2d 992.

With respect to the adequacy of TLD's initial capitalization, the trial court did not find credible Theresa's testimony that she wrote a $1,000 check from her personal checking account to purchase 1,000 shares of TLD stock in 1998 when TLD was incorporated. In light of Theresa's failure to produce any record of this claimed initial capital contribution to TLD, we cannot say that the trial court's finding that TLD was not capitalized at its inception was unreasonable, arbitrary, or not based on the evidence; nor is the opposite conclusion clearly evident. The evidence demonstrates that at her deposition on January 26, 2004, Theresa indicated that she would obtain a copy of her cancelled check showing the $1,000 capital contribution to TLD. Yet at trial eight months later, Theresa failed to produce the check or a reasonable explanation of her failure to do so. "An unfavorable evidentiary presumption arises if a party, without reasonable excuse, fails to produce evidence which is under his control." *Berlinger's, Inc. v. Beef's Finest, Inc.*, 57 Ill.App.3d 319, 325, 14 Ill.Dec. 764, 372 N.E.2d 1043 (1978). In an effort to show adequate capitalization, DiCosola directs us to the loans made to TLD by DiCosola and Theresa, and the $4 million line of credit TLD had at a bank. This does not demonstrate adequate capitalization but, rather, shows the inadequacy of TLD's capitalization and indicates that the initial capitalization, if any, was insufficient to conduct TLD's business of building homes as a general contractor. See *Fiumetto,* 321 Ill.App.3d at 959-60, 255 Ill.Dec. 510, 749 N.E.2d 992. Also as evidence of adequate capitalization, DiCosola points to spec homes that he claims TLD has owned over the years. However, there is no claim that these homes were ever

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unencumbered assets of TLD. Thus, the trial court's finding that TLD was inadequately capitalized was not against the manifest weight of the evidence.

DiCosola also argues that because the Fontanas had every opportunity to investigate the financial status of TLD before hiring TLD to build their home, undercapitalization is a less significant factor. It is true that undercapitalization is less significant in a contract case, where the claim arises from a consensual transaction, than in a tort case, where there is no voluntary dealing. See *Fiumetto*, 321 Ill.App.3d at 960-61, 255 Ill.Dec. 510, 749 N.E.2d 992. Nevertheless, assuming without deciding that DiCosola did nothing to conceal from the Fontanas that they were contracting **[840 N.E.2d 780]** with TLD and not him personally, we do not believe that the diminished significance of the undercapitalization factor renders against the manifest weight of the evidence the trial court's ultimate determination based on the all of the appropriate factors.

With respect to TLD's failure to observe corporate formalities, the trial court based its finding that this factor weighed in favor of piercing the corporate veil on two criteria: (1) TLD's failure to attach the legal descriptions of the properties sold to the corporate resolutions resolving to sell those properties, and (2) the absence of corporate resolutions authorizing notes to be paid to the DiCosolas to satisfy the loans the DiCosolas purportedly made to TLD. DiCosola's sole contention is that absolutely no authority supports the trial court's conclusion that the failure to include the legal descriptions of the properties with the corporate resolutions resolving to sell those properties amounts to a failure to observe corporate formalities. DiCosola does not challenge the second basis and, because the second basis alone is sufficient to support the trial court's finding, we need not address further DiCosola's contention regarding this factor.

With respect to the "nonfunctioning of the other officers or directors" factor, the trial court found that the evidence did not show that Theresa was active as a director or officer of TLD, that Theresa's testimony established that she had no real decision-making role in TLD, and that her role was the selection of amenities for the spec homes and other *de minimis* tasks. DiCosola argues that Theresa was a functioning director of the corporation, contending that he and Theresa shared responsibility for the business operations of TLD, with DiCosola playing the greater role in the home-building process. DiCosola argues that Theresa was an active participant in deciding what properties to purchase and what types of homes to build on the properties, as well as functioning as TLD's office manager and spec home designer.

We believe that the evidence supports the conclusion that Theresa

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did not function as an active director of TLD. Specifically, prior to the instant litigation, Theresa did not know that she was the sole shareholder in TLD and its sole director. Rather, Theresa thought that she and DiCosola were co-owners and directors of TLD. When asked about her knowledge of the corporate records she signed, Theresa

testified that she signed whatever her lawyers told her to sign. Theresa had no idea how much money was loaned to TLD, and she had no knowledge of a $532,000 loan allegedly owed to her. Theresa also lacked knowledge of how funds were deposited into her and DiCosola's personal checking account, but knew that the money came from the business. The only decisions that Theresa claimed to have made that were arguably significant were decisions made in conjunction with DiCosola concerning what properties to purchase for the purpose of building spec homes. Even if such decisions are the type that a corporate director would make, the trial court found that Theresa had no real decision-making role in TLD and, as finder of fact, it was the trial court's role in a bench trial to assess the credibility of witnesses (*In re Application of the County Treasurer & ex officio County Collector*, 131 Ill.2d 541, 549, 137 Ill.Dec. 561, 546 N.E.2d 506 (1989)). As such, it was the trial court's prerogative to dismiss Theresa's testimony regarding her decision-making role in TLD as not credible if it saw fit to do so. Based on the foregoing, we cannot conclude that the trial court's finding that Theresa was a nonfunctioning director was **[840 N.E.2d 781]** against the manifest weight of the evidence.

Although DiCosola notes that TLD filed corporate bylaws, prepared resolutions and shareholder actions, filed all necessary paperwork with the Secretary of State, filed all tax returns, and maintained a separate bank account and financial records, the evidence of TLD's failure to keep and maintain corporate records is legion. There were no corporate resolutions whatsoever regarding the loans DiCosola and Theresa made to TLD, or the terms of these loans. In fact, there are no corporate records of the shareholder loans listed on TLD's tax returns, no notes or other evidence of claimed indebtedness, and no evidence of repayment of any indebtedness. Moreover, despite DiCosola's claim that all of the proceeds from the sales of TLD's assets in 2002 went to repay TLD's indebtedness, there are no corporate records of the amounts borrowed by TLD to purchase the properties and build the homes sold. Additionally, DiCosola admitted he has never had a written contract with a subcontractor, never takes bids from subcontractors, never issues written change orders to his subcontractors, does not keep written work schedules for projects, and keeps no financial records for any payments that TLD makes except for draw schedules filed with title companies. Consequently, the trial

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court's determination that TLD failed to keep and maintain corporate records was not against the manifest weight of the evidence.

DiCosola argues further that there was absolutely no evidence that TLD's funds or assets were ever commingled or that the monies earned by the company were diverted to DiCosola and Theresa. We disagree. Theresa testified that TLD has never had any employees and does not pay a salary to anyone. TLD's income tax returns for the years 1998 through 2002 reflect that no salary or wages were paid to anyone and that no compensation was paid to any corporate officer. Thus, neither DiCosola nor Theresa received any wages, salary, or compensation of any kind from TLD. Theresa also testified that she never received a dividend from TLD, and she admitted that she had testified earlier that she never received a check from TLD for anything. However, Theresa also testified that she had no idea how funds were deposited into her and DiCosola's personal checking account, but she knew that they "cut a check from the business." As such, funds from TLD's accounts went into DiCosola and Theresa's personal checking account. This money was not salary, wages, dividends, or distributions and, therefore, demonstrates the commingling of TLD's funds with DiCosola and Theresa's personal funds. From this and other evidence presented at trial, the trial court could have reasonably concluded that the funds or assets of TLD were commingled with the personal funds and assets of DiCosola and Theresa. Thus, the trial court's finding as to this factor was not against the manifest weight of the evidence.

In sum, DiCosola's arguments have not convinced us that, with respect to the first prong of the test utilized to determine if piercing a corporate veil is appropriate, the trial court's judgment was against the manifest weight of the evidence.

b. "Fraud, Injustice, or Inequitable Consequences" Prong

The second prong of the test used to determine if piercing a corporate veil is appropriate is that circumstances must exist such that adherence to the fiction of a separate corporate existence would sanction a fraud, promote injustice, or promote inequitable consequences. *Pintozzi*, 50 Ill.2d at 128-29, 277 N.E.2d 844; *Wallen*, 262 Ill.App.3d at 68-69, 199 Ill.Dec. 359, 633 N.E.2d 1350 .

[840 N.E.2d 782] The second prong has been described further as "[s]ome element of unfairness, something akin to fraud or deception, or the existence of a compelling public interest." *Berlinger's, Inc.*, 57 Ill.App.3d at 324, 14 Ill.Dec. 764, 372 N.E.2d 1043; *Wallen*, 262 Ill.App.3d at 68-69, 199 Ill.Dec. 359, 633 N.E.2d 1350. Actual fraud is not necessarily a predicate to piercing the corporate veil; limited liability may be discarded to prevent injustice or inequitable consequences. *Central States, Southeast & Southwest Areas Pension Fund v. Gaylur Products, Inc.*, 66 Ill.App.3d 709, 23 Ill.Dec. 487, 384 N.E.2d 123 (1978).

Although [362 Ill.App.3d 508] the trial court did not specifically address the second prong of the piercing test,

we find that it was satisfied in this case. The trial court could reasonably conclude from the evidence presented at trial that DiCosola caused TLD to be incorporated and placed nominal ownership and control solely in the hands of Theresa for the purpose of shielding himself personally from the liabilities to which his general contracting activities might expose him. As we explained above, the evidence established that, although Theresa was the sole shareholder and sole director of TLD, the trial court found that she was not acting as a director of TLD and that TLD was merely an alter ego of DiCosola. Moreover, once DiCosola's general contracting activities led to a lawsuit and the possibility of a substantial judgment against TLD was evident, DiCosola began selling off TLD's assets to the detriment of TLD's potential judgment creditors, the Fontanas. This lawsuit was filed on September 4, 2001. TLD began the year 2002 with approximately $1.8 million in assets and ended the year with no assets. DiCosola argues that no evidence was introduced to show that TLD's assets were transferred or dissipated to avoid paying a judgment. We disagree.

Although DiCosola claimed that the $1.8 million realized by TLD from the sale of assets in 2002 went to pay down the money borrowed on their line of credit to build the homes sold, there was no proof of that claim other than his testimony. If DiCosola's testimony was accurate, then TLD realized no profit on any of those properties. The fact that TLD operated for five years and realized a profit in only one of those years, while at the same time DiCosola and Theresa received no salaries or distributions from TLD and had no other sources of income, casts doubt on DiCosola's position that TLD was a viable corporation. In addition, TLD's income tax return for 2002 shows that part of the purported corporate debt that was paid off with proceeds from the sale of TLD's assets was a portion of a $663,989 loan that the shareholder made to TLD. More specifically, TLD paid Theresa $91,783 in 2002 as payback of a purported shareholder loan at a time when TLD was being sued by the Fontanas for over $2 million. We find this problematic because, as noted by the trial court, there were no corporate records showing the terms of any shareholder loans. This was an inequitable circumstance in view of the impending $1.2 million liability TLD would owe to the Fontanas. In addition, after this lawsuit was filed, DiCosola began building homes under the newly formed NTK, Inc. There was no explanation for this maneuver other than to keep assets out of TLD and, consequently, beyond the reach of any judgment the Fontanas might secure against TLD. Based on this evidence, the trial court could reasonably conclude that DiCosola

eliminated the assets of TLD to the detriment of TLD's eventual creditors.

In sum, we are not convinced that the trial court's judgment with respect to the **[840 N.E.2d 783]** second prong of the piercing test was against the manifest weight of the evidence. Accordingly, we conclude that the trial court's decision to pierce the corporate veil of TLD was not against the manifest weight of the evidence. Consequently, we affirm the trial court's order entering judgment against Nicola DiCosola personally.

B. The Fontanas' Cross-Appeal Regarding Attorney Fees

Following the entry of judgment in their favor, the Fontanas filed a "motion for award of costs and attorney's fees." In their motion, the Fontanas prayed for $32,302.89 in expenses paid to various home inspectors, engineers, and architects in connection with their effort to identify construction defects in the home; $16,262.95 in fees for expert testimony presented at trial; and $209,823.99 in attorney fees the Fontanas paid with respect to their attempts to have construction completed and to the instant litigation. The Fontanas relied upon section 10F of the construction contract, which provides:

"To the extent Builder or Purchaser fails to comply with provisions of this Contract, the other party may retain an attorney to assist it in the enforcement of the provisions of this Contract, and the party at fault (i.e., not in compliance with the provisions of this Contract), shall pay any and all reasonable expense relating to the enforcement of the provisions of this Contract."

After the issue was briefed and argued, the trial court granted the Fontanas' motion in part, and denied it in part, ruling as follows:

"I think, under the American rule, the--any provision regarding attorney's fees which is in derogation of the common law has to be specifically spelled out. I think this provision is ambiguous, and I don't believe it clearly states that the parties are entitled to attorney's fees or any expenses other than what by case law is determined to be expenses in a suit which is filed. I'm going to deny the petition for attorney's fees. I will allow expenses relating to the filing and service and expenses that are applicable under the Illinois statute and case law."

In their cross-appeal, the Fontanas contend that the trial court erred in finding that section 10F of the construction contract was ambiguous, because its plain meaning leaves no doubt that the parties intended the recovery of attorney fees. The Fontanas argue that because section 10F references the retention of an attorney to assist in the enforcement of the contract and, in the same sentence, assigns the party not in compliance with the contract "any

and all reasonable

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expenses relating to enforcement," no reasonable person executing the construction contract would understand that they would not have to pay attorney fees upon their breach of the contract. In response, DiCosola argues that because section 10F does not include the term "attorney fees," the term "reasonable expense" cannot be expanded to include attorney fees. Alternatively, DiCosola argues that the failure to include the term "attorney fees" renders section 10F ambiguous and that it should be construed against the Fontanas, as it was their attorney who drafted that portion of the construction contract.

"Illinois generally follows the 'American Rule': absent statutory authority or a contractual agreement between the parties, each party to litigation must bear its own attorney fees and costs[, and may not recover those fees and costs] from an adversary." *Morris B. Chapman & Associates, Ltd. v. Kitzman,* 193 Ill.2d 560, 572, 251 Ill.Dec. 141, 739 N.E.2d 1263 (2000). A court may not award attorney fees as a matter of contractual construction in the **[840 N.E.2d 784]** absence of *specific* language. *Thread & Gage Co. v. Kucinski,* 116 Ill.App.3d 178, 186, 71 Ill.Dec. 925, 451 N.E.2d 1292 (1983); *Qazi v. Ismail,* 50 Ill.App.3d 271, 273, 7 Ill.Dec. 434, 364 N.E.2d 595 (1977). In this case we are called upon to decide whether section 10F of the construction contract, by sufficiently specific language, overrides the "American Rule" and allows the Fontanas to recover their reasonable attorney fees. The construction of a contract presents a question of law that we review *de novo. FTI International, Inc. v. Cincinnati Insurance Co.,* 339 Ill.App.3d 258, 259, 274 Ill.Dec. 135, 790 N.E.2d 908 (2003).

DiCosola has not directed us to any authority in support of his argument that use of the precise term "attorney fees" in the contractual provision is required to meet the specific language requirement. To be sure, the Illinois cases addressing this issue require a high level of specificity, but they stop short of holding that use of the term "attorney fees" is required. See *Thread & Gage Co.,* 116 Ill.App.3d at 186, 71 Ill.Dec. 925, 451 N.E.2d 1292; *Qazi,* 50 Ill.App.3d at 273, 7 Ill.Dec. 434, 364 N.E.2d 595; see also *Boulevard Bank National Ass'n v. Philips Medical Systems International,* 827 F.Supp. 510, 511 (N.D.Ill.1993) (rejecting contention that under Illinois law a court may not award attorney fees based upon a contractual provision not specifically mentioning "attorney fees"). Although it is clearly the preferable practice to employ the term "attorney fees" when expressing the parties' intent to override the "American Rule" through a contractual agreement, Illinois law does not require use of the specific term "attorney fees" in order to do so.

We are then left with the issue of whether the language "any and all reasonable expense relating to enforcement" in section 10F specifically includes attorney fees. Under the rules of contract construction, the determinative factor is the intention of the parties, which can best be determined by considering the contract as a whole, reviewing each [362 Ill.App.3d 511] part in light of the others. *Premier Title Co. v. Donahue,* 328 Ill.App.3d 161, 164, 262 Ill.Dec. 376, 765 N.E.2d 513 (2002); *Dolezal v. Plastic & Reconstructive Surgery, S.C.,* 266 Ill.App.3d 1070, 1080, 204 Ill.Dec. 10, 640 N.E.2d 1359 (1994). Based on the whole of the language used in section 10F, we believe that the language "any and all reasonable expense relating to enforcement" specifically includes attorney fees. We conclude that whatever else "any and all reasonable expenses related to enforcement" includes, it is sufficiently clear that those expenses include amounts paid to an attorney retained "to assist in the enforcement of the provisions of [the] contract."

To better understand our conclusion, it is useful to split section 10F into two parts. The first part provides: "To the extent Builder or Purchaser fails to comply with provisions of this Contract, the other party may retain an attorney to assist it in the enforcement of the provisions of this contract." The second part provides: "the party at fault * * * shall pay any and all reasonable expense relating to the enforcement of the provisions of this Contract." In view of the fact that no contractual provision is necessary to grant a party the right expressed in the first part, there is no reason to include the language in the first part other than to specify that such expense is recoverable from the party at fault. A contrary construction renders the first part of section 10F meaningless in violation of the principle that requires that a contract be construed such that none of its terms are regarded as mere surplusage. See *Premier Title Co.,* 328 Ill.App.3d at 166-67, 262 Ill.Dec. 376, 765 N.E.2d 513

[840 N.E.2d 785] Simply put, the first part of section 10F describes one type of expense (the retention of an attorney to assist in the enforcement of the contract) that, under the second part of section 10F, relates to the enforcement of the provisions of the contract and that the party at fault is required to pay. Read any other way, the first part of section 10F becomes surplusage. Thus, we hold that the only reasonable way to read section 10F is as an expression of the intent of the parties to require the party who fails to comply with the provisions of the construction contract to reimburse the other party for attorney fees incurred to enforce the provisions of the construction contract. Because we disagree with the trial court's conclusion that section 10F is ambiguous, we cannot construe section 10F against the drafter as DiCosola invites us to do.

For the foregoing reasons, we reverse that portion of the trial court's December 16, 2004, order denying the Fontanas' request for attorney fees. We remand this cause and direct the trial court to determine what portion of the requested attorney fees are reasonable and to award them to the Fontanas.

III. CONCLUSION

Based on the forgoing, we affirm the personal judgment entered [362 Ill.App.3d 512] against Nicola DiCosola in the circuit court of Du Page County. However, we reverse the portion of the circuit court's order denying the Fontanas' request for attorney fees, and we remand the cause with directions.

Affirmed in part and reversed in part; cause remanded with directions.

BOWMAN and BYRNE, JJ., concur.

Notes:

[1] At the time the lawsuit was originally filed, TLD was named TLD Enterprises, Inc. It changed its name to TLD Builders, Inc., following the filing of this lawsuit.

[2] The Fontanas ultimately settled with Stanley L. Glodeck and dismissed their claim against him before trial.

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by 16 Jade Street, LLC v. R. Design Const. Co., S.C., April 4, 2012

368 Ill.App.3d 63
Appellate Court of Illinois,
First District, Fourth Division.

Philip PULEO, Malex Corporation, Amy Derksen, Chani Derus, Robert Filiczkowski, d/b/a Robert Filiczkowski Design Services, Yspex, Inc., Jacob Lesgold, Van Ratsavongsay, and Bryan Weiss d/b/a Gearhouse Studios, Plaintiffs–Appellants,
v.
Michael TOPEL, Individually and d/b/a Thinktank, LLC, and Thinktank, LLC, an Illinois **Limited Liability Company** in Dissolution, Defendants–Appellees.

No. 1–05–0367.
|
Sept. 29, 2006.

Synopsis
Background: Independent contractors, who were not paid for work performed for **limited liability company** (LLC) after it was involuntarily dissolved, filed complaint against LLC and its managing **member** in which they alleged breach of contract, unjust enrichment, and claims under the account stated theory. The Circuit Court, Cook County, Ronald F. Bartkowicz, J., dismissed all claims against managing **member** with prejudice, and granted plaintiffs' motion for judgment on the pleadings against LLC. Plaintiffs appealed.

[Holding][:] The Appellate Court, Quinn, P.J., **held** that plaintiffs could not establish managing **member's personal** liability for **debts** that LLC incurred after its dissolution.

Affirmed.

West Headnotes (6)

[1] **Appeal and Error**Pleading

Appellate review of a dismissal of a complaint on its pleadings is de novo.

[2] **Appeal and Error**Dismissal and nonsuit in general

In reviewing dismissal of a complaint on its pleadings, appellate court accepts all well-pleaded allegations in the complaint as true.

[3] **Statutes**Presumptions

When a statute is amended, it is presumed that the legislature meant to change the law as it formerly existed.

2 Cases that cite this headnote

[4] **Corporations and Business Organizations**Liability for acts and **debts** of **company**

Independent contractors could not establish managing **member's personal** liability for **debts** that **limited liability company** (LLC) incurred after its dissolution, without showing that a provision establishing managing **member's personal** liability was contained in LLC's articles of organization, and that managing **member** consented in writing to the adoption of such a provision. S.H.A. 805 ILCS 180/10–10(d).

15 Cases that cite this headnote

[5] **Corporations and Business Organizations**Liability for acts and **debts** of **company**
Corporations and Business Organizations Rights, duties, and liabilities

It would be presumed that, by removing language which explicitly provided that a **member** or manager of a **limited liability company** (LLC) could be **held personally** liable for his or her own actions or for the actions of the LLC to the same extent as a shareholder or director of a corporation could be **held personally** liable, legislature meant to shield a **member** or manager of an LLC from **personal** liability. S.H.A. 805 ILCS 180/10–10(a, b).

17 Cases that cite this headnote

[6] **Corporations and Business Organizations**Liability for acts and **debts** of **company**
Corporations and Business Organizations Rights, duties, and liabilities

Limited Liability Company Act does not provide for a **member** or manager's **personal** liability to a third party for a **limited liability company's** (LLC's) **debts** and liabilities, except as provided in LLC's articles of organization and consented to in writing by the **member** so liable. S.H.A. 805 ILCS 180/10–10(d).

14 Cases that cite this headnote

Attorneys and Law Firms

****1153** Griffin Law Offices, LLC, Chicago (Thomas G. Griffin and Troy M. Sphar, of counsel), for Appellants.

No Appellee brief filed, for Appellee.

Opinion

Presiding Justice QUINN delivered the opinion of the court:

*****58 *64** Plaintiffs Philip Puleo, Malex Corporation, Amy Derksen, Chani Derus, Robert Filiczkowski, YSPEX, Inc., Jacob Lesgold, Van Ratsavongsay, and Bryan Weiss appeal the order of the circuit court dismissing their claims against defendant Michael Topel (Topel).[1] On appeal, plaintiffs contend that the circuit court erred by finding that Topel could not be **held personally** liable for obligations incurred on behalf of defendant Thinktank, LLC (Thinktank), after the **company** was involuntary dissolved.

The record shows that effective May 30, 2002, Thinktank, a **limited liability company** (LLC) primarily involved in web design and web marketing, was involuntarily dissolved by the Illinois Secretary of State. The dissolution was due to Thinktank's failure to file its 2001 annual report as required by the Illinois **Limited Liability Company** Act (the Act) (805 ILCS 180/35–25(1) (West 2004)).

Thereafter, on December 2, 2002, plaintiffs, independent contractors hired by Topel, filed a complaint against Topel and Thinktank in which they alleged breach of contract, unjust enrichment, and claims under the account stated theory. Those claims stemmed from plaintiffs' contention that Topel, who plaintiffs alleged was the sole manager and owner of Thinktank, knew or should have known of Thinktank's *****59 **1154** involuntary dissolution, but nonetheless continued to conduct business as Thinktank from May 30, 2002, through the end of August 2002. They further contended that on or about August 30, 2002, Topel informed Thinktank employees and independent contractors, including ***65** plaintiffs, that the **company** was ceasing operations and that their services were no longer needed. Thinktank then failed to pay plaintiffs for work they had performed.

On or about April 4, 2003, Thinktank and Topel served their answer to the complaint on plaintiffs. In response, plaintiffs filed a motion for summary judgment on April 25, 2003. In that motion, plaintiffs argued that the only allegations that Thinktank and Topel denied in their answer pertained to Lesgold. As such, plaintiffs contended that there was no genuine issue of material fact and, thus, they were entitled to judgment as a matter of law. Subsequently, on June 6, 2003, plaintiffs filed a request to admit.

Although neither Thinktank nor Topel filed a response to plaintiffs' motion for summary judgment, they filed a response to plaintiffs' request to admit. Therein, defendants denied that Topel, as sole manager and owner

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of Thinktank, was in a position to know that Thinktank had been involuntarily dissolved by the Illinois Secretary of State or that the **company** was operating while dissolved during the period beginning on May 30, 2002.

On September 2, 2003, the circuit granted plaintiffs' motion for judgment on the pleadings against Thinktank. Thereafter, on October 16, 2003, plaintiffs filed a separate motion for summary judgment against Topel.[2] Relying on *Gonnella Baking Co. v. Clara's Pasta Di Casa, Ltd.*, 337 Ill.App.3d 385, 272 Ill.Dec. 224, 786 N.E.2d 1058 (2003), plaintiffs contended that Topel, as a principal of Thinktank, an LLC, had a legal status similar to a shareholder or director of a corporation, who courts have found liable for a dissolved corporation's **debts**. Thus, plaintiffs argued that Topel was **personally** liable for Thinktank's **debts**. Topel did not file a response, and plaintiffs subsequently argued that Topel's failure to respond should be treated as a failure to contest their motion and that judgment should be entered for them.

On March 25, 2004, the circuit court denied plaintiffs' motion for summary judgment against Topel. Subsequently, plaintiffs filed a motion to reconsider on July 1, 2004, which the circuit court denied on August 23, 2004.

Plaintiffs then filed a motion for clarification on September 13, 2004, in order to obtain the circuit court's basis for denying their motion to reconsider. On October 12, 2004, the circuit court granted plaintiffs' motion for clarification. In doing so, the circuit court acknowledged that Topel continued to do business as Thinktank after its dissolution and that the contractual obligations at issue were incurred after the dissolution. However, the court then stated:

> ***66** "This court bases its decision on its reading of the Illinois **Limited Liability Company** Act. Specifically, this court reads 805 ILCS 180/10–10 in concert with 805 ILCS 180/35–7 as well as the legislative notes to 805 ILCS 180/10–10 to determine that the Illinois Legislature did not intend to **hold** a **member** of a **Limited Liability Company** liable for **debts** incurred after the **Limited Liability Company** had been involuntarily dissolved."

****1155 ***60** Finally, on January 6, 2005, the circuit court entered a final order dismissing all of plaintiffs' claims against Topel with prejudice. The court stated in pertinent part:

> "Based upon the Court's prior finding that the Illinois Legislature did not intend to **hold** a **member** of a **Limited Liability Company** liable for **debts** incurred after the **Limited Liability Company** had been involuntarily dissolved, the Court finds that all of Plaintiffs' claims against Defendant Topel within the Complaint fail as a matter of law, as they are premised upon Defendant Topel's alleged **personal** liability for obligations incurred in the name of Thinktank LLC after it had been involuntarily dissolved by the Illinois Secretary of State."

Plaintiffs now appeal that order.

We initially note that Topel has not filed a brief. Nonetheless, we may proceed under the principles set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill.2d 128, 133, 345 N.E.2d 493 (1976).

[1] [2] Our review of a dismissal of a complaint on its pleadings is *de novo*. *Keck & Associates, P.C. v. Vasey*, 359 Ill.App.3d 566, 568, 295 Ill.Dec. 905, 834 N.E.2d 486 (2005). In doing so, we accept all well-pleaded allegations in the complaint as true. *Board of Managers of the Village Centre Condominium Ass'n v. Wilmette Partners*, 198 Ill.2d 132, 134, 260 Ill.Dec. 203, 760 N.E.2d 976 (2001).

In this court, plaintiffs contend that the circuit court erred in dismissing their claims against Topel. In making that argument, plaintiffs acknowledge that the issue as to whether a **member** or manager of an LLC may be **held personally** liable for obligations incurred by an involuntarily dissolved LLC appears to be one of first impression under the Act. That said, plaintiffs assert that it has long been the law in Illinois that an officer or director of a dissolved corporation has no authority to exercise corporate powers and, thus is **personally** liable for any **debts** he incurs on behalf of the corporation after

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its dissolution. *Gonnella Baking Co.*, 337 Ill.App.3d at 386, 272 Ill.Dec. 224, 786 N.E.2d 1058; *Cardem, Inc. v. Marketron International, Ltd.*, 322 Ill.App.3d 131, 255 Ill.Dec. 376, 749 N.E.2d 477 (2001); *Chicago Title & Trust Co. v. Brooklyn Bagel Boys, Inc.*, 222 Ill.App.3d 413, 164 Ill.Dec. 930, 584 N.E.2d 142 (1991). Plaintiffs reason that Topel, as managing **member** of Thinktank, similarly should be **held** liable for **debts** the **company** incurred after its dissolution.

[3] We first look to the provisions of the Act as they provided the ***67** trial court its basis for its ruling. *Katris v. Carroll*, 362 Ill.App.3d 1140, 1144, 299 Ill.Dec. 482, 842 N.E.2d 221 (2005) (in reviewing a circuit court's summary judgment, this court looked to the applicable provisions of the Act to determine the fiduciary duties owed by managers and **members** of an LLC). When reviewing a statute, the cardinal rule is to ascertain and give effect to the intent of the legislature. *Carroll*, 362 Ill.App.3d at 1145, 299 Ill.Dec. 482, 842 N.E.2d 221. The plain meaning of the language in the statute provides the best indication of legislative intent. *Carroll*, 362 Ill.App.3d at 1145, 299 Ill.Dec. 482, 842 N.E.2d 221. Where the statutory language is clear, the court must give it effect without resorting to other aids for construction. *Solich v. George & Anna Portes Cancer Prevention Center of Chicago, Inc.*, 158 Ill.2d 76, 81, 196 Ill.Dec. 655, 630 N.E.2d 820 (1994). Further, when a statute is amended, it is presumed that the legislature meant to change the law as it formerly existed. *****61 **1156** *Department of Transportation v. Drury Displays, Inc.*, 327 Ill.App.3d 881, 888, 261 Ill.Dec. 875, 764 N.E.2d 166 (2002), citing *Scribner v. Sachs*, 18 Ill.2d 400, 411, 164 N.E.2d 481 (1960).

As stated, the circuit court relied on sections 10–10 and 35–7 of the Act in making its ruling. Section 10–10 provides:

> "(a) Except as otherwise provided in subsection (d) of this Section, the **debts**, obligations, and liabilities of a **limited liability company**, whether arising in contract, tort, or otherwise, are solely the **debts**, obligations, and liabilities of the **company**. A **member** or manager is not **personally** liable for a **debt**, obligation, or liability of the **company** solely by reason of being or acting as a **member** or manager.
>
> (b) (Blank)
>
> (c) The failure of a **limited liability company** to observe the usual **company** formalities or requirements relating to the exercise of its **company** powers or management of its business is not a ground for imposing **personal** liability on the **members** or managers for liabilities of the **company**.
>
> (d) All or specified **members** of a **limited liability company** are liable in their capacity as **members** for all or specified **debts**, obligations, or liabilities of the **company** if:
>
> (1) a provision to that effect is contained in the articles of organization; and
>
> (2) a **member** so liable has consented in writing to the adoption of the provision or to be bound by the provision." 805 ILCS 180/10–10 (West 2004).

Section 35–7 provides:

> "(a) A **limited liability company** is bound by a **member** or manager's act after dissolution that:
>
> (1) is appropriate for winding up the **company's** business; or
>
> (2) would have bound the **company** under Section 13–5 before dissolution, if the other party to the transaction did not have notice of the dissolution.
>
> ***68** (b) A **member** or manager who, with knowledge of the dissolution, subjects a **limited liability company** to liability by an act that is not appropriate for winding up the **company's** business is liable to the **company** for any damage caused to the **company** arising from the liability." 805 ILCS 180/35–7 (West 2004).

[4] Section 10–10 clearly indicates that a **member** or manager of an LLC is not **personally** liable for **debts** the **company** incurs unless each of the provisions in subsection (d) is met. In this case, plaintiffs cannot establish either of the provisions in subsection (d). They have not provided this court with Thinktank's articles of organization, much less a provision establishing Topel's **personal** liability, nor have they provided this court with Topel's written adoption of such a provision. As such, under the express language of the Act, plaintiffs cannot establish Topel's **personal** liability for **debts** that Thinktank incurred after its dissolution.

As plaintiffs contend, similar to the Business Corporation Act (BCA) (see 805 ILCS 5/12.30 (West 2004)), the Act explicitly provides that an LLC continues after dissolution only for the purpose of winding up its business (805 ILCS 180/35–3 (West 2004)). However, as plaintiffs concede in their brief, the Act does not contain a provision similar to section 3.20 of the Business Corporation Act, which provides:

> "All persons who assume to exercise corporate powers

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without authority so to do shall be jointly and severally liable for all **debts** and liabilities incurred or arising as a result thereof." 805 ILCS 5/3.20 (West 2004).

****1157 ***62** Moreover, we observe that section 35–7 of the Act explicitly provides that a **member** or manager of an LLC who, with knowledge of the dissolution, exceeds the scope of his authority during the wrapping up of a **company's** business is liable *to the* ***company*** for any damages arising from the liability. 805 ILCS 180/35–7(b) (West 2004). The Act, however, contains no language concerning a **member** or manager's liability to a third party. That silence speaks volumes when viewed in conjunction with the legislature's amendment of the former version of section 10–10.

Prior to its amendment, section 10–10 provided:

"(a) A **member** of a **limited liability company** shall be **personally** liable for any act, **debt**, obligation, or liability of the **limited liability company** or another **member** or manager to the extent that a shareholder of an Illinois business corporation is liable in analogous circumstances under Illinois law.

(b) A manager of a **limited liability company** shall be **personally** liable for any act, **debt**, obligation, or liability of the **limited liability company** or another manager or **member** to the extent that a director of an Illinois business corporation is liable in analogous ***69** circumstances under Illinois law." 805 ILCS 180/10–10 (West 1996).

[5] In 1998, however, the legislature amended section 10–10 and in doing so removed the above language which explicitly provided that a **member** or manager of an LLC could be **held personally** liable for his or her own actions or for the actions of the LLC to the same extent as a shareholder or director of a corporation could be **held personally** liable. As we have not found any legislative commentary regarding that amendment, we presume that by removing the noted statutory language, the legislature meant to shield a **member** or manager of an LLC from **personal** liability. *Drury Displays, Inc.*, 327 Ill.App.3d at 888, 261 Ill.Dec. 875, 764 N.E.2d 166 ("When a statute is amended, it is presumed that the legislature intended to change the law as it formerly existed").

Nonetheless, plaintiffs ask this court to disregard the 1998 amendment and to imply a provision into the Act similar to section 3.20 of the Business Corporation Act. We cannot do so.

This court recently rejected a similar request in *In re Application of County Collector*, 356 Ill.App.3d 668, 673–74, 292 Ill.Dec. 515, 826 N.E.2d 951 (2005). There, petitioner Dream Sites, LLC, purchased property at an annual tax sale as a result of respondent Grace Apostolic Church's delinquent general real estate taxes. Petitioner then filed a petition for issuance of a tax deed and lodged a "Notice of expiration of period of redemption" pursuant to section 22–10 of the Property Tax Code (Code) (35 ILCS 200/22–10 (West 2002)) which provided in pertinent part "[i]n counties with 3,000,000 or more inhabitants, the notice shall also state the address, room number, and time at which the hearing is set." The petition, however, omitted a street address and merely stated that the hearing for issuance of the tax deed would be **held** in "Room 1704, Richard J. Daley Center in Chicago, Illinois." Respondent filed an objection arguing that the notice was insufficient due to the lack of a street address. The circuit court denied the motion and entered an order granting petitioner's petition.

On appeal, respondent argued that the circuit court's ruling was against the manifest weight of the evidence because it ignored the plain language of section 22–10 of the Code. Conversely, petitioner argued that despite the language of section 22–10, this court should find that "Daley Center, Chicago, Illinois" was an adequate address *****63 **1158** for purposes of the petition. This court, however, concluded that by amending section 22–10 to require that a notice provide an address and not merely a building name, the legislature intended a notice to include a street address to denote the physical location of a building. As such, this court reversed the circuit court's ruling and remanded the cause for further proceedings.

[6] ***70** In the case at bar, we similarly decline plaintiffs' request to ignore the statutory language. When the legislature amended section 10–10 (805 ILCS 180/10–10 (West 2004)), it clearly removed the provision that allowed a **member** or manager of an LLC to be **held personally** liable in the same manner as provided in section 3.20 of the Business Corporation Act. Thus, the Act does not provide for a **member** or manager's **personal** liability to a third party for an LLC's **debts** and liabilities, and no rule of construction authorizes this court to declare that the legislature did not mean what the plain language of the statute imports. *Solich*, 158 Ill.2d at 83, 196 Ill.Dec. 655, 630 N.E.2d 820.

We, therefore, find that the circuit court did not err in concluding that the Act did not permit it to find Topel **personally** liable to plaintiffs for Thinktank's **debts** and liabilities. We agree with plaintiff that the circuit court's ruling does not provide an equitable result. However, the circuit court, like this court, was bound by the statutory

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language.

Accordingly, we affirm the judgment of the circuit court of Cook County.

Affirmed.

CAMPBELL and MURPHY, JJ., concur.

All Citations

368 Ill.App.3d 63, 856 N.E.2d 1152, 306 Ill.Dec. 57

Footnotes

1 The record shows that plaintiff Jacob Lesgold pursued a separate summary judgment action against Topel.

2 Plaintiff Jacob Lesgold filed a separate motion for summary judgment against Thinktank on October 16, 2003.

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Appellate Court of Illinois,
Second District.
Joseph L. FONTANA and Angela D. Fontana, Plaintiffs–Appellees and Cross–Appellants,
v.
TLD BUILDERS, INC., Defendant (Nicola DiCosola, Defendant–Appellant and Cross–Appellee).

No. 2–05–0045.
Dec. 16, 2005.

Background: Home purchasers brought breach of contract action against construction company and president of company, seeking to pierce the corporate veil and hold president personally liable. In a bench trial, the Circuit Court, Du Page County, Bonnie M. Wheaton, J., found president personally liable and denied purchasers' request for attorney fees.

Holdings: On cross-appeals, the Appellate Court, Kapala, J., held that:
(1) status of president as a nonshareholder did not preclude piercing the corporate veil to impose personal liability on him;
(2) piercing of the corporate veil was warranted; and
(3) under terms of contract, purchasers were entitled to attorney fees.

Affirmed in part, reversed in part, and remanded with directions.

West Headnotes

[1] Corporations and Business Organizations 101 1011

101 Corporations and Business Organizations
101I Nature and Theory of Incorporation
101k1010 Corporation as Distinct Entity
101k1011 k. In general. Most Cited Cases
(Formerly 101k1.3)

Corporations and Business Organizations 101 1640

101 Corporations and Business Organizations
101VI Shareholders and Members
101VI(D) Liability for Corporate Debts and Acts
101k1640 k. In general. Most Cited Cases
(Formerly 101k215)

Corporations and Business Organizations 101 1958

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101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(E) Liability for Corporate Debts and Acts
101k1956 Nature and Grounds in General
101k1958 k. Acting in corporate capacity as opposed to acting in personal capacity. Most Cited Cases
(Formerly 101k325)

A corporation is a legal entity that exists separately and distinctly from its shareholders, officers, and directors, who generally are not liable for the corporation's debts.

[2] Corporations and Business Organizations 101 ⚿1640

101 Corporations and Business Organizations
101VI Shareholders and Members
101VI(D) Liability for Corporate Debts and Acts
101k1640 k. In general. Most Cited Cases
(Formerly 101k215)

A primary purpose of doing business as a corporation is to insulate stockholders from unlimited liability for corporate activity.

[3] Corporations and Business Organizations 101 ⚿1640

101 Corporations and Business Organizations
101VI Shareholders and Members
101VI(D) Liability for Corporate Debts and Acts
101k1640 k. In general. Most Cited Cases
(Formerly 101k215)

Limited liability will ordinarily exist even when the corporation is closely held or has a single shareholder.

[4] Corporations and Business Organizations 101 ⚿1040

101 Corporations and Business Organizations
101II Disregarding Corporate Entity; Piercing Corporate Veil
101k1035 Reasons and Justifications
101k1040 k. Instrumentality in general. Most Cited Cases
(Formerly 101k1.4(4))

Corporations and Business Organizations 101 ⚿1051

101 Corporations and Business Organizations
101II Disregarding Corporate Entity; Piercing Corporate Veil
101k1050 Separate Corporations; Disregarding Separate Entities
101k1051 k. In general. Most Cited Cases

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(Formerly 101k1.5(1))

A court may disregard a corporate entity and pierce the veil of limited liability where the corporation is merely the alter ego or business conduit of another person or entity; this doctrine imposes liability on the individual or entity that uses a corporation merely as an instrumentality to conduct that person's or entity's business.

[5] Corporations and Business Organizations 101 ⚿1037

101 Corporations and Business Organizations
101II Disregarding Corporate Entity; Piercing Corporate Veil
101k1035 Reasons and Justifications
101k1037 k. Justice and equity in general. Most Cited Cases
(Formerly 101k1.4(2))

Corporations and Business Organizations 101 ⚿1038

101 Corporations and Business Organizations
101II Disregarding Corporate Entity; Piercing Corporate Veil
101k1035 Reasons and Justifications
101k1038 k. Fraud or illegal acts in general. Most Cited Cases
(Formerly 101k1.4(3))

Liability imposed after piercing the corporate veil arises from fraud or injustice perpetrated not on the corporation but on third persons dealing with the corporation.

[6] Corporations and Business Organizations 101 ⚿1031

101 Corporations and Business Organizations
101II Disregarding Corporate Entity; Piercing Corporate Veil
101k1031 k. Nature of remedy. Most Cited Cases
(Formerly 101k1.7(1), 101k1.4(1))

The doctrine of piercing the corporate veil is an equitable remedy; it is not itself a cause of action but rather is a means of imposing liability on an underlying cause of action, such as a tort or breach of contract.

[7] Corporations and Business Organizations 101 ⚿1051

101 Corporations and Business Organizations
101II Disregarding Corporate Entity; Piercing Corporate Veil
101k1050 Separate Corporations; Disregarding Separate Entities
101k1051 k. In general. Most Cited Cases
(Formerly 101k1.5(1))

Corporations and Business Organizations 101 ⚿1086(15)

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101 Corporations and Business Organizations
101II Disregarding Corporate Entity; Piercing Corporate Veil
101k1079 Actions to Pierce Corporate Veil
101k1086 Evidence
101k1086(4) Weight and Sufficiency
101k1086(15) k. Degree of proof. Most Cited Cases
(Formerly 101k1.7(2))

A party seeking to pierce the corporate veil has the burden of making a substantial showing that one corporation is really a dummy or sham for another, and courts will pierce the corporate veil only reluctantly.

[8] Corporations and Business Organizations 101 ⚿1037

101 Corporations and Business Organizations
101II Disregarding Corporate Entity; Piercing Corporate Veil
101k1035 Reasons and Justifications
101k1037 k. Justice and equity in general. Most Cited Cases
(Formerly 101k1.4(2))

Corporations and Business Organizations 101 ⚿1038

101 Corporations and Business Organizations
101II Disregarding Corporate Entity; Piercing Corporate Veil
101k1035 Reasons and Justifications
101k1038 k. Fraud or illegal acts in general. Most Cited Cases
(Formerly 101k1.4(3))

Corporations and Business Organizations 101 ⚿1039

101 Corporations and Business Organizations
101II Disregarding Corporate Entity; Piercing Corporate Veil
101k1035 Reasons and Justifications
101k1039 k. Alter ego in general. Most Cited Cases
(Formerly 101k1.4(1))

A two-prong test is employed in order to determine whether to pierce the corporate veil: (1) there must be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist; and (2) circumstances must exist such that adherence to the fiction of a separate corporate existence would sanction a fraud, promote injustice, or promote inequitable consequences.

[9] Appeal and Error 30 ⚿1012.1(7.1)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts,

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and Findings
30XVI(I)3 Findings of Court
30k1012 Against Weight of Evidence
30k1012.1 In General
30k1012.1(7) Particular Cases and Issues
30k1012.1(7.1) k. In general. Most Cited Cases

A reviewing court will not reverse the finding of the trial court regarding piercing the corporate veil unless it is against the manifest weight of the evidence.

[10] Corporations and Business Organizations 101 1059

101 Corporations and Business Organizations
101II Disregarding Corporate Entity; Piercing Corporate Veil
101k1057 Particular Occasions for Determining Corporate Entity
101k1059 k. Contracts in general. Most Cited Cases
(Formerly 101k1.6(2))

Status of president of construction company as a nonshareholder in company did not preclude piercing the corporate veil and imposing personal liability on president in home purchasers' breach of contract action.

[11] Corporations and Business Organizations 101 1503

101 Corporations and Business Organizations
101VI Shareholders and Members
101VI(A) In General
101k1502 Who Are Shareholders or Members
101k1503 k. In general. Most Cited Cases
(Formerly 101k170)

A "parent corporation" is a corporation that has working control of the subsidiary corporation through stock ownership.

[12] Appeal and Error 30 1012.1(5)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1012 Against Weight of Evidence
30k1012.1 In General
30k1012.1(5) k. Manifest weight. Most Cited Cases

A decision is against the manifest weight of the evidence when the opposite conclusion is clearly evident or where it is unreasonable, arbitrary, or not based on the evidence.

[13] Corporations and Business Organizations 101 1043

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101 Corporations and Business Organizations
101II Disregarding Corporate Entity; Piercing Corporate Veil
101k1042 Factors Considered
101k1043 k. In general. Most Cited Cases
(Formerly 101k1.4(1))

In determining whether the unity of interest and ownership prong of the piercing-the-corporate-veil test is met, a court generally will not rest its decision on a single factor, but will examine many factors, including: (1) inadequate capitalization; (2) failure to issue stock; (3) failure to observe corporate formalities; (4) nonpayment of dividends; (5) insolvency of the debtor corporation; (6) nonfunctioning of the other officers or directors; (7) absence of corporate records; (8) commingling of funds; (9) diversion of assets from the corporation by or to a stockholder or other person or entity to the detriment of creditors; (10) failure to maintain arm's-length relationships among related entities; and (11) whether, in fact, the corporation is a mere facade for the operation of the dominant stockholders.

[14] Corporations and Business Organizations 101 ⚿1045

101 Corporations and Business Organizations
101II Disregarding Corporate Entity; Piercing Corporate Veil
101k1042 Factors Considered
101k1045 k. Undercapitalization. Most Cited Cases
(Formerly 101k1.4(1))

The consideration of whether a corporation is adequately capitalized in determining whether the unity of interest and ownership prong of the piercing-the-corporate-veil test is met is based on the policy that shareholders should in good faith put at the risk of the business unencumbered capital reasonably adequate for the corporation's prospective liabilities.

[15] Corporations and Business Organizations 101 ⚿1045

101 Corporations and Business Organizations
101II Disregarding Corporate Entity; Piercing Corporate Veil
101k1042 Factors Considered
101k1045 k. Undercapitalization. Most Cited Cases
(Formerly 101k1.4(2))

It is inequitable to allow shareholders to set up a flimsy organization just to escape personal liability.

[16] Corporations and Business Organizations 101 ⚿1045

101 Corporations and Business Organizations

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101II Disregarding Corporate Entity; Piercing Corporate Veil
101k1042 Factors Considered
101k1045 k. Undercapitalization. Most Cited Cases
(Formerly 101k1.4(1))

To determine whether a corporation is adequately capitalized for purposes of the unity of interest and ownership prong of the piercing-the-corporate-veil-test, one must compare the amount of capital to the amount of business to be conducted and obligations to be fulfilled.

[17] Evidence 157 ⚿75

157 Evidence
157II Presumptions
157k74 Evidence Withheld or Falsified
157k75 k. In general. Most Cited Cases

An unfavorable evidentiary presumption arises if a party, without reasonable excuse, fails to produce evidence which is under his control.

[18] Corporations and Business Organizations 101 ⚿1086(10)

101 Corporations and Business Organizations
101II Disregarding Corporate Entity; Piercing Corporate Veil
101k1079 Actions to Pierce Corporate Veil
101k1086 Evidence
101k1086(4) Weight and Sufficiency
101k1086(10) k. Undercapitalization. Most Cited Cases
(Formerly 101k1.7(2))

Trial court's finding in regards to the unity of interest and ownership prong of the piercing-the-corporate-veil-test that construction company was inadequately capitalized was not against the manifest weight of the evidence, where sole shareholder was unable to provide a cancelled check indicating that she had paid corporation $1,000 for her shares, and shareholder and president made numerous loans to corporation.

[19] Corporations and Business Organizations 101 ⚿1086(8)

101 Corporations and Business Organizations
101II Disregarding Corporate Entity; Piercing Corporate Veil
101k1079 Actions to Pierce Corporate Veil
101k1086 Evidence
101k1086(4) Weight and Sufficiency
101k1086(8) k. Alter ego, instrumentality, or agency in general. Most Cited Cases
(Formerly 101k1.7(2))

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Trial court's finding in regards to the unity of interest and ownership prong of the piercing-the-corporate-veil-test that construction company did not follow corporate formalities was not against the manifest weight of the evidence, where there were no corporate resolutions authorizing notes to be paid to president and shareholder to satisfy the loans they purportedly made to the corporation.

[20] Corporations and Business Organizations 101 ⚿1086(9)

101 Corporations and Business Organizations
101II Disregarding Corporate Entity; Piercing Corporate Veil
101k1079 Actions to Pierce Corporate Veil
101k1086 Evidence
101k1086(4) Weight and Sufficiency
101k1086(9) k. Domination or control by shareholder. Most Cited Cases
(Formerly 101k1.7(2))

Trial court's finding in regards to the unity of interest and ownership prong of the piercing-the-corporate-veil-test that sole shareholder of construction company was a nonfunctioning director was not against the manifest weight of the evidence, where shareholder believed that she and her husband were co-owners and directors of company, she did not know how much money was loaned to company, and she had no real decision-making role in company.

[21] Corporations and Business Organizations 101 ⚿1086(8)

101 Corporations and Business Organizations
101II Disregarding Corporate Entity; Piercing Corporate Veil
101k1079 Actions to Pierce Corporate Veil
101k1086 Evidence
101k1086(4) Weight and Sufficiency
101k1086(8) k. Alter ego, instrumentality, or agency in general. Most Cited Cases
(Formerly 101k1.7(2))

Trial court's finding in regards to the unity of interest and ownership prong of the piercing-the-corporate-veil-test that construction company failed to keep and maintain corporate records was not against the manifest weight of the evidence, where there were no records of the amounts borrowed by company to purchase properties and build homes, and president admitted he never had a written contract with a subcontractor, never took bids from subcontractors, never issued written change orders, did not keep written work schedules for projects, and kept no financial records for any payments that company made except for draw schedules filed

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with title companies.

[22] Corporations and Business Organizations 101 ⚿1086(11)

101 Corporations and Business Organizations
101II Disregarding Corporate Entity; Piercing Corporate Veil
101k1079 Actions to Pierce Corporate Veil
101k1086 Evidence
101k1086(4) Weight and Sufficiency
101k1086(11) k. Commingling of funds or assets. Most Cited Cases
(Formerly 101k1.7(2))

Trial court's finding in regards to the unity of interest and ownership prong of the piercing-the-corporate-veil-test that construction company's funds and assets were commingled and that money earned by the company was diverted to president and sole shareholder was not against the manifest weight of the evidence, where shareholder testified that company had no employees and never paid a salary or a dividend, that she had no idea how funds were deposited into her and president's personal checking account, but that they "cut a check from the business."

[23] Corporations and Business Organizations 101 ⚿1037

101 Corporations and Business Organizations
101II Disregarding Corporate Entity; Piercing Corporate Veil
101k1035 Reasons and Justifications
101k1037 k. Justice and equity in general. Most Cited Cases
(Formerly 101k1.4(2))

Corporations and Business Organizations 101 ⚿1038

101 Corporations and Business Organizations
101II Disregarding Corporate Entity; Piercing Corporate Veil
101k1035 Reasons and Justifications
101k1038 k. Fraud or illegal acts in general. Most Cited Cases
(Formerly 101k1.4(3))

Actual fraud is not necessarily a predicate to piercing the corporate veil; limited liability may be discarded to prevent injustice or inequitable consequences.

[24] Corporations and Business Organizations 101 ⚿1059

101 Corporations and Business Organizations
101II Disregarding Corporate Entity; Piercing Corporate Veil
101k1057 Particular Occasions for Determining Corporate Entity
101k1059 k. Contracts in general. Most Cited Cases

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(Formerly 101k1.6(2))

Adherence to the fiction of a separate corporate existence for construction company would have sanctioned a fraud, promoted injustice, or promoted inequitable consequences, and thus, piercing the corporate veil of construction company was warranted, where the evidence indicated that president incorporated company and placed nominal ownership and control in the hands of his wife to shield himself personally from liabilities to which his general contracting activities exposed him, and that once a breach of contract lawsuit was filed against company, president began to sell off company's assets to the detriment of company's potential judgment creditors.

[25] Costs 102 ⚿194.32

102 Costs
102VIII Attorney Fees
102k194.24 Particular Actions or Proceedings
102k194.32 k. Contracts. Most Cited Cases

Under terms of home construction contract, home purchasers were entitled to attorney fees in their breach of contract action against construction company and its president, even though the contract did not specifically use the term "attorney fees," where the contract stated that in the event of breach, the party at fault was required to pay "any and all reasonable expense relating to enforcement."

[26] Costs 102 ⚿194.16

102 Costs
102VIII Attorney Fees
102k194.16 k. American rule; necessity of contractual or statutory authorization or grounds in equity. Most Cited Cases

Under the "American Rule," absent statutory authority or a contractual agreement between the parties, each party to litigation must bear its own attorney fees and costs, and may not recover those fees and costs from an adversary.

[27] Costs 102 ⚿194.32

102 Costs
102VIII Attorney Fees
102k194.24 Particular Actions or Proceedings
102k194.32 k. Contracts. Most Cited Cases

A court may not award attorney fees as a matter of contractual construction in the absence of specific language.

[28] Appeal and Error 30 ⚿893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo

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30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In general. Most Cited Cases

The construction of a contract presents a question of law that the Appellate Court reviews de novo..

[29] Costs 102 ⚿194.32

102 Costs
102VIII Attorney Fees
102k194.24 Particular Actions or Proceedings
102k194.32 k. Contracts. Most Cited Cases

Although it is clearly the preferable practice to employ the term “attorney fees” when expressing the parties' intent to override the American Rule through a contractual agreement, Illinois law does not require use of the specific term “attorney fees” in order to do so.

[30] Contracts 95 ⚿147(3)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k147 Intention of Parties
95k147(3) k. Construing whole contract together. Most Cited Cases

Under the rules of contract construction, the determinative factor is the intention of the parties, which can best be determined by considering the contract as a whole, reviewing each part in light of the others.

[31] Contracts 95 ⚿143.5

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143.5 k. Construction as a whole. Most Cited Cases

A contract must be construed such that none of its terms are regarded as mere surplusage.

****770** Terry A. Ekl, Vincent C. Mancini, Connolly, Ekl & Williams, P.C., Clarendon Hills, for Nicola DiCosola, TLD Builders, Inc.

William T. Dwyer, Jr., O'Rourke, Hogan, Fowler & Dwyer, Chicago, for Angela D. Fontana, Joseph L. Fontana.

Justice KAPALA delivered the opinion of the court:

*****657 *493** Defendant-appellant and cross-appellee, Nicola DiCosola (DiCosola), appeals the $1,271,816.10 judgment entered against him personally in the circuit court of Du Page County after a trial without a jury.

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DiCosola contends that the trial court erred when it pierced the corporate veil of defendant, TLD Builders, Inc. (TLD), and held him personally liable for the obligations of the corporation. Plaintiffs-appellees and cross-appellants, Joseph L. Fontana and Angela D. Fontana (the Fontanas), cross-appeal, contending that the trial court erred in failing to grant their motion for attorney fees. For the reasons ***494** that follow, we reject DiCosola's appellate *****658 **771** contentions and affirm the trial court's judgment against DiCosola personally. In the cross-appeal, we reverse that portion of the trial court's order denying the Fontanas' request for attorney fees, and we remand the cause.

I. BACKGROUND

This lawsuit was originally filed on September 4, 2001, naming as defendants TLD [FN1] and architect Stanley L. Glodeck [FN2]. On July 16, 2003, the Fontanas were given leave to file an amended complaint naming DiCosola as an additional defendant. In the amended complaint filed on July 30, 2003, the Fontanas alleged that they owned a parcel of real property commonly known as 347 Ruby Street, Clarendon Hills, Illinois (the property). The Fontanas alleged further that on September 24, 1999, they and TLD entered into a written construction contract in which TLD agreed to construct a single-family residence (the home) on the property for the sum of $1,475,800. In count I of the amended complaint, the Fontanas sought a declaration that they were excused from further performance of their obligations under the construction contract, as a result of TLD's material breach of the construction contract. In count II of the amended complaint, the Fontanas alleged that TLD breached the terms of the construction contract by failing to construct the home in accordance with the construction contract and by abandoning all work on the home in February 2001, leaving the home incomplete and uninhabitable. As a result of the breach, the Fontanas alleged, the costs and expenses necessary to correct the defects and deficiencies in the construction performed by TLD, and to complete the construction of the home, exceeded the fair market value of the home had it been completed in accordance with the architect's drawings. The Fontanas alleged further that, as of September 2002, the home had no value and could not be economically repaired or completed, so it was demolished in November 2002. As a result of the damages due to the breach, the Fontanas prayed for a judgment against TLD in an amount in excess of $2 million, and also prayed for interest, costs, and reasonable attorney fees.

FN1. At the time the lawsuit was originally filed, TLD was named TLD Enterprises, Inc. It changed its name to TLD Builders, Inc., following the filing of this lawsuit.

FN2. The Fontanas ultimately settled

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with Stanley L. Glodeck and dismissed their claim against him before trial.

In count III of the amended complaint, the Fontanas alleged that the architect breached the terms of the contract that he entered into with the Fontanas. In count IV of the amended complaint, titled "Piercing the Corporate Veil," the Fontanas alleged that DiCosola was ***495** the alter ego of TLD and is thereby liable for the damages sought from TLD in count II of the amended complaint. The Fontanas alleged further that since the commencement of the instant lawsuit against TLD, DiCosola has caused TLD to cease its business operations such that the corporation has no funds or income with which to compensate them for the damages resulting from the breach of the construction contract. The Fontanas alleged that adherence to the fiction of the separate corporate existence of TLD would promote injustice by denying them any recovery of the losses resulting from the direct actions of DiCosola.

At the conclusion of the bench trial of this cause, the trial court held that TLD materially breached the construction contract and failed to cure the breach. The trial court also found that the evidence was *****659 **772** sufficient to establish that the amount of money the Fontanas paid to TLD, together with the cost to complete the unfinished home according to the plans and specifications referenced in the construction contract, would exceed the $2.2 million value of the home were it completed pursuant to the plans and specifications. As such, the trial court held that it was appropriate under the circumstances to demolish the unfinished home, and it calculated the Fontanas' damages to be $1,271,816.10. The trial court entered judgment in that amount in favor of the Fontanas and against TLD and DiCosola, jointly and severally.

The trial court's determination that TLD materially breached the construction contract and its calculation of the resulting damages have not been challenged on appeal. Instead, DiCosola contends that the trial court erred in piercing the corporate veil and holding him personally liable for the obligations of TLD. As such, we discuss only the evidence presented at trial that is necessary to the disposition of DiCosola's appeal.

The Fontanas called Theresa DiCosola, who testified that she believed that she and DiCosola, her husband, were equal owners of TLD until she learned that a corporation's president is not equal to a corporation's director. When asked if she was the incorporator of TLD, Theresa said, "[w]hatever my lawyer did." Theresa did not recall the date that TLD was incorporated, how many shares TLD issued, or the amount paid for the shares. After reviewing the articles of incorporation, Theresa recalled that she incorporated TLD and that 1,000 shares were issued to her at a price of $1 per share. The-

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resa agreed that on January 26, 2004, the date she gave her deposition in the instant case, she did not know that she was the sole shareholder of TLD. When asked if she wrote a $1,000 check to TLD for the 1,000 shares of TLD stock, the following exchange ensued:

***496** "[THERESA]: I did check that with my lawyer and he did say that a thousand dollars was for a thousand shares.

[PLAINTIFFS' COUNSEL]: Did you write a check to TLD Enterprises for a thousand dollars?

[THERESA]: From what I understand, a thousand dollars went in the company to start it.

[PLAINTIFFS' COUNSEL]: That's not my question.

[THERESA]: Well, the money was taken from our personal account.

[PLAINTIFFS' COUNSEL]: The question is, did you write a check to TLD Enterprises—

[THERESA]: Well, I am going to say yes.

[PLAINTIFFS' COUNSEL]: Okay. Fine. Do you have the check?

[THERESA]: I have moved three or four times. I really don't—I didn't realize I had to save all of these personal checks from my personal account, so I am going to say no.

[PLAINTIFFS' COUNSEL]: Well, when is it that you remembered that you wrote a check to TLD Enterprises?

[THERESA]: Actually, I talked to my lawyer after the deposition, Bob Borla, because I did not—I remember signing papers, but it wasn't as though I remembered how it came about.

[PLAINTIFFS' COUNSEL]: Well, during your deposition, you didn't remember whether you wrote a check for a thousand dollars; and you said you would have to check your checkbook and find out. Did you check your checkbook?

****773 ***660** [THERESA]: I told you, I don't have any—do not have any of the return[ed] checks.

[PLAINTIFFS' COUNSEL]: So the only knowledge you have about paying for the stock of the company is what your lawyer told you?

[THERESA]: Yes.

[PLAINTIFFS' COUNSEL]: And who is that lawyer?

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[THERESA]: Robert Borla. He said we did it in the office."

Theresa also testified that she signed the annual corporate minutes of TLD as sole shareholder and director, but she said that DiCosola handled all the financial matters related to TLD. Theresa said that she and DiCosola loaned money to TLD in the past, including 13 loans in 1999. She did not know how the money was transferred into the company because she did not handle the financial end of the operation. Theresa testified that she did not know that TLD owed her $572,000 as of December 31, 2002, but she testified that the $572,000 loaned to TLD came from her and DiCosola's personal account. At the time of her deposition, Theresa did not know that TLD was a "sub-chapter S corporation," what a K–1 form was, or whether she ever ***497** received a paycheck from TLD. Theresa said that she has never received a dividend from TLD and did not know if TLD had profits or losses in the years 1998, 1999, 2000, 2001, and 2002. However, Theresa did sign TLD's income tax returns for those years. Theresa admitted that TLD reported $1,818, 213 in assets as of January 1, 2002, and zero assets as of December 31, 2002. Theresa did not know where the assets went.

Theresa testified further that she, DiCosola, and their lawyer decided who the officers of TLD would be. It was a running joke in her family that she owned the company, that "mom was the boss." Theresa said that she and DiCosola decided together what properties to purchase to build speculative (spec) homes on, and that she relied on her husband to determine the sale prices. Theresa acknowledged that resolutions of the board of directors of TLD, of which she is the only director, showed that TLD sold seven properties for prices totaling $3,234,000 between October 29, 2001, and February 4, 2002, but that she did not participate in deciding the selling prices of those properties and did not know the amounts TLD received for the properties. Theresa denied paying her and DiCosola's personal bills through TLD, and then the following exchange ensued:

"[PLAINTIFFS' COUNSEL]: Let me ask you, if you were asked this question and gave this answer at your deposition on page 7 starting at line three:

'Do you receive a paycheck from any business?

Answer: Do I receive a paycheck? I didn't receive—we pay our bills that way through the business, but I never—there was never a paycheck in my name.'

Were you asked the question and did you give that answer?

[THERESA]: You asked the question and I answered it. I was very nervous.

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[PLAINTIFFS' COUNSEL]: As a matter of fact, Mrs. DiCosola, you don't know how funds are deposited in your joint checking account; do you?

[THERESA]: No.

[PLAINTIFFS' COUNSEL]: You don't know where the money comes from?

[THERESA]: I know that we cut a check from the business."

Theresa testified further that TLD has never had any employees and does not pay a salary to anyone. Theresa and DiCosola *****661 **774** have no sources of income other than TLD, and DiCosola has worked exclusively for TLD since 1998. When asked where she and her husband got money to live on if they did not draw salaries or wages from TLD and the company had net losses in excess of $1 million from 1998 through 2002, Theresa said they lived off the proceeds of the sales of two personal homes that they "did very well on."

***498** During questioning by counsel for DiCosola, Theresa said that her duties with respect to TLD were office work, filing, answering the telephone, babysitting children when they would come into the office, cleaning, and doing all the "spec work." By "spec work" Theresa meant selecting the windows, roofs, brick, cabinetry, floors, paint, moldings, lighting, and appliances for the spec homes that TLD built. Theresa testified that TLD is still in existence. Theresa explained that TLD never paid her and DiCosola's personal mortgage, electric bill, or gas bill but, rather, they have always paid those bills through their personal account and never through the business.

The Fontanas also called DiCosola, who testified that he is the president of TLD. He acknowledged that TLD has never had an employee. He said that TLD is in the business of building homes as a general contractor. TLD was the general contractor on the Fontana home at 347 Ruby Street in Clarendon Hills. DiCosola said that he has never had a written contract with a subcontractor and never takes bids from subcontractors. DiCosola agreed that he never issues written change orders to his subcontractors and does not keep written work schedules for projects because "the job pretty much tells itself how to run it." TLD keeps no financial records for any payments that it makes except for draw schedules filed with title companies. DiCosola kept no written records of the changes the Fontanas requested to be made to the home. DiCosola explained that there was no need to keep records of the changes because none of the money went through TLD. DiCosola testified that he has no record of the cash the Fontanas paid to him for changes made to the home, and no records of any payments made to any subcontractors performing the work on the

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changes. DiCosola explained that any money given to him by the Fontanas for changes was forwarded to the subcontractors who performed the work. DiCosola admitted that he has another company, NTK Enterprises. NTK has built two spec homes since the instant lawsuit was filed; one has been sold. DiCosola admitted that TLD went from approximately $1.8 million in assets on January 1, 2002, to zero assets on December 31, 2002. When asked where the $1.8 million went, DiCosola said that it went to pay down the money borrowed on the line of credit to build the properties that were sold. DiCosola related that TLD's 2002 federal income tax return showed $1,472,388 in liabilities in the form of mortgages, notes, bonds, and payables; $388,157 in other liabilities; and $663,989 in liabilities in the form of loans from shareholders.

The Fontanas successfully moved into evidence TLD's filings with the Illinois Secretary of State's Office and TLD's stock certificate. These documents indicated that TLD was incorporated on November ***499** 10, 1998, and that Theresa was the sole shareholder. Other documents admitted into evidence showed shareholder action appointing DiCosola as president and secretary of TLD. The tax returns of TLD showed a loss of $182 in 1998, a loss of $203,403 in 1999, a profit of $139,765 in 2000, a loss of $451,997 in 2001, and a loss of $254,042 in 2002.

After considering all the evidence, and finding the breach of contract and resulting****775 ***662** damages in the amount mentioned above, the trial court held that DiCosola's status as a nonshareholder of TLD did not preclude holding him liable for the obligations of TLD pursuant to the equitable remedy of "piercing of the corporate veil." The trial court found this court's decision in *Macaluso v. Jenkins,* 95 Ill.App.3d 461, 50 Ill.Dec. 934, 420 N.E.2d 251 (1981), instructive on the issue. The trial court noted that in *Macaluso* this court affirmed a personal judgment against the chairman of the board of a not-for-profit corporation even though not-for-profit corporations do not have shareholders. With respect to the factors used to determine whether piercing the corporate veil is appropriate, the trial court found that the following factors weighed in favor of piercing the corporate veil: inadequate capitalization of TLD (the trial court determined that Theresa's testimony regarding the $1,000 check "cast doubt" on whether any initial capitalization occurred), failure to observe certain corporate formalities, failure to pay dividends, operation of the corporation without a profit, commingling of corporate and personal assets, a non-functioning officer or director in Theresa, insolvency of the corporation, and absence of corporate records. The trial court found that the actual issuance of stock was the only factor that weighed in favor of not piercing the corporate veil. Based on the foregoing, the trial court ruled as follows:

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"I think that all of these factors taken together are clear and convincing that Mr. DiCosola is the dominant force behind this corporation, that the corporation is little more than a shell which was established to shield him from liability. I think the fact that he signed the contract with his own individual signature in two places, while it is certainly not dispositive, its just one more indication that this business is Mr. DiCosola and that the corporation in the words of the Macaluso case should be disregarded and the veil of limited liability pierced because it would be an obstacle to the protection of private rights and because the corporation is merely the alter ego or business conduit of Mr. DiCosola who is the governing and dominating personality in this business enterprise.

For that reason, I will find that Mr. DiCosola is the alter ego of the business, that TLD Enterprises is a business conduit of his dominating personality so that the judgment will enter against Mr. DiCosola personally and against the corporation jointly and severally in the amount that I set forth before and that will be a final order."

***500** DiCosola timely appeals and the Fontanas cross-appeal. TLD has not appealed.

II. ANALYSIS

A. DiCosola's Appeal

[1][2][3][4][5][6] A corporation is a legal entity that exists separately and distinctly from its shareholders, officers, and directors, who generally are not liable for the corporation's debts. *Peetoom v. Swanson,* 334 Ill.App.3d 523, 526, 268 Ill.Dec. 305, 778 N.E.2d 291 (2002). A primary purpose of doing business as a corporation is to insulate stockholders from unlimited liability for corporate activity. *Peetoom,* 334 Ill.App.3d at 526, 268 Ill.Dec. 305, 778 N.E.2d 291. Limited liability will ordinarily exist even when the corporation is closely held or has a single shareholder. *Peetoom,* 334 Ill.App.3d at 526, 268 Ill.Dec. 305, 778 N.E.2d 291. "However, a court may disregard a corporate entity and pierce the veil of limited liability where the corporation is merely the alter ego or business conduit of another person or entity." *Peetoom,* 334 Ill.App.3d at 527, 268 Ill.Dec. 305, 778 N.E.2d 291. This doctrine imposes liability on the individual or entity that uses a *****663 **776** corporation merely as an instrumentality to conduct that person's or entity's business. *Peetoom,* 334 Ill.App.3d at 527, 268 Ill.Dec. 305, 778 N.E.2d 291. "Such liability arises from fraud or injustice perpetrated not on the corporation but on third persons dealing with the corporation." *Peetoom,* 334 Ill.App.3d at 527, 268 Ill.Dec. 305, 778 N.E.2d 291. "The doctrine of piercing the corporate veil is an equitable remedy; it is not itself a cause of action but rather is a means of imposing liability on an underlying cause of action, such as a tort or breach of contract." *Peetoom,* 334 Ill.App.3d

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at 527, 268 Ill.Dec. 305, 778 N.E.2d 291.

[7][8][9] "A party seeking to pierce the corporate veil has the burden of making 'a substantial showing that one corporation is really a dummy or sham for another' [citation], and courts will pierce the corporate veil only reluctantly [citation]." *In re Estate of Wallen,* 262 Ill.App.3d 61, 68, 199 Ill.Dec. 359, 633 N.E.2d 1350 (1994). We employ a two-prong test in order to determine whether to pierce the corporate veil: (1) there must be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist; and (2) circumstances must exist such that adherence to the fiction of a separate corporate existence would sanction a fraud, promote injustice, or promote inequitable consequences. *People ex rel. Scott v. Pintozzi,* 50 Ill.2d 115, 128–29, 277 N.E.2d 844 (1971); *Wallen,* 262 Ill.App.3d at 68–69, 199 Ill.Dec. 359, 633 N.E.2d 1350. A reviewing court will not reverse the finding of the trial court regarding piercing the corporate veil unless it is against the manifest weight of the evidence. *Wallen,* 262 Ill.App.3d at 68, 199 Ill.Dec. 359, 633 N.E.2d 1350; *Ted Harrison Oil Co. v. Dokka,* 247 Ill.App.3d 791, 796, 187 Ill.Dec. 441, 617 N.E.2d 898 (1993).

1. *Imposition of a Liability of a Corporation on a Nonshareholder*

[10] DiCosola's first appellate contention is that the trial court erred in ***501** finding him personally liable under a veil-piercing theory because no Illinois authority allows piercing the corporate veil to impose liability on a nonshareholder. Because he was never a shareholder in TLD, DiCosola maintains, the "unity of interest and ownership" element of piercing the corporate veil was not satisfied. We reject this contention.

In *Macaluso,* this court rejected the argument that because the defendant, who was the chairman of the board and treasurer of a not-for-profit corporation, did not and could not own shares in the not-for-profit corporation, he could not be held liable for the corporation's debt. *Macaluso,* 95 Ill.App.3d at 465, 50 Ill.Dec. 934, 420 N.E.2d 251. We noted that the "unity of interest and ownership" requirement of piercing the corporate veil could not technically be met. *Macaluso,* 95 Ill.App.3d at 465, 50 Ill.Dec. 934, 420 N.E.2d 251. However, after noting further that the equitable remedy of piercing the corporate veil looks to substance rather than form (*Macaluso,* 95 Ill.App.3d at 465, 50 Ill.Dec. 934, 420 N.E.2d 251), we concluded that "even though [the defendant] did not and could not own shares of [the not-for-profit corporation], he did exercise ownership control over the corporation to such a degree that separate personalities of [the corporation and the defendant] did not exist, and that [the corporation] was a business conduit of [the defendant]." *Macaluso,* 95 Ill.App.3d at 466, 50 Ill.Dec. 934, 420 N.E.2d 251. Contrary to DiCosola's contention, *Macaluso* is Illinois authority for holding a nonshareholder liable

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for a corporation's debts *****664 **777** through the equitable remedy of piercing the corporate veil.

We disagree with DiCosola's characterization of our holding in *Macaluso* as applying an exception to the rule of stock ownership because the plaintiffs sought the piercing of a not-for-profit corporation's veil as opposed to an ordinary corporation's veil. The bases of our holding in *Macaluso* for imposing the liability of the corporation upon the nonshareholder defendant were his exercise of ownership control over the corporation such that their separate personalities did not exist and that the corporation was a business conduit of the defendant. *Macaluso,* 95 Ill.App.3d at 465–66, 50 Ill.Dec. 934, 420 N.E.2d 251.

Our holding in *Macaluso* is consistent with the decisions of courts in other jurisdictions that have considered the issue and have concluded that equitable ownership in a corporation, demonstrated by control exercised by an individual sought to be held liable for corporate debts, may satisfy the "unity of interest and ownership" element of piercing the corporate veil. See *Freeman v. Complex Computing Co.,* 119 F.3d 1044, 1051 (2d Cir.1997) (applying New York law, held that "New York courts have recognized for veil-piercing purposes the doctrine of equitable ownership, under which an individual who exercises sufficient control over the corporation may be deemed an 'equitable owner', notwithstanding the fact that the individual is not a ***502** shareholder of the corporation"); *Lally v. Catskill Airways, Inc.,* 198 A.D.2d 643, 645, 603 N.Y.S.2d 619, 621 (3d Dep't 1993) (nonshareholder defendant may be, "in reality," the equitable owner of a corporation where the nonshareholder defendant "exercise[s] considerable authority over [the corporation] ... to the point of completely disregarding the corporate form and acting as though [its] assets [are] his alone to manage and distribute"); *In re MacDonald,* 114 B.R. 326, 332–33 (D.Mass.1990) (piercing the corporate veil in bankruptcy case to establish debtor as the equitable owner of corporate stock that ostensibly was owned by debtor's father, and therefore finding stock subject to turnover order); *Angelo Tomasso, Inc. v. Armor Construction & Paving, Inc.,* 187 Conn. 544, 556–57, 447 A.2d 406, 412 (1982) ("[S]tock ownership, while important, is not a prerequisite to piercing the corporate veil but is merely one factor to be considered in evaluating the entire situation. Similarly, we have never required that an individual be an officer or director of the pierced corporation in order to hold him liable for the debts of the corporation. It is clear that the key factor in any decision to disregard the separate corporate entity is the element of control or influence exercised by the individual sought to be held liable over corporate affairs. [Citations.] Thus, while the usual case does involve a director, officer or shareholder of a corporation, the lack thereof, in an unusual

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case such as this, would not prevent us from imposing liability upon an individual by piercing the corporate veil if the evidence demonstrated the requisite level of control and otherwise satisfied the instrumentality or other applicable test"); *Establissement Tomis v. Shearson Hayden Stone, Inc.,* 459 F.Supp. 1355, 1366, n. 13 (S.D.N.Y.1978) (declining to find that under no set of circumstances could defendant husband be shown to be an alter ego of corporation simply because 100% of the corporation's stock was held in his wife's name instead of his).

[11] The only case law DiCosola cites in support of his argument that he cannot be held liable under a veil-piercing theory because he is not a shareholder is *Hystro Products, Inc. v. MNP Corp.,* 18 F.3d 1384, 1388–89 (7th Cir.1994). *Hystro* ******665 **778*** *Products* does not so hold. In *Hystro Products,* the creditor of a subsidiary corporation sought to pierce the corporate veil of the subsidiary corporation and hold the parent corporation liable for the debt of its subsidiary corporation. *Hystro Products,* 18 F.3d at 1386. In discussing the "unity of interest and ownership" element of piercing the corporate veil, the court in *Hystro Products* wrote: "Stock control and the existence of common officers and directors are *generally* prerequisites to the piercing of the corporate veil although these factors alone will not suffice." (Emphasis added.) *Hystro Products,* 18 F.3d at 1389. The foregoing is a recognition***503** that where the alleged alter ego of a parent corporation is the subsidiary corporation, stock ownership by the parent is ordinarily one of the elements that is required to show unity of interest and ownership. However, *Hystro Products* is not authority for the proposition that the alter ego of a corporation can never be a nonshareholder. Cases involving parent and subsidiary corporations will not address the issue of whether actual stock ownership is *always* required to meet the "unity of interest and ownership" element of piercing the corporate veil. This is because, by definition, a parent corporation is a corporation that has working control of the subsidiary corporation through stock ownership. See 18 Am.Jur.2d *Corporations* § 41 (2004). Consequently, the issue of establishing the "unity of interest and ownership" element through equitable ownership rather than through actual ownership of stock did not arise in *Hystro Products.*

Consequently, based on the foregoing, we reject DiCosola's first appellate contention. We hold that DiCosola's status as a nonshareholder in TLD does not preclude piercing TLD's corporate veil and imposing personal liability upon DiCosola for TLD's liability to the Fontanas.

2. *The Propriety of Piercing TLD's Corporate Veil*

[12] DiCosola's second appellate contention is that the trial court's decision to pierce TLD's corporate veil was against the manifest weight of the evidence because the

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Fontanas failed to make a substantial showing as to each prong of the piercing test. A decision is against the manifest weight of the evidence when the opposite conclusion is clearly evident or where it is unreasonable, arbitrary, or not based on the evidence. *Maple v. Gustafson,* 151 Ill.2d 445, 454, 177 Ill.Dec. 438, 603 N.E.2d 508 (1992).

a. "Unity of Interest and Ownership" Prong

[13] In determining whether the "unity of interest and ownership" prong of the piercing-the-corporate-veil test is met, a court generally will not rest its decision on a single factor, but will examine many factors, including: (1) inadequate capitalization; (2) failure to issue stock; (3) failure to observe corporate formalities; (4) nonpayment of dividends; (5) insolvency of the debtor corporation; (6) nonfunctioning of the other officers or directors; (7) absence of corporate records; (8) commingling of funds; (9) diversion of assets from the corporation by or to a stockholder or other person or entity to the detriment of creditors; (10) failure to maintain arm's-length relationships among related entities; and (11) whether, in fact, the corporation is a mere facade for the operation of the dominant stockholders. *Jacobson v. Buffalo Rock Shooters Supply, Inc.,* 278 Ill.App.3d 1084, 1088, 215 Ill.Dec. 931, 664 N.E.2d 328 (1996); *Estate of Wallen,* 262 Ill.App.3d at 69, 199 Ill.Dec. 359, 633 N.E.2d 1350.

***504** DiCosola argues that the trial court's findings as to inadequate capitalization, the *****666 **779** failure to observe corporate formalities, the nonfunctioning of other officers or directors, the absence of corporate records, and the commingling of funds were against the manifest weight of the evidence. DiCosola does not challenge the trial court's findings that TLD's insolvency and failure to pay dividends weighed in favor of piercing the corporate veil, and he makes no argument regarding the above-marked (2), (9), (10), and (11) factors.

[14][15][16] The consideration of whether a corporation is adequately capitalized is based on the policy that shareholders should in good faith put at the risk of the business unencumbered capital reasonably adequate for the corporation's prospective liabilities. *Fiumetto v. Garrett Enterprises, Inc.,* 321 Ill.App.3d 946, 959, 255 Ill.Dec. 510, 749 N.E.2d 992 (2001). It is inequitable to allow shareholders to set up a flimsy organization just to escape personal liability. *Fiumetto,* 321 Ill.App.3d at 959, 255 Ill.Dec. 510, 749 N.E.2d 992. "To determine whether a corporation is adequately capitalized, one must compare the amount of capital to the amount of business to be conducted and obligations to be fulfilled." *Fiumetto,* 321 Ill.App.3d at 959, 255 Ill.Dec. 510, 749 N.E.2d 992.

[17][18] With respect to the adequacy of TLD's initial capitalization, the trial court did not find credible Theresa's testimony that she

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wrote a $1,000 check from her personal checking account to purchase 1,000 shares of TLD stock in 1998 when TLD was incorporated. In light of Theresa's failure to produce any record of this claimed initial capital contribution to TLD, we cannot say that the trial court's finding that TLD was not capitalized at its inception was unreasonable, arbitrary, or not based on the evidence; nor is the opposite conclusion clearly evident. The evidence demonstrates that at her deposition on January 26, 2004, Theresa indicated that she would obtain a copy of her cancelled check showing the $1,000 capital contribution to TLD. Yet at trial eight months later, Theresa failed to produce the check or a reasonable explanation of her failure to do so. "An unfavorable evidentiary presumption arises if a party, without reasonable excuse, fails to produce evidence which is under his control." *Berlinger's, Inc. v. Beef's Finest, Inc.*, 57 Ill.App.3d 319, 325, 14 Ill.Dec. 764, 372 N.E.2d 1043 (1978). In an effort to show adequate capitalization, DiCosola directs us to the loans made to TLD by DiCosola and Theresa, and the $4 million line of credit TLD had at a bank. This does not demonstrate adequate capitalization but, rather, shows the inadequacy of TLD's capitalization and indicates that the initial capitalization, if any, was insufficient to conduct TLD's business of building homes as a general contractor. See *Fiumetto,* 321 Ill.App.3d at 959–60, 255 Ill.Dec. 510, 749 N.E.2d 992. Also as evidence of adequate capitalization, DiCosola points to spec homes that he claims TLD has owned over the years. However, there is no claim that these homes were ever ***505** unencumbered assets of TLD. Thus, the trial court's finding that TLD was inadequately capitalized was not against the manifest weight of the evidence.

DiCosola also argues that because the Fontanas had every opportunity to investigate the financial status of TLD before hiring TLD to build their home, undercapitalization is a less significant factor. It is true that undercapitalization is less significant in a contract case, where the claim arises from a consensual transaction, than in a tort case, where there is no voluntary dealing. See *Fiumetto,* 321 Ill.App.3d at 960–61, 255 Ill.Dec. 510, 749 N.E.2d 992. Nevertheless, assuming without deciding that DiCosola did nothing to conceal from the Fontanas that they were contracting *****667 **780** with TLD and not him personally, we do not believe that the diminished significance of the undercapitalization factor renders against the manifest weight of the evidence the trial court's ultimate determination based on the all of the appropriate factors.

[19] With respect to TLD's failure to observe corporate formalities, the trial court based its finding that this factor weighed in favor of piercing the corporate veil on two criteria: (1) TLD's failure to attach the legal descriptions of the properties sold to the corporate resolutions resolving to sell those properties, and (2) the absence of corporate

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resolutions authorizing notes to be paid to the DiCosolas to satisfy the loans the DiCosolas purportedly made to TLD. DiCosola's sole contention is that absolutely no authority supports the trial court's conclusion that the failure to include the legal descriptions of the properties with the corporate resolutions resolving to sell those properties amounts to a failure to observe corporate formalities. DiCosola does not challenge the second basis and, because the second basis alone is sufficient to support the trial court's finding, we need not address further DiCosola's contention regarding this factor.

[20] With respect to the "nonfunctioning of the other officers or directors" factor, the trial court found that the evidence did not show that Theresa was active as a director or officer of TLD, that Theresa's testimony established that she had no real decision-making role in TLD, and that her role was the selection of amenities for the spec homes and other *de minimis* tasks. DiCosola argues that Theresa was a functioning director of the corporation, contending that he and Theresa shared responsibility for the business operations of TLD, with DiCosola playing the greater role in the home-building process. DiCosola argues that Theresa was an active participant in deciding what properties to purchase and what types of homes to build on the properties, as well as functioning as TLD's office manager and spec home designer.

We believe that the evidence supports the conclusion that Theresa ***506** did not function as an active director of TLD. Specifically, prior to the instant litigation, Theresa did not know that she was the sole shareholder in TLD and its sole director. Rather, Theresa thought that she and DiCosola were co-owners and directors of TLD. When asked about her knowledge of the corporate records she signed, Theresa testified that she signed whatever her lawyers told her to sign. Theresa had no idea how much money was loaned to TLD, and she had no knowledge of a $532,000 loan allegedly owed to her. Theresa also lacked knowledge of how funds were deposited into her and DiCosola's personal checking account, but knew that the money came from the business. The only decisions that Theresa claimed to have made that were arguably significant were decisions made in conjunction with DiCosola concerning what properties to purchase for the purpose of building spec homes. Even if such decisions are the type that a corporate director would make, the trial court found that Theresa had no real decision-making role in TLD and, as finder of fact, it was the trial court's role in a bench trial to assess the credibility of witnesses (*In re Application of the County Treasurer & ex officio County Collector*, 131 Ill.2d 541, 549, 137 Ill.Dec. 561, 546 N.E.2d 506 (1989)). As such, it was the trial court's prerogative to dismiss Theresa's testimony regarding her decision-making role in TLD as not credible if it saw fit to do so. Based on the foregoing, we

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cannot conclude that the trial court's finding that Theresa was a nonfunctioning director was *****668 **781** against the manifest weight of the evidence.

[21] Although DiCosola notes that TLD filed corporate bylaws, prepared resolutions and shareholder actions, filed all necessary paperwork with the Secretary of State, filed all tax returns, and maintained a separate bank account and financial records, the evidence of TLD's failure to keep and maintain corporate records is legion. There were no corporate resolutions whatsoever regarding the loans DiCosola and Theresa made to TLD, or the terms of these loans. In fact, there are no corporate records of the shareholder loans listed on TLD's tax returns, no notes or other evidence of claimed indebtedness, and no evidence of repayment of any indebtedness. Moreover, despite DiCosola's claim that all of the proceeds from the sales of TLD's assets in 2002 went to repay TLD's indebtedness, there are no corporate records of the amounts borrowed by TLD to purchase the properties and build the homes sold. Additionally, DiCosola admitted he has never had a written contract with a subcontractor, never takes bids from subcontractors, never issues written change orders to his subcontractors, does not keep written work schedules for projects, and keeps no financial records for any payments that TLD makes except for draw schedules filed with title companies. Consequently, the trial ***507** court's determination that TLD failed to keep and maintain corporate records was not against the manifest weight of the evidence.

[22] DiCosola argues further that there was absolutely no evidence that TLD's funds or assets were ever commingled or that the monies earned by the company were diverted to DiCosola and Theresa. We disagree. Theresa testified that TLD has never had any employees and does not pay a salary to anyone. TLD's income tax returns for the years 1998 through 2002 reflect that no salary or wages were paid to anyone and that no compensation was paid to any corporate officer. Thus, neither DiCosola nor Theresa received any wages, salary, or compensation of any kind from TLD. Theresa also testified that she never received a dividend from TLD, and she admitted that she had testified earlier that she never received a check from TLD for anything. However, Theresa also testified that she had no idea how funds were deposited into her and DiCosola's personal checking account, but she knew that they “cut a check from the business.” As such, funds from TLD's accounts went into DiCosola and Theresa's personal checking account. This money was not salary, wages, dividends, or distributions and, therefore, demonstrates the commingling of TLD's funds with DiCosola and Theresa's personal funds. From this and other evidence presented at trial, the trial court could have reasonably concluded that the funds or assets of TLD were commingled with the personal funds and assets of DiCosola and Theresa. Thus, the trial court's

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finding as to this factor was not against the manifest weight of the evidence.

In sum, DiCosola's arguments have not convinced us that, with respect to the first prong of the test utilized to determine if piercing a corporate veil is appropriate, the trial court's judgment was against the manifest weight of the evidence.

b. "Fraud, Injustice, or Inequitable Consequences" Prong

[23] The second prong of the test used to determine if piercing a corporate veil is appropriate is that circumstances must exist such that adherence to the fiction of a separate corporate existence would sanction a fraud, promote injustice, or promote inequitable consequences. *Pintozzi,* 50 Ill.2d at 128–29, 277 N.E.2d 844; *Wallen,* 262 Ill.App.3d at 68–69, 199 Ill.Dec. 359, *****669 **782** 633 N.E.2d 1350. The second prong has been described further as "[s]ome element of unfairness, something akin to fraud or deception, or the existence of a compelling public interest." *Berlinger's, Inc.,* 57 Ill.App.3d at 324, 14 Ill.Dec. 764, 372 N.E.2d 1043; *Wallen,* 262 Ill.App.3d at 68–69, 199 Ill.Dec. 359, 633 N.E.2d 1350. Actual fraud is not necessarily a predicate to piercing the corporate veil; limited liability may be discarded to prevent injustice or inequitable consequences. *Central States, Southeast & Southwest Areas Pension Fund v. Gaylur Products, Inc.,* 66 Ill.App.3d 709, 23 Ill.Dec. 487, 384 N.E.2d 123 (1978).

[24] ***508** Although the trial court did not specifically address the second prong of the piercing test, we find that it was satisfied in this case. The trial court could reasonably conclude from the evidence presented at trial that DiCosola caused TLD to be incorporated and placed nominal ownership and control solely in the hands of Theresa for the purpose of shielding himself personally from the liabilities to which his general contracting activities might expose him. As we explained above, the evidence established that, although Theresa was the sole shareholder and sole director of TLD, the trial court found that she was not acting as a director of TLD and that TLD was merely an alter ego of DiCosola. Moreover, once DiCosola's general contracting activities led to a lawsuit and the possibility of a substantial judgment against TLD was evident, DiCosola began selling off TLD's assets to the detriment of TLD's potential judgment creditors, the Fontanas. This lawsuit was filed on September 4, 2001. TLD began the year 2002 with approximately $1.8 million in assets and ended the year with no assets. DiCosola argues that no evidence was introduced to show that TLD's assets were transferred or dissipated to avoid paying a judgment. We disagree.

Although DiCosola claimed that the $1.8 million realized by TLD from the sale of assets in 2002 went to pay down the money borrowed on their line of credit to build the

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homes sold, there was no proof of that claim other than his testimony. If DiCosola's testimony was accurate, then TLD realized no profit on any of those properties. The fact that TLD operated for five years and realized a profit in only one of those years, while at the same time DiCosola and Theresa received no salaries or distributions from TLD and had no other sources of income, casts doubt on DiCosola's position that TLD was a viable corporation. In addition, TLD's income tax return for 2002 shows that part of the purported corporate debt that was paid off with proceeds from the sale of TLD's assets was a portion of a $663,989 loan that the shareholder made to TLD. More specifically, TLD paid Theresa $91,783 in 2002 as payback of a purported shareholder loan at a time when TLD was being sued by the Fontanas for over $2 million. We find this problematic because, as noted by the trial court, there were no corporate records showing the terms of any shareholder loans. This was an inequitable circumstance in view of the impending $1.2 million liability TLD would owe to the Fontanas. In addition, after this lawsuit was filed, DiCosola began building homes under the newly formed NTK, Inc. There was no explanation for this maneuver other than to keep assets out of TLD and, consequently, beyond the reach of any judgment the Fontanas might secure against TLD. Based on this evidence, the trial court could reasonably conclude that DiCosola ***509** eliminated the assets of TLD to the detriment of TLD's eventual creditors.

In sum, we are not convinced that the trial court's judgment with respect to the *****670 **783** second prong of the piercing test was against the manifest weight of the evidence. Accordingly, we conclude that the trial court's decision to pierce the corporate veil of TLD was not against the manifest weight of the evidence. Consequently, we affirm the trial court's order entering judgment against Nicola DiCosola personally.

B. The Fontanas' Cross–Appeal Regarding Attorney Fees

[25] Following the entry of judgment in their favor, the Fontanas filed a "motion for award of costs and attorney's fees." In their motion, the Fontanas prayed for $32,302.89 in expenses paid to various home inspectors, engineers, and architects in connection with their effort to identify construction defects in the home; $16,262.95 in fees for expert testimony presented at trial; and $209,823.99 in attorney fees the Fontanas paid with respect to their attempts to have construction completed and to the instant litigation. The Fontanas relied upon section 10F of the construction contract, which provides:

> "To the extent Builder or Purchaser fails to comply with provisions of this Contract, the other party may retain an attorney to assist it in the enforcement of the provisions of this Contract, and the party at fault (i.e., not in compliance with the provisions of this Contract), shall pay any and all

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> reasonable expense relating to the enforcement of the provisions of this Contract."

After the issue was briefed and argued, the trial court granted the Fontanas' motion in part, and denied it in part, ruling as follows:

> "I think, under the American rule, the—any provision regarding attorney's fees which is in derogation of the common law has to be specifically spelled out. I think this provision is ambiguous, and I don't believe it clearly states that the parties are entitled to attorney's fees or any expenses other than what by case law is determined to be expenses in a suit which is filed. I'm going to deny the petition for attorney's fees. I will allow expenses relating to the filing and service and expenses that are applicable under the Illinois statute and case law."

In their cross-appeal, the Fontanas contend that the trial court erred in finding that section 10F of the construction contract was ambiguous, because its plain meaning leaves no doubt that the parties intended the recovery of attorney fees. The Fontanas argue that because section 10F references the retention of an attorney to assist in the enforcement of the contract and, in the same sentence, assigns the party not in compliance with the contract "any and all reasonable ***510** expenses relating to enforcement," no reasonable person executing the construction contract would understand that they would not have to pay attorney fees upon their breach of the contract. In response, DiCosola argues that because section 10F does not include the term "attorney fees," the term "reasonable expense" cannot be expanded to include attorney fees. Alternatively, DiCosola argues that the failure to include the term " attorney fees" renders section 10F ambiguous and that it should be construed against the Fontanas, as it was their attorney who drafted that portion of the construction contract.

[26][27][28] "Illinois generally follows the 'American Rule': absent statutory authority or a contractual agreement between the parties, each party to litigation must bear its own attorney fees and costs[, and may not recover those fees and costs] from an adversary." *Morris B. Chapman & Associates, Ltd. v. Kitzman,* 193 Ill.2d 560, 572, 251 Ill.Dec. 141, 739 N.E.2d 1263 (2000). A court may not award attorney fees as a matter of contractual construction in the *****671 **784** absence of *specific* language. *Thread & Gage Co. v. Kucinski,* 116 Ill.App.3d 178, 186, 71 Ill.Dec. 925, 451 N.E.2d 1292 (1983); *Qazi v. Ismail,* 50 Ill.App.3d 271, 273, 7 Ill.Dec. 434, 364 N.E.2d 595 (1977). In this case we are called upon to decide whether section 10F of the construction contract, by sufficiently specific language, overrides the "American Rule" and allows the Fontanas to recover their reasonable attorney fees. The construction of a contract presents a question of law that we review *de novo. FTI Interna-*

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tional, Inc. v. Cincinnati Insurance Co., 339 Ill.App.3d 258, 259, 274 Ill.Dec. 135, 790 N.E.2d 908 (2003).

[29] DiCosola has not directed us to any authority in support of his argument that use of the precise term "attorney fees" in the contractual provision is required to meet the specific language requirement. To be sure, the Illinois cases addressing this issue require a high level of specificity, but they stop short of holding that use of the term "attorney fees" is required. See *Thread & Gage Co.,* 116 Ill.App.3d at 186, 71 Ill.Dec. 925, 451 N.E.2d 1292; *Qazi,* 50 Ill.App.3d at 273, 7 Ill.Dec. 434, 364 N.E.2d 595; see also *Boulevard Bank National Ass'n v. Philips Medical Systems International,* 827 F.Supp. 510, 511 (N.D.Ill.1993) (rejecting contention that under Illinois law a court may not award attorney fees based upon a contractual provision not specifically mentioning "attorney fees"). Although it is clearly the preferable practice to employ the term "attorney fees" when expressing the parties' intent to override the "American Rule" through a contractual agreement, Illinois law does not require use of the specific term "attorney fees" in order to do so.

[30] We are then left with the issue of whether the language "any and all reasonable expense relating to enforcement" in section 10F specifically includes attorney fees. Under the rules of contract construction, the determinative factor is the intention of the parties, which can best be determined by considering the contract as a whole, reviewing each ***511** part in light of the others. *Premier Title Co. v. Donahue,* 328 Ill.App.3d 161, 164, 262 Ill.Dec. 376, 765 N.E.2d 513 (2002); *Dolezal v. Plastic & Reconstructive Surgery, S.C.,* 266 Ill.App.3d 1070, 1080, 204 Ill.Dec. 10, 640 N.E.2d 1359 (1994). Based on the whole of the language used in section 10F, we believe that the language "any and all reasonable expense relating to enforcement" specifically includes attorney fees. We conclude that whatever else "any and all reasonable expenses related to enforcement" includes, it is sufficiently clear that those expenses include amounts paid to an attorney retained "to assist in the enforcement of the provisions of [the] contract."

[31] To better understand our conclusion, it is useful to split section 10F into two parts. The first part provides: "To the extent Builder or Purchaser fails to comply with provisions of this Contract, the other party may retain an attorney to assist it in the enforcement of the provisions of this contract." The second part provides: "the party at fault * * * shall pay any and all reasonable expense relating to the enforcement of the provisions of this Contract." In view of the fact that no contractual provision is necessary to grant a party the right expressed in the first part, there is no reason to include the language in the first part other than to specify that such expense is recoverable from the party at fault.

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A contrary construction renders the first part of section 10F meaningless in violation of the principle that requires that a contract be construed such that none of its terms are regarded as mere surplusage. See *Premier Title Co.,* 328 Ill.App.3d at 166–67, 262 *****672 **785** Ill.Dec. 376, 765 N.E.2d 513. Simply put, the first part of section 10F describes one type of expense (the retention of an attorney to assist in the enforcement of the contract) that, under the second part of section 10F, relates to the enforcement of the provisions of the contract and that the party at fault is required to pay. Read any other way, the first part of section 10F becomes surplusage. Thus, we hold that the only reasonable way to read section 10F is as an expression of the intent of the parties to require the party who fails to comply with the provisions of the construction contract to reimburse the other party for attorney fees incurred to enforce the provisions of the construction contract. Because we disagree with the trial court's conclusion that section 10F is ambiguous, we cannot construe section 10F against the drafter as DiCosola invites us to do.

For the foregoing reasons, we reverse that portion of the trial court's December 16, 2004, order denying the Fontanas' request for attorney fees. We remand this cause and direct the trial court to determine what portion of the requested attorney fees are reasonable and to award them to the Fontanas.

III. CONCLUSION

Based on the forgoing, we affirm the personal judgment entered ***512** against Nicola DiCosola in the circuit court of Du Page County. However, we reverse the portion of the circuit court's order denying the Fontanas' request for attorney fees, and we remand the cause with directions.

Affirmed in part and reversed in part; cause remanded with directions.

BOWMAN and BYRNE, JJ., concur.

Ill.App. 2 Dist.,2005.
Fontana v. TLD Builders, Inc.
362 Ill.App.3d 491, 840 N.E.2d 767, 298 Ill.Dec. 654

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141 MIDAMERICA BANK, fsb, Plaintiff-Appellant, v. CHARTER ONE BANK, fsb, Defendant-Appellee., 2008 WL 6587554, *6587554+ (Appellate Brief) (Ill. Oct 29, 2008) **Brief and Argument of Midamerica Bank, FSB** (NO. 106804) " ★★★**HN: 25,26,29 (Ill.Dec.)**

142 MAXIT, INC., an Illinois corporation, Plaintiff-Petitioner, v. John Van CLEVE, an individual; and Kelley Van Cleve, an individual, Defendants-Respondents., 2008 WL 5686881, *5686881+ (Appellate Brief) (Ill. Apr 09, 2008) **Brief of Defendants-Respondents John Van Cleve and Kelley Van Cleve** (NO. 105532) ★★**HN: 31 (Ill.Dec.)**

143 Willie B. HADLEY, Plaintiff-Appellee, v. ILLINOIS DEPARTMENT OF CORRECTIONS, Defendant-Appellant., 2006 WL 4526884, *4526884 (Appellate Brief) (Ill. Jul 12, 2006) **Brief of the Defendant-Appellant Illinois Department of Corrections** (NO. 101979) ★★

144 OLD ORCHARD URBAN LIMITED PARTNERSHIP, as Beneficiary of Trust Agreement Dated June 1, 1993, known as Trust No. 116914-09, with American National Bank and Trust Company of Chicago as Trustee, Plaintiff-Appellant, v. HARRY ROSEN INC., Defendant-Appellee., 2008 WL 8201147, *8201147+ (Appellate Brief) (Ill.App. 1 Dist. Dec 04, 2008) **Supplemental Brief of Defend Ant-Appellee Harry Rosen Inc.** (NO. 08-0815) ★★

145 OLD ORCHARD URBAN LIMITED PARTNERSHIP, as Beneficiary of Trust Agreement Dated June 1, 1993, known as Trust No. 116914-09, with American National Bank and Trust Company of Chicago as Trustee, Plaintiff-Appellant, v. HARRY ROSEN INC., Defendant-Appellee., 2008 WL 8201145, *8201145+ (Ap-

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146 Thomas A. ROSE, Plaintiff-Appellant, v. HOLLINGER INTERNATIONAL, INC., Chicago Sun-Times Inc. and Jerusalem Post, Defendants-Appellees., 2007 WL 5239055, *5239055+ (Appellate Brief) (Ill.App. 1 Dist. May 03, 2007) **Brief of Defendants-Appellees Hollinger International, Inc., Chicago Sun-times Inc. and Jerusalem Post** (NO. 1-06-2885) ★★**HN: 8,24 (Ill.Dec.)**

147 TOWER INVESTORS, LLC, an Illinois Corporation, Plaintiff-Appellee, v. 111 EAST CHESTNUT CONSULTANTS. INC., an Illinois Corporation, and Invsco Group, Ltd., an Illinois Corporation, Defendant-Appellants., 2006 WL 5453659, *5453659 (Appellate Brief) (Ill.App. 1 Dist. Nov 01, 2006) **Reply Brief** (NO. 1-06-0254) " ★★**HN: 13 (Ill.Dec.)**

148 Todd J. CHAPMAN and Wendi L. Chapman, Plaintiffs-Counterdefendants-Appellants, v. Robert S. ENGEL and Linda R. Engel, Defendants-Counterplaintiffs-Appellees., 2006 WL 6226956, *6226956 (Appellate Brief) (Ill.App. 1 Dist. Oct 02, 2006) **Brief of Plaintiffs-Appellants** (NO. 06-0791) ★★

149 James COSTELLO, Plaintiff-Appellee, v. LIBERTY MUTUAL FIRE INSURANCE COMPANY, Defendant-Appellant., 2006 WL 6860493, *1 (Appellate Brief) (Ill.App. 1 Dist. May 19, 2006) **Reply Brief of Defendant-Appellant Liberty Mutual Fire Insurance Company** (NO. 1-04-3740) ★★**HN: 30 (Ill.Dec.)**

150 GILLESPIE COMMUNITY UNIT SCHOOL DISTRICT NO. 7, Macoupin County, Illinois, Plaintiff/Appellant, v. UNION PACIFIC RAILROAD COMPANY, Defendant/Appellee., 2011 WL 8005328, *1 (Appellate Brief) (Ill.App. 4 Dist. Jul 22, 2011) **Appellant's Reply Brief** (NO. 4-11-0142) " ★★**HN: 8 (Ill.Dec.)**

151 GILLESPIE COMMUNITY UNIT SCHOOL DISTRICT NO. 7, Macoupin County, Illinois, Plaintiff/Appellant, v. UNION PACIFIC RAILROAD COMPANY, Defendant/Appellee, ILLINOIS MINE SUBSIDENCE INSURANCE FUND, Intervening Plaintiff/Appellant., 2011 WL 8005327, *1+ (Appellate Brief) (Ill.App. 4 Dist. Jul 08, 2011) **Appellee's Brief and Supplemental Appendix** (NO. 4-11-0142) " ★★**HN: 5,8,16 (Ill.Dec.)**

152 GILLESPIE COMMUNITY UNIT SCHOOL DISTRICT NO. 7, Plaintiff-Appellant, v. UNION PACIFIC RAILROAD COMPANY, et. al., Defendant-Appellee and ILLINOIS MINE SUBSIDENCE INSURANCE FUND, Intervening Plain-

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153 KONRAD MOTOR & WELDER SERVICE, INC., Konrad Lambrecht, and Sharon Lambrecht, Appellants, (Third-Party Defendants), v. MAGNETECH INDUSTRIAL SERVICES, INC., Appellees, (Third-Party Counterclaimant)., 2012 WL 2400733, *1+ (Appellate Brief) (Ind.App. May 04, 2012) **Brief of Appellee Magnetech Industrial Services, Inc.** (NO. 45A04-1203-CC-I09) " ★★**HN: 14 (Ill.Dec.)**

154 GEOFFREY and Nancy Thompson, Appellants, v. James KINNEY, et al., Respondents., 2008 WL 6496430, *6496430+ (Appellate Brief) (Minn.App. Dec 16, 2008) **Appellants' Reply Brief** (NO. A08-1681) ★★

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157 COUGHLIN CONSTRUCTION CO., Inc., Plaintiff and appellee, v. NU-TEC INDUSTRIES, INC., Ronald J. Balzer, Rudy Balzer, James Balzer, Defendants and appellants, Nils NORDIN, individually, defendant., 2008 WL 1998032, *1998032+ (Appellate Brief) (N.D. Apr 25, 2008) **Reply Brief** (NO. 20070311) ★★★

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159 Gary L. HOPKINS and Mary Hopkins Appellants (Plaintiffs), v. BANK OF THE WEST, Randall L. Burnett and G&R Enterprises LLC Appellees (Defendants)., 2013 WL 2731396, *1+ (Appellate Brief) (Wyo. Feb 22, 2013) **Brief for Appellants Gary L Hopkins & Mary Hopkins** (NO. S-13-0005) ★★

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162 GREAT AMERICAN DUCK RACES, INC., an Arizona Corporation, Plaintiff, v. INTELLECTUAL SOLUTIONS, INC., a Delaware Corporation; ASAP Sales, LLC, a Delaware Limited Liability Company; Claypool Resources, LLC, a Delaware Limited Liability Company; Mervin Dayan and Vivian Dayan, Husband and Wife; and Maurice Dayan and Jennifer Dayan, Husband and Wife, Defendants. And Related Counterclaims., 2012 WL 3639302, *1 (Trial Motion, Memorandum and Affidavit) (D.Ariz. Jun 01, 2012) **Plaintiff's Response to Motion to Dismiss** (NO. 2:12-CV-00436-JWS) ★★

163 Cathleen CHANNEL, Theresa Wharry, Stacie Hanson, Monique Nichols, Plaintiffs, v. HOME MORTGAGE, INC., an Arizona corporation conducting business in Arizona, Carl Brown; Molly Brown, Defendants., 2007 WL 4400919, *4400919 (Trial Motion, Memorandum and Affidavit) (D.Ariz. Aug 07, 2007) **Plaintiffs' Request for Reconsideration of Summary Judgment Order** (NO. CIV2003-0100PHXROS) ★

164 Cathleen CHANNEL; Theresa Wharry; Stacie Hanson; Monique Nichols, Plaintiffs, v. HOME MORTGAGE, INC., an Arizona corporation conducting business in Arizona; Carl Brown; Molly Brown; Greg Brown; Jane Doe Brown; Does 1-10; XYZ Corporations; Black Partnerships, Defendants., 2006 WL 5112021, *5112021 (Trial

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167 Theresa BRELAND and Steven L. Breland, Plaintiffs, v. MCDONALD'S CORPORATION, Defendant. McDonald's Corporation and McDonald's USA, LLC, Counter-Plaintiffs, v. Theresa Breland and Steven L. Breland, Counter-Defendants., 2010 WL 1789494, *1789494 (Trial Motion, Memorandum and Affidavit) (N.D.Ga. Mar 04, 2010) **Memorandum of Law in Support of McDonald's Corporation and McDonald's USA, LLC's Motion for Summary Judgment on Their Counterclaims against Theresa and Steven Breland** (NO. 109-CV-0523) ★★

168 AUTOMATIONDIRECT.COM, INC., Plaintiff, v. AUTOTECH TECHNOLOGIES LIMITED PARTNERSHIP, AVG Advanced Technologies Limited Partnership, Shalli Industries, Inc., and Shalabh Kumar, Defendants., 2006 WL 426555, *426555 (Trial Motion, Memorandum and Affidavit) (N.D.Ga. Jan 23, 2006) **Plaintiff's Memorandum in Opposition to Defendants' Motion to Compel Arbitration and for Dismissal or, Alternatively, for Stay of Proceedings Pending Arbitration** (NO. 105-CV-961-CC) ★★

169 SMS DEMAG AKTIENGESELLSCHAFT, Plaintiff, Terronics Development Corporation, Intervenor Plaintiff/Counter-Defendant, v. MATERIAL SCIENCES CORPORATION, Defendant/Counter-Plaintiff., 2007 WL 2972999, *2972999+ (Trial Motion, Memorandum and Affidavit) (C.D.Ill. Aug 31, 2007) **Material Science Corporation's Motion for Summary Judgment Against Terronics Devel-**

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170 Susan SPITZ, an individual, Plaintiff, v. PROVEN WINNERS NORTH AMERICA, LLC, a California limited liability company, and EiroAmerican Propagators, LLC, a California limited liability company, Defendants., 2013 WL 1181288, *1 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Jan 10, 2013) **Defendant EuroAmerican Propagators' Memorandum of Law in Support of Its Motion for Summary Judgment** (NO. 3:11-CV-3997) ★**HN: 13 (Ill.Dec.)**

171 LM INSURANCE CORPORATION, Plaintiff, v. ACEO, INC., et al., Defendants., 2012 WL 6040390, *1+ (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Aug 24, 2012) **Defendants David Jatho and Roy Hombs' Reply to Plaintiff's Response to Motion for Summary Judgment** (NO. 08 CV 2372) " ★**HN: 1,2,4 (Ill.Dec.)**

172 LP XXIV, LLC, d/b/a Las Palmas, Apartments, Plaintiff, v. GREAT AMERICAN INSURANCE COMPANY (incorrectly sued as Great American Custom, LA), and Great American E & S Insurance Company, Defendants., 2012 WL 6046365, *1+ (Trial Motion, Memorandum and Affidavit) (N.D.Ill. May 14, 2012) **Defendants' Memorandum of Law in Support of Motion to Dismiss Count IV of Plaintiff's Complaint and to Dismiss Plaintiff's Complaint in its Entirety as to Great American Insurance Company** (NO. 12-3462) " ★★**HN: 4,5 (Ill.Dec.)**

173 Sekre KOUAKOU, et al., Plaintiffs, v. SUTTON FUNDING LLC, et al., Defendants., 2011 WL 5346566, *1 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Sep 27, 2011) **Plaintiffs' Memorandum of Law in Support of Plaintiffs' Response to Defendant Christopher Likens' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(2) and 12(b)(6)** (NO. 09 C 7132) ★★**HN: 8,13 (Ill.Dec.)**

174 Sekre KOUAKOU, et al., Plaintiffs, v. SUTTON FUNDING LLC, et al., Defendants., 2011 WL 4806313, *1 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Aug 24, 2011) **Plaintiffs' Memorandum of Law in Support of Plaintiffs' Response to Defendant Michael J. Riley's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(2) and 12(b)(6)** (NO. 09CV07132) ★★**HN: 13 (Ill.Dec.)**

175 WAHL CLIPPER CORPORATION, Plaintiff, v. KIM LAUBE & COMPANY, INC. and Kim Edward Laube, Defendants., 2011 WL 3741972, *1 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Jul 18, 2011) **Defendants' Reply in Support of Motion for Protective Order Pursuant to Fed. R. Civ. P. 26(c)(1)(D)** (NO. 11CV01704) ★★**HN: 6 (Ill.Dec.)**

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176 FREE GREEN CAN, LLC and Fgc Franchises, LLC, Plaintiffs, v. GREEN RECYCLING ENTERPRISES, LLC (a/k/a Green Recycling Enterprises, Inc.), Aslan Financial Group, Inc., Edward Jarzobski, Dedric Gill, Robb Jorgensen and Brian Gubbels, Defendants., 2010 WL 5632649, *1 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Dec 07, 2010) **Counter-Defendants' Memorandum in Support of Motion to Dismiss Count II and Count III of Defendant Green Recycling Enterprises, Inc.'s Counterclaim** (NO. 10-CV-5764) ★**HN: 13 (Ill.Dec.)**

177 MANHEIM AUTOMOTIVE FINANCIAL SERVICES, INC., Plaintiff, v. JOLIET MOTORS, INC. and Cindy Boliaux, Defendants., 2010 WL 5624929, *1 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Nov 19, 2010) **Manheim Automotive Financial Services, Inc.'s Reply in Support of Motion for Summary Judgment against Cindy Boliaux** (NO. 10-CV-02858, 10-CV-3411) " ★★

178 MANHEIM AUTOMOTIVE FINANCIAL SERVICES, INC., Plaintiff, v. JOLIET MOTORS, INC. and Cindy Boliaux, Defendants. Automotive Finance Corp., Plaintiff, v. Joliet Motors, Inc., Cindy Boliaux, Donald Schook, and Jeremiah Reitz., 2010 WL 5624928, *1 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Nov 12, 2010) **Response to Manheim Automotive Financial Services, Inc.'s Motion for Summary Judgment against Cindy Boliaux** (NO. 10-CV-2858, 10-CV-3411) ★★**HN: 24 (Ill.Dec.)**

179 LABORERS' PENSION FUND and Laborers Welfare Fund of the Health and Welfare Department of the Construction and General Laborers' District Council of Chicago and Vicinity, James S. Jorgensen, Administrator of the Funds, and General Laborers' District Council of Chicago and Vicinity, Plaintiffs, v. LAKE CITY JANITORIAL, INC., KB Building Services, Inc. and James A. Busby, individually, Defendants., 2010 WL 4359504, *4359504 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Sep 10, 2010) **Memorandum in Support of James Busby's Motion to Dismiss** (NO. 10-CV-1659) " ★★**HN: 13 (Ill.Dec.)**

180 LM INSURANCE CORPORATION, Plaintiff, v. ACEO, INC. and Alliance Insurance Group, Inc., Defendants., 2010 WL 1869403, *1869403 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Mar 02, 2010) **Alliance Insurance Group, Inc.'s Reply to Plaintiff's Response in Opposition to Motion to Dismiss** (NO. 08CV2372) " ★★**HN: 6 (Ill.Dec.)**

181 LM INSURANCE CORPORATION, Plaintiff, v. ACEO, INC., et al., Defendants., 2010 WL 1869402, *1869402+ (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Feb 05, 2010) **Plaintiff's Response to Alliance Insurance Group, Inc. and Aceo,**

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Inc.'s Motion to Dismiss (NO. 08-CV-2372) ★★**HN: 4 (Ill.Dec.)**

182 LM INSURANCE CORPORATION, Plaintiff, v. ACEO, INC. Alliance Staff Services, Inc., Alliance Insurance Group, Inc., Total H.R. Employer Services, Inc., Performance HR, Ltd., David Jatho, and Roy Hombs, Defendants., 2009 WL 4388016, *4388016 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Oct 14, 2009) **Defendants Reply to Plaintiff's Response to Motion to Dismiss** (NO. 08CV2372) ★★**HN: 4 (Ill.Dec.)**

183 Raymond GROSS, an individual, and Paul Lucking, an individual, Plaintiffs, v. SECURITY ASSOCIATES INTERNATIONAL, INC., a Delaware corporation; Cordell Funding, LLLP, a Florida limited liability company; SA Systems, LLC, a Delaware limited liability company; Castlerock Security, Inc., a Delaware corporation; Robin Rodriguez, an individual; John C. Howe, an individual; and Gary Frohman, an individual, Defendants., 2009 WL 4388389, *4388389 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Oct 07, 2009) **Plaintiffs' Memorandum of Law in Opposition to Certain Defendants' Motion to Dismiss** (NO. 09CV3095) " ★★**HN: 24 (Ill.Dec.)**

184 LM INSURANCE CORPORATION, Plaintiff, v. ACEO, INC., et al., Defendants., 2009 WL 4388015, *4388015+ (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Sep 30, 2009) **Plaintiff's Response to Defendants' Motion to Dismiss** (NO. 08-CV-2372) " ★★★**HN: 4,6 (Ill.Dec.)**

185 LM INSURANCE CORPORATION, Plaintiff, v. ACEO, INC. Alliance Staff Services, Inc., Alliance Insurance Group, Inc., Total H.R. Employer Services, Inc., Performance HR, Ltd., David Jatho, and Roy Hombs, Defendants., 2009 WL 4388019, *4388019 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Sep 09, 2009) **Brief of Defendant Performance HR, Ltd. in Support of Motion to Dismiss under FRCP 12(b)(6)** (NO. 08CV2372) ★**HN: 6 (Ill.Dec.)**

186 LM INSURANCE CORPORATION, Plaintiff, v. ACEO, INC. Alliance Staff Services, Inc., Alliance Insurance Group, Inc., Total H.R. Employer Services, Inc., Performance HR, Ltd., David Jatho, and Roy Hombs, Defendants., 2009 WL 4388017, *4388017 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Sep 02, 2009) **Brief of Defendants David Jatho and Roy Hombs in Support of Motion to Dismiss under FRCP 12(b)(6)** (NO. 08CV2372) ★**HN: 6 (Ill.Dec.)**

187 LM INSURANCE CORPORATION, Plaintiff, v. ACEO, INC. Alliance Staff Services, Inc., Alliance Insurance Group, Inc., Total H.R. Employer Services, Inc., Performance HR, Ltd., David Jatho, and Roy Hombs, Defendants., 2009 WL

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4388018, *4388018 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Sep 02, 2009) **Brief of Defendants Alliance Staff Services, Inc. and Total H.R. Employer Services, Inc. in Support of Motion to Dismiss under FRCP 12(b)(6)** (NO. 08CV2372) ★**HN: 6 (Ill.Dec.)**

188 Pragati PINTO, Plaintiff, v. GSS AMERICA, INC., GSS Infotech America, LTD., Infospectrum Consulting, Inc., and System Dynamix Corporation, Defendants., 2009 WL 3042185, *3042185 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Jul 28, 2009) **Plaintiff's Opposition to Defendants' Motion to Dismiss** (NO. 109CV02966) ★★

189 AGUILA RECORDS, INC., an Illinois Corporation, and Aguila Raid Publishing, Inc., an Illinois Corporation, Plaintiffs, v. NUEVA GENERACION MUSIC GROUP, INC., a Texas Corporation, Martin Fabian, Marisa L. Caballero, Rene Urbina, Chris Urbina, Hector Urbina, Eric Urbina, Rodolfo Avitia, Oscar Urbina, Sr., and Oscar Urbina, Jr., Defendants., 2009 WL 3042283, *3042283 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Jul 07, 2009) **Memorandum in Support of Defendants Nueva Generacion Music Group, Inc., Martin Fabian, and Marisa L. Caballero's Motion to Dismiss Plaintiffs' Complaint for Failure to State a Claim** (NO. 109CV03399) " ★★**HN: 24 (Ill.Dec.)**

190 Fred BOUDREAU, et al., Plaintiffs, v. James GENTILE, et al., Defendants., 2009 WL 4049490, *4049490 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. May 18, 2009) **Plaintiffs' Reply Memorandum in Support of Motion for Summary** (NO. 07CV5273) ★★**HN: 13 (Ill.Dec.)**

191 RICHARD KNORR INTERNATIONAL, LTD. and Richard Knorr, Individually, Plaintiffs, v. GEOSTAR INC., a foreign corporation, et al., Defendants., 2009 WL 2242976, *2242976 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. May 06, 2009) **Defendant Geostar's Reply in Support of Its Motion to Dismiss for Lack of Personal Jurisdiction** (NO. 108CV05414) ★★**HN: 13 (Ill.Dec.)**

192 Fred BOUDREAU, Trustee on behalf of the Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Health and Welfare Fund, Plaintiffs, v. James GENTILE, an individual, Midland Transportation Group, Inc. f/k/a Midland Transportation, Inc., Midland Logistics, Inc., Midland Transportation Service Group, Ltd., Stellman Direct, Inc., Usmds, Inc., Midland Direct, Inc., Midland Direct Transportation Group Inc., Midland Direct Group, 2009 WL 4049498, *4049498+ (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Mar 27, 2009) **Plaintiffs' Memorandum in Support of Motion for Summary Judgment** (NO. 07CV5273)

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193 UNITED STATES OF AMERICA, Plaintiff, v. James W. CLARK, et al., Defendants., 2009 WL 819747, *819747+ (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Feb 25, 2009) **United States' Response to Thomas G. Cooper's Motion to Dismiss for Failure to State a Claim** (NO. 108CV04158) ★★**HN: 13 (Ill.Dec.)**

194 ACME-HARDESTY CO., Plaintiff, v. AKZO NOBEL NV, Akzo Nobel Industries SDN. Bhd., (currently known as Pacific Oleo Industries Sdn. Bhd.), Akzo Nobel Chemicals International BV, Van Leer Malaysia Sdn. Bhd., (currently known as Greif Malaysia Sdn. Bhd.), and Greif, Inc., Defendants., 2009 WL 819701, *819701+ (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Feb 06, 2009) **Greif, Inc.'s Reply in Support of 12(b)(6) Motion to Dismiss** (NO. 108CV04249) " ★★**HN: 13 (Ill.Dec.)**

195 CONTINENTAL CASUALTY COMPANY; American Casualty Company of Reading, Pennsylvania; Transportation Insurance Company; and National Fire Insurance Company of Hartford, Plaintiffs, v. STAFFING CONCEPTS, INC.; Staffing Concepts National, Inc., Staffing Concepts International, Inc.; Sc of Florida II, Inc.; Venture Resources Group, LLC; Alternative Marketing Program, Inc.; Human Capital Services, Inc.; Productive Employer Concepts, Inc.; Human Capital Solutions,, 2008 WL 5559833, *5559833+ (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Dec 24, 2008) **Defendants' Reply to Plaintiffs' Response to Motion to Transfer Venue to Florida or Dismiss Certain Defendants** (NO. 106CV05473) " ★★**HN: 13 (Ill.Dec.)**

196 TRUSTEES OF CHICAGO PAINTERS AND DECORATORS PENSION, Healt And Welfare Deferred Savings, Aprenticeship, Scholarship, And Joint Cooperation Trust Funds, Plaintiff, v. DESTINY DECORATORS., 2008 WL 7148405, *7148405 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Nov 21, 2008) **Motion for Summary Judgment** (NO. 07C4236) " ★★**HN: 13 (Ill.Dec.)**

197 GENERAL CITRUS INTERNATIONAL INCORPORATED, f/k/a Barranca Brown Corporation, Plaintiff, v. Jerome REMIEN, the Jerome Remien Revocable Trust Dated June 13, 1989, Burton URY, and URY Corporation, Defendant, URY CORPORATION, Counterplaintiff, v. GENERAL CITRUS INTERNATIONAL CORPORATION, Counterdefendant, URY CORPORATION, Crossplaintiff, v. Jerome REMIEN, Crossdefendant., 2008 WL 4274206, *4274206+ (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Aug 18, 2008) **Memorandum of Burton URY and URY Corporation in Opposition to Motion for Summary Judgment**

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Filed by General Citrus International Incorporated (NO. 104CV06402) ★★★**HN: 8 (Ill.Dec.)**

198 GENERAL CITRUS INTERNATIONAL INCORPORATED f/k/a Barranca Brown Corporation, Plaintiff, v. Jerome REMIEN et. al., Defendants. URY CORPORATION, Counterplaintiff, v. GENERAL CITRUS INTERNATIONAL INCORPORATED, Counterdefendant. URY CORPORATION, Crossplaintiff, v. Jerome REMIEN, Crossdefendant., 2008 WL 4274207, *4274207+ (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Aug 18, 2008) **Defendants Jerome Remien and the Jerome Remien Revocable Trust Dated June 13, 1989 Response to Plaintiff's Motion for Partial Summary Judgment** (NO. 104CV06402) ★★**HN: 20 (Ill.Dec.)**

199 GENERAL CITRUS INTERNATIONAL INCORPORATED, Plaintiff, v. JEROME REMIEN, ET AL., Defendants., 2008 WL 4274209, *4274209 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Aug 18, 2008) **General Citrus's Brief in Opposition to Remiein Defendants' Motion for Summary Judgment** (NO. 104CV06402) ★★

200 GMAC LLC, Plaintiff, v. EINER HILLQUIST AND NEIL HILLQUIST, Defendants., 2008 WL 4271528, *4271528 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Aug 14, 2008) **Memorandum of Law in Support of Motion for Summary Judgment** (NO. 106CV03619) ★★**HN: 24 (Ill.Dec.)**

201 Dr. James ELIPAS, John Pavlopoulos, Thomas Pavlopoulos, Dennis Pavlopoulos, Ivo CozzinI, Plaintiffs, v. James K. JEDYNAK; B. Gail Howard; Unified Worldwide Transport, LLC; Kkj Holdings, LLC; Kkj Holdings II, Inc.; Kkj Holdings III, LLC; Kkj Holdings IV, LLC; Asset Protection, Inc.; Unlimited Options, Inc., Prosperous Endeavors Limited Partnership, Pacific Coast Holding Group, L.L.C., Greg Kitter; and Wendy Jedynak, Defendants., 2008 WL 4293505, *4293505 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Jul 18, 2008) **Plaintiffs' Response to Kkj Holdings, II, Inc., Kkj Holdings III, LLC, KKJ Holdings IV, LLC, Asset Protection, INC., Unlimited Options, INC., Prosperous Endeavors Limited Partnership, Pacific Coast ...** (NO. 107CV03026) ★★

202 UNITED STAFFING SOLUTIONS, INC., a corporation, Plaintiffs, v. Victor HOROWITZ, an individual; Mercy Healthcare and Rehabilitation Centers; and Does 1 through 50, inclusive, Defendants., 2008 WL 4227645, *4227645+ (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Jul 10, 2008) **Defendant Victor Horowitz's Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 9(b), 12(b)(2), 12(b)(6) and 12(e)** (NO. 108CV04652) ★★**HN: 24 (Ill.Dec.)**

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203 GENERAL CITRUS INTERNATIONAL INCORPORATED, f/k/a Barranca Brown Corporation, Plaintiff, v. Jerome REMIEN, et al., Defendants., 2008 WL 2850391, *2850391 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Jun 26, 2008) **General Citrus's Brief in Support of Motion for Partial Summary Judgment** (NO. 104CV06402) " ★★**HN: 24 (Ill.Dec.)**

204 PLATINUMTEL COMMUNICATIONS, LLC, Plaintiff, v. ZEFCOM, LLC d/b/a Tellispire, Telispire, Inc., et al., Defendants., 2008 WL 2851741, *2851741 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Jun 10, 2008) **Defendants Natour and U.s. Mobile's Memorandum In Support of Their Amended Motion to Dismiss Plaintiff's Amended Complaint Joining Motions of Defendants Telispire, and Ez Stream** (NO. 108CV01062) ★★**HN: 7 (Ill.Dec.)**

205 UNITED STATES OF AMERICA, Plaintiff, v. NORTHERN STATES INVESTMENTS, INC., And Lasalle National Bank, As Trustee for Land Trust No. 10-17758-9, Defendants., 2008 WL 2850160, *2850160 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. May 01, 2008) **United States' Memorandum of Law In Support of Motion for Summary Judgment** (NO. 106CV05355) ★★**HN: 8 (Ill.Dec.)**

206 WACHOVIA SECURITIES, LLC, Plaintiff, v. David NEUHAUSER; Andrew A. Jahelka; Richard O. Nichols; Leon A. Greenblatt III; Banco Panamericano, Inc., a South Corporation; Loop Corp., a South Dakota corporation; Loop Properties, Inc., an Illinois corporation; and Scattered Corp., a South Dakota corporation;, Defendants., 2008 WL 2166459, *2166459 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Mar 24, 2008) **Plaintiff's Post-Trial Brief Regarding Leon Greenblatt's Trial Testimony** (NO. 104CV03082) ★

207 Dr. James ELIPAS, et al., Plaintiffs, v. James K. JEDYNAK, et. al., Defendants. James K. JEDYNAK, Counter plaintiff, v. James ELIPAS, Counter defendant. Brian KING, et al., Plaintiffs, v. James K. JEDYNAK, et al., Defendants., 2008 WL 788381, *788381 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Feb 21, 2008) **Defendants KKJ Holdings II, Inc., KKJ Holdings III, LLC, KKJ Holdings IV, LLC, Asset Protection, Inc., Unlimited Options, Inc., Prosperous Endeavors Limited Partnership and Pacific Coast Holdings ...** (NO. 107CV03026) ★★

208 LEAF FUNDING, INC., Plaintiff, v. PMI SPORTS, INC., et al., Defendants., 2008 WL 788151, *788151 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Jan 31, 2008) **Memorandum in Support of Leaf Funding, Inc.'s Motion for Summary**

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Judgment Against Defendants, PMI Sports, Inc., Michael P. Balaskovits, and Darryl Osikowicz (NO. 107CV04571) ★**HN: 29 (Ill.Dec.)**

209 Dr. James ELIPAS, et al., Plaintiffs, v. James K. JEDYNAK, et al., Defendants. James K. JEDYNAK, Counter plaintiff, v. James ELIPAS, Counter, Defendant. Brian A. KING, et al., Plaintiffs, v. James K. JEDYNAK, et al., Defendants., 2008 WL 788375, *788375 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Jan 24, 2008) **Plaintiffs' Response in Opposition to the Jedynak Entities' Motion to Dismiss** (NO. 107CV03026) ★★**HN: 8 (Ill.Dec.)**

210 Heidi K. DOYLE, Plaintiffs, v. REAL ESTATE INNOVATIONS, LLC an Illinois Limited Liability Company, and George P. Klein, Jr., Defendant., 2007 WL 4804354, *4804354 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Nov 15, 2007) **Motion of Rei and George P. Klein, Jr. to Dismiss Plaintiff's Second Amended Complaint for Failure to Join an Indispensable Party and Dismiss Counts III, IV and V of Plaintiff's Second Amended ...** (NO. 07CV429) ★★

211 Dr. James ELIPAS, John Pavlopoulos, Thomas Pavlopoulos, Dennis Pavlopoulos, and Ivo Cozzini, Plaintiffs, v. James K. JEDYNAK, B. Gail Howard, Worldwide Transport, LLC, KKJ Holdings, LLC, KKJ Holdings II, Inc., KKJ Holdings III, LLC, KKJ Holdings IV, LLC, Asset Protection, Inc., Unlimited Options, Inc., Prosperous Endeavors Limited Partnership, Pacific Coast Holdings Group, LLC, Greg Kitter, and Wendy Jedynak, Defendants; James K. Jedynak, Counter, 2007 WL 4804596, *4804596+ (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Oct 29, 2007) **Defendants Wendy Jedynak and KKJ Holdings, LLC'S Reply Memorandum in Support of Their Motion to Dismiss Plaintiffs' First Amended Complaint** (NO. 07-C-3026) ★★

212 Dr. James ELIPAS, John Pavlopoulos, Thomas Pavlopoulos, Dennis Pavlopoulos, IVO Cozzini, Plaintiffs, v. James K. JEDYNAK; B. Gail Howard; Unified World-wide Transport, LLC; KKJ Holdings, LLC; KKJ Holdings II, Inc.; KKJ Holdings III, LLC; KKJ Holdings IV, LLC; Asset Protection, INC.; Unlimited Options, INC., Prosperous Endeavors Limited Partnership, Pacific Coast Holding Group, L.L.C., Greg Kitter; and Wendy Jedynak, Defendants., 2007 WL 4804611, *4804611 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Oct 15, 2007) **Plaintiffs' Response to Jedynak Entities' Motion to Dismiss Plaintiffs' First Amended Complant** (NO. 07C3026) ★★

213 Dr. James ELIPAS, John Pavlopoulos, Thomas Pavlopoulos, Dennis Pavlopoulos, Ivo Cozzini, Plaintiffs, v. James K. JEDYNAK; B. Gail Howard; Unified Worldwide

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Transport, LLC; KKJ Holdings, LLC; KKJ Holdings II, Inc.; KKJ Holdings III, LLC; KKJ Holdings IV, LLC; Asset Protection, Inc.; Unlimited Options, Inc., Prosperous Endeavors Limited Partnership, Pacific Coast Holding Group, L.L.C., Greg Kitter; and Wendy Jedynak, Defendants., 2007 WL 4804607, *4804607 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Oct 12, 2007) **Plaintiffs' Response to Wendy Jedynak and KKJ Holding, LLC's Motion to Dismiss Plaintiffs' First Amended Complant** (NO. 07C3026) ★★

214 REHABCARE GROUP EAST, INC. D/B/A Rehabcare Group Therapy Services, Inc., a Delaware Corporation, Plaintiff, v. CERTIFIED HEALTH MANAGEMENT, INC., an Illinois Corporation, Prairie View Care Center of Charleston, Inc., an Illinois Corporation Flora Pavilion Nursing Home Center, Inc., an Illinois Corporation, Champaign Care &Rehab Center, Inc. d/b/a Care Center of Champaign, an Illinois Corporation, Urbana Care & Rehab Center, Inc. d/b/a Care Center of, 2007 WL 3314893, *3314893+ (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Sep 21, 2007) **Certified Health Management, Inc.'s Reply Brief in Support of Motion to Dismiss Complaint** (NO. 07C2923) ★★

215 REHABCARE GROUP EAST, INC. D/B/A Rehabcare Group Therapy Services, Inc., Plaintiff, v. CERTIFIED HEALTH MANAGEMENT, INC., et al., Defendants., 2007 WL 3314892, *3314892 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Sep 07, 2007) **Plaintiff Rehabcare Group East, Inc. d/b/a Rehabcare Group Therapy Services, Inc.'s Opposition to Defendant Certified Health Management, Inc.'s Motion to Dismiss** (NO. 07-C-2923) ★

216 Cristi A. HOFFMAN, as Executor of the Estate of John W. Hoffman, and Cristi A. Hoffman, individually, Designed Alloys, Inc., an Illinois corporation, Designed Alloy Products, Inc., an Illinois corporation, and Alloy Rod Products, Inc., an Illinois corporation, Plaintiffs, v. James P. SUMNER and Frank D. Winter, Defendants; Frank D. Winter and James P. Sumner, Defendants/Counter-Plaintiffs, v. Designed Alloys, Inc., Designed Alloy Products, Inc. Alloy Rod, 2007 WL 2959252, *2959252 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Aug 16, 2007) **Winter's and Sumner's Memorandum in Opposition to the Motions for Summary Judgment Filed By all Counter-Defendants** (NO. 05C7114) ★

217 Heidi K. DOYLE, Plaintiffs, v. REAL ESTATE INNOVATIONS, LLC an Illinois Limited Liability Company, and George P. Klein, Jr., Defendant., 2007 WL 2960501, *2960501 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Aug 16, 2007) **Motion of Rei and George P. Klein, Jr. to Dismiss Plaintiff's Second**

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Amended Complaint for Failure to Join an Indispensable Party and Dismiss Counts III, IV and V of Plaintiff's Second Amended ... (NO. 07CV429) ★★

218 Nereida MENDEZ, Plaintiff, v. Perla DENTAL, Dental Profile, Defendants., 2007 WL 2281785, *2281785+ (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Jun 21, 2007) **Plaintiff's Response to Defendants' Post-Judgment Brief Addressing Title VII's Damages Cap** (NO. 04C4159) ★★

219 Nereida MENDEZ, Plaintiff, v. Perla DENTAL, Dental Profile, Defendants., 2007 WL 5019913, *5019913+ (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Jun 14, 2007) **Plaintiff's Post-Trial Motion for Title VII Damages Cap to be Set at $100,000.00** (NO. 104CV04159) ★★**HN: 17 (Ill.Dec.)**

220 Jeffrey BROWN, individually and on behalf of all others similarly situated, Plaintiff, v. ONE SOURCE MORTGAGE, INC. and Charles Mangold III, Defendants., 2007 WL 1348867, *1348867+ (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Mar 05, 2007) **Defendant Charles Mangold III's Memorandum in Support of His Motion to Dismiss Plaintiff's Complaint** (NO. 07CV0063) ★★★

221 ORGLER HOMES, INC. and David Orgler, Plaintiffs, v. CHICAGO REGIONAL COUNCIL OF, CARPENTERS, United Brotherhood Carpenters and Joiners of America, and Local Union No. 2087 of the United Brotherhood of Carpenters, and Joiners of America, Defendants., 2006 WL 3879708, *3879708 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Nov 10, 2006) **Plaintiffs' Memorandum of Law in Support of Motion to Dismiss Defendants' Counterclaims to Plaintiffs' Second Amended Complaint** (NO. 06-C50097) ★★

222 HOTSAMBA, INC., Plaintiff, v. CATERPILLAR INC., Defendant; Caterpillar Inc., Counter-Plaintiff, v. Hotsamba, Inc. and Robert T. Onesto, Counter-Defendants., 2006 WL 3038442, *3038442 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Sep 21, 2006) **Hotsamba, Inc. and Robert T. Onesto's Motion for Judgment as a Matter of Law as to Caterpillar's Counterclaims for Fraud, Breach of Contract, and Declaratory Judgment** (NO. 01C5540) ★★

223 MCI NETWORK SERVICES, INC., n/k/a Verizon Business Services Inc., Plaintiff, v. GLOBCOM, INC., an Illinois corporation, and Glenn Kofman, an individual, Defendants., 2006 WL 5503285, *5503285 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Sep 13, 2006) **Opposition of MCI Network Services, Inc. to the Motion of Defendant Kofman to Compel** (NO. 105CV05759) ★**HN: 29 (Ill.Dec.)**

224 THE UNITED STATES OF AMERICA ex rel. Cleveland A. Tyson, the State of

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Illinois ex rel. Cleveland A. Tyson, the People of the State of Illinois, and the United States, Plaintiffs, v. AMERIGROUP ILLINOIS, INC. and Amerigroup Corporation, Defendants., 2006 WL 3038463, *3038463 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Sep 12, 2006) **Plaintiffs' Motion in Limine Under Rule 42(b) to Bifurcate Claim of Alter-Ego Liability** (NO. 02-C-6074) ★★

225 DENT-A-MED, INC., d/b/a HC Processing Center, Plaintiff, v. Lifetime SMILES, P.C., formerly known as White Oak Dental, P.C., an Illinois corporation, DW Management Company, formerly known as, Lifetime Smiles, Inc., an Illinois corporation Fred S. Weiner, Daisy Weiner, Joy A. Texter and Susan Yanowsky Defendants., 2006 WL 2445362, *2445362 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Jul 26, 2006) **Plaintiff's Response to Defendants, Daisy Weiner and Susan Yanowsky's Motion for Summary Judgment on Counts I & II** (NO. 04C4780) ★★

226 DUNKIN' DONUTS LLC, et al., Plaintiffs, v. James PIELET, et al., Defendants., 2006 WL 2188360, *2188360 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Jun 05, 2006) **Reply in Support of Motion to Dismiss of Melissa Pielet, Bradley Pielet, J.P. Retail Investments, LLC, Highland Properties, LLC, Deerfield Properties, LLC, Northbrook Properties, LLC, and Riverwoods ...** (NO. 06-CV-2213) ★

227 HONG KONG ELECTRO-CHEMICAL WORKS LTD., a Hong Kong corporation, Plaintiff, v. Garry LESS, individually and d/b/a Todd Industries, a dissolved Illinois corporation, Todd Industries Inc., a dissolved Illinois corporation, Bernice Less, individually and d/b/a Todd Industries, Jeffrey Less individually and d/b/a Todd Industries, Michelle Less, individually and d/b/a Todd Industries, Defendants., 2006 WL 1002115, *1002115+ (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Mar 22, 2006) **Defendants' Reply in Support of their Motions for Summary Judgment** (NO. 05C3582) ★★

228 MITSUBISHI MOTORS CREDIT OF AMERICA, INC., a Delaware corporation, Plaintiff, v. SHAVER IMPORTS, INC., an Illinois Corporation, William M. Shaver, Patrick R. Shea, and Gerald A. Hannigan, Defendants., 2006 WL 3031025, *3031025 (Trial Motion, Memorandum and Affidavit) (N.D.Ill. 2006) **Brief of Shea and Hannigan in Support of Their Motion to Dismiss Counts I, II and III of the Counterclaim of William M. Shaver to Their Cross-Claim** (NO. 06C0510) ★★

229 William CUMBERLAND, III, and William Cumberland, Jr., Plaintiffs, v. NATIONWIDE MUTUAL INSURANCE COMPANY and Wottowa Insurance Agency,

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Inc., Defendants., 2009 WL 864265, *864265 (Trial Motion, Memorandum and Affidavit) (S.D.Ill. Feb 24, 2009) **Memorandum of Law in Support of Defendant Wottowa Insurance Agency Inc.'s Motion to Dismiss** (NO. 309CV00091) ★★**HN: 7 (Ill.Dec.)**

230 Milton GERSTENECKER, on behalf of himself and all other similarly situated, Plaintiff, v. TERMINIX INTERNATIONAL, INC., and the ServiceMaster Company, Defendants., 2007 WL 4445934, *4445934+ (Trial Motion, Memorandum and Affidavit) (S.D.Ill. Apr 12, 2007) **Memorandum of Law in Support of Motion to Dismiss** (NO. 07-CV-164-MJR) ★★★

231 HARKER'S DISTRIBUTION, INC., Plaintiff, v. REINHART FOODSERVICE, L.L.C., Defendant., 2008 WL 6604181, *6604181 (Trial Motion, Memorandum and Affidavit) (N.D.Iowa Dec 02, 2008) **Defendant's Reply Brief in Support of Its Motion to Compel Arbitration and to Stay Proceedings** (NO. 508CV04076) ★★**HN: 30 (Ill.Dec.)**

232 Clayton PERFALL and Union Street Capital Management, LLC, Plaintiffs, v. E.L.K. CAPITAL ADVISORS, Defendant., 2006 WL 4048416, *4048416+ (Trial Motion, Memorandum and Affidavit) (S.D.N.Y. Dec 26, 2006) **Defendant E.L.K. Capital Advisors, LLC'S Reply Memorandum of Law in Support of its Motion to Dismiss** (NO. 06CV13725, MGC) ★★

233 In re PARMALAT SECURITIES LITIGATION. Gerald K. Smith, v. Bank of America Corporation, et al., 2006 WL 1548982, *1548982+ (Trial Motion, Memorandum and Affidavit) (S.D.N.Y. Apr 12, 2006) **Memorandum of Law in Support of Grant Thornton LLP's Motion to Dismiss the First Amended Complaint** (NO. 06CV00383, LAK) ★★

234 In re PARMALAT SECURITIES LITIGATION; Gerald K. Smith, v. Bank of America Corporation, et al., 2006 WL 1548983, *1548983+ (Trial Motion, Memorandum and Affidavit) (S.D.N.Y. Apr 12, 2006) **Memorandum of Law in Support of Grant Thornton LLP'S Motion to Dismiss the First Amended Complaint** (NO. 06CV00383, LAK) ★★

235 KODAK GRAPHIC COMMUNICATIONS CANADA COMPANY, as Successor to Creo Inc., Plaintiff, v. E. I. DU PONT DE NEMOURS AND COMPANY, Defendant., 2012 WL 6199420, *1+ (Trial Motion, Memorandum and Affidavit) (W.D.N.Y. May 25, 2012) **Plaintiff's Reply Memorandum of Law in Further Support of Its Motion for Summary Judgment** (NO. 08-CV-6553T) ★★

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236 KODAK GRAPHIC COMMUNICATIONS CANADA COMPANY, as Successor to Creo Inc., Plaintiff, v. E. I. DU PONT DE NEMOURS AND COMPANY, Defendant., 2012 WL 6199409, *1+ (Trial Motion, Memorandum and Affidavit) (W.D.N.Y. Mar 30, 2012) **Plaintiff's Memorandum of Law in Support of Its Motion for Summary Judgment** (NO. 08-CV-6553T) " ★★**HN: 31 (Ill.Dec.)**

237 Kerry HARRIS, individually and in a Derivative capacity on behalf of IHT Technology, Inc., Plaintiffs, v. Chris MACK a/k/a C. Mack, IHT Technology, Inc., Shabaka, LLC, and Ankole Sporting Goods, LLC, Defendants, v. K-Armor, LLC, Angel 7 Industries, LLC, and A7 Helmet Systems, LLC, Counter-Defendants., 2012 WL 6600835, *1 (Trial Motion, Memorandum and Affidavit) (W.D.Tex. Jul 16, 2012) **Defendants' Response to Counter-Defendant A7 Helmet System's, LLC's Motion for Summary Judgment Against Chris Mack and IHT Technology, Inc.** (NO. 5:11-CV-00622-FB) ★★**HN: 13 (Ill.Dec.)**

238 Kerry HARRIS, individually, and in a derivative capacity on behalf of IHT Technology, Inc., Plaintiffs, v. Chris MACK a/k/a C. Mack and IHT Technology, Inc., Defendants., 2012 WL 6600839, *1 (Trial Motion, Memorandum and Affidavit) (W.D.Tex. Jul 02, 2012) **Counter-Defendant, A7 Helmet Systems, LLC's, Motion for Summary Judgment Against Chris Mack and IHT Technology, Inc.** (NO. 5:11-CV-00622-FB) ★★**HN: 8,13 (Ill.Dec.)**

239 SEATER CONSTRUCTION CO., INC., and Seater Construction of Illinois, Plaintiff, v. DEKA INVESTMENTS, LLC, an Illinois Company, Deano Vass, and Karen Vass, Defendants., 2012 WL 5271885, *1+ (Trial Motion, Memorandum and Affidavit) (Ill.Cir.Ct. Jun 21, 2012) **Plaintiff's Trial Memorandum** (NO. 07 CH 514) " ★★★★**HN: 13,16,23 (Ill.Dec.)**

240 Mervyn COHEN, Plaintiff, v. Larry BASIL aka Lawrence Basil, Terry Crittenden, and Basil Contracting Company, Defendants., 2012 WL 4442304, *1+ (Trial Motion, Memorandum and Affidavit) (Ill.Cir.Ct. Apr 24, 2012) **Larry Basil and Basil Contracting Corporation's Closing Argument Brief** (NO. 07 CH 1648) " ★★★★**HN: 7,22 (Ill.Dec.)**

241 Guy M. BONNEVILLE, as Special Administrator of The Estate of Melissa C. Dorner, Deceased, Plaintiff, v. WILMETTE REAL ESTATE & MANAGEMENT CO., formerly known as Wilmette REAL Estate, Inc., an Illinois Corporation, Bchtower, LLC, an Illinois Limited Liability Corporation, Halim Tower, Individually, Cameel Halim, Individually, and Roberto Ramirez, Individually, Defendants., 2012 WL 1120447, *1 (Trial Motion, Memorandum and Affidavit) (Ill.Cir.Ct. Feb

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08, 2012) **Defendant Cameel Halim's Combined Motion to Dismiss Pursuant to 735 ILCS 5/2-619.1** (NO. 07 L 000473) ★★**HN: 8,13 (Ill.Dec.)**

242 SEATER CONSTRUCTION CO., INC., and Seater Construction of Illinois, a Wisconsin Corporation, Plaintiffs, v. DEKA INVESTMENTS, LLC, an Illinois Corporation, Deano Vass, and Karen Vass, Defendants., 2010 WL 9008516, *1+ (Trial Motion, Memorandum and Affidavit) (Ill.Cir.Ct. Oct 28, 2010) **Reply to Plaintiff's Response to Defendants' Motion to Dismiss** (NO. 07 CH 514) " ★★**HN: 7,8,16 (Ill.Dec.)**

243 Gary SINAGRA and Jolanta Sinagra, Plaintiffs, v. Kenneth JOHNSON, individually and JP Development, a general partnership, Defendants., 2009 WL 5948236, *5948236 (Trial Motion, Memorandum and Affidavit) (Ill.Cir.Ct. Mar 26, 2009) **Memorandum of Law in Support of Motion to Strike** (NO. 07AR1278) ★★

244 SANDHU PETROLEUM, INC., an Illinois Corporation, Plaintiff/Counter-Defendant, v. PRAIRIE MIDWEST, INC., an Illinois Corporation, Borchers C.C., Inc., an Illinois Corporation, Forsyth Convenience Center, Inc. an Illinois Corporation, Defendants/Counter-Plaintiffs/Third Party Plaintiffs., 2009 WL 8490539, *1 (Trial Motion, Memorandum and Affidavit) (Ill.Cir.Ct. 2009) **Third Pary Defendant's Section 2-619.1 Motion to Dismiss and Motion to Strike Second Amended Third Party Complaint** (NO. 09 L 001021) ★★**HN: 1,4,7 (Ill.Dec.)**

245 PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, v. INTERNATIONAL PROFIT ASSOCIATES, INC., International Tax Advisors, Inc., Integrated Business Analysis, Inc., Accountancy Associates, LLC and John Burgess, Defendants., 2009 WL 8585830, *1+ (Trial Motion, Memorandum and Affidavit) (Ill.Cir.Ct. 2009) **People's Memorandum of Law in Opposition to Defendant John Burgess' Motion to Dismiss Pursuant to 735 ILCS 5/2-615** (NO. 09CH16073) ★★**HN: 8,23 (Ill.Dec.)**

246 JOHN CRANE INC., Plaintiff, v. ADMIRAL INSURANCE COMPANY, et al., Defendants., 2006 WL 5895295, *5895295 (Trial Motion, Memorandum and Affidavit) (Ill.Cir.Ct. Oct 25, 2006) **Certain Defendants' Reply In Support of Their Motion to Require Immediate Production of Documents In the Possession of Plaintiff's Agents, David Lillycrop and Entry of An Appropriate Trial Sanction** (NO. 04-CH-08266) " ★★**HN: 17 (Ill.Dec.)**

247 PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, v. PRICE LINE LOCKSMITH INC., a New York Corporation, d/b/a Priceline Locksmith, Inc., d/b/a Locksmith 24 Hours Inc., Gilad Gill, Individually and as President of Price Line Locksmith Inc., Davis Sasson, Individually and as President of Price Line Locksmith Inc., Superb

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Solutions Inc., a New York Corporation, and Shlomo Hadar, Individually and as President of Superb Solutions Inc., Defendants., 2006 WL 4686193, *4686193 (Trial Motion, Memorandum and Affidavit) (Ill.Cir.Ct. Feb 24, 2006) **Motion to Dismiss Complaint** (NO. 05CH22019) ★★

248 JOE KINSELLA & SON, INC., an Illinois Corporation, Plaintiff, v. Jerry BARTON and Elaine Barton, Defendants, Joe Kinsella & Son, Inc., and Tom Kinsella, Counter-defendants., 2006 WL 1878345, *1878345+ (Trial Motion, Memorandum and Affidavit) (Ill.Cir.Ct. Jan 13, 2006) **Defendants/Counterplaintiffs' Bench Brief Regarding Piercing the Corporate Veil** (NO. CAUSE00-L-1167) ★★

249 CONSTANTINOS (GUS) PONERIS et al., Plaintiffs, v. A&L PAINTING, LLC, et al., Defendants., 2007 WL 5848442, *5848442 (Trial Motion, Memorandum and Affidavit) (Ohio Com.Pl. Sep 24, 2007) **Plaintiffs' Opposition to Defendants' Motion to Dismiss Plaintiffs' Re-Filed Complaint** (NO. CV2007010066) ★★

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2013 IL App (2d) 121140-U

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.
NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).
Appellate Court of Illinois,
Second District.

SEATER CONSTRUCTION COMPANY, INC., and Seater Construction of Illinois,
Plaintiffs–Appellants,
v.
DEKA INVESTMENTS, LLC, Home State Bank, Community Trust Credit Union, Deano Vass, and Karen Vass, Defendants–Appellees,
(Unknown Owners, Defendants).

No. 2–12–1140.
|
June 24, 2013.

Appeal from the Circuit Court of Lake County. No. 07–CH–514, Mitchell L. Hoffman, Judge, Presiding.

ORDER

Justice ZENOFF delivered the judgment of the court:

***1** ¶ 1 *Held:* (1) The trial court's two summary judgment orders were affirmed where plaintiffs failed to preserve for appeal their challenge to the first order and where plaintiffs failed to cite any legal authority to support their argument related to the second order; (2) the trial court's judgment on plaintiffs' two veil-**piercing** counts was affirmed where the judgment was not against the manifest weight of the evidence.

¶ 2 Plaintiffs, Seater Construction Company, Inc., and Seater Construction of Illinois (collectively, "Seater"), filed an action against defendants, Deka Investments, LLC ("Deka"), Home State Bank, Community Trust Credit Union, Karen and Deano Vass, and Unknown Owners. Seater sought to enforce a mechanics lien recorded against a parcel of property, part of which was owned by Deka and mortgaged by Home State Bank, and part of which was owned by Community Trust Credit Union. Alternatively, Seater sought to recover damages from Deka for breaching two contracts for construction management and carpentry services, and to **pierce** Deka's veil of limited liability to recover damages against Karen and Deano, the two members[1] of Deka. The trial court granted summary judgment in favor of Deka, Community Trust Credit Union, and Home State Bank on Seater's mechanics lien claims. Following a bench trial, the court entered judgment in the amount of $148,460 against Deka on Seater's breach of contract claims but entered judgment in favor of Karen and Deano on Seater's veil-**piercing** claims. On appeal, Seater challenges the summary judgment orders entered on its mechanics lien claims and the judgment entered on its claims to **pierce** Deka's limited liability veil. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Karen and Deano Vass, who were married, formed Deka for the purpose of purchasing and developing a parcel of unimproved property located at the southwest corner of Grass Lake Road and Deep Lake Road in Lake Villa, Illinois. They funded Deka by each contributing $1,000. Deka purchased the property in September 2004 for $1,600,000 with a mortgage from Home State Bank in the amount of $1,225,000.[2] Karen and Deano planned to develop the land and to construct a retail complex to be called Lake Tower Crossing. The development included construction of a new road called Tower Drive. Deka obtained construction loans from Home State Bank in the amounts of $2,500,000 and $429,933.75. Deka also entered into an escrow agreement with Chicago Title Insurance Company ("Chicago Title") naming it as escrow trustee and making it responsible for disbursing all payments to contractors during the course of construction.

¶ 5 Deka entered into two contracts with Seater. The first contract, dated March 15, 2005, was for construction management services and required Seater, among other things, to develop schedules and cost estimates, to solicit bids from subcontractors, and to schedule and attend regular meetings with Deka. Deka was to pay Seater a construction management fee equal to 8% of the total construction value of the on-site improvements, plus 3%

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of the total construction value of the roadway improvements. The second contract, dated March 7, 2006, was for carpentry services. The total amount of the carpentry contract was $195,345.

***2** ¶ 6 Although Karen and Deano disputed whether Seater fulfilled all of its obligations under the contracts, Deka never terminated the contracts. Seater last performed work at Lake Tower Crossing in December 2006. Upon finishing work, Seater contended that Deka owed it $272,664.32, which included $134,571.65 for carpentry work, $89,770.63 for Seater's construction management fee related to on-site improvements, $733.37 for Seater's construction management fee related to roadway improvements, and $47,588.67 for general conditions.

¶ 7 A. Mechanics Lien

¶ 8 On January 18, 2007, Seater recorded its original mechanics lien in the amount of $272,664.32 with the Lake County Recorder of Deeds. The mechanics lien was recorded against the undivided parcel of property encompassing the entire Lake Tower Crossing development located at 850 Tower Drive, and contained the perimeter metes and bounds legal description of the property. On February 23, 2007, Seater filed its original three-count complaint in the circuit court of Lake County. Count I, which named Deka, Home State Bank, and Unknown Owners as defendants, sought to enforce the mechanics lien. The count referenced the mechanics lien but described the property subject to the lien by using the updated legal description as described by a plat recorded with the Recorder of Deeds on August 24, 2005. The plat subdivided the parcel of property into five lots. Seater alleged that it provided construction services and materials to improve the property and that it completed work on December 18, 2006.

¶ 9 On June 17, 2008, Seater filed a first amended complaint, which was nearly identical to its original complaint, but which named Community Trust Credit Union as an additional defendant in count I. Seater alleged that Community Trust Credit Union had obtained an interest in the property by virtue of a deed recorded on May 2, 2007.

¶ 10 Deka, Home State Bank, and Community Trust Credit Union all filed motions for summary judgment on count I of Seater's first amended complaint. The defendants argued that Seater's mechanics lien was defective because it did not include a completion date for work on the property and because it contained a perimeter metes and bounds legal description of the property, rather than an updated description reflecting the subdivisions. The trial court granted summary judgment in favor of all three defendants; however, it granted Seater leave to file an amended count I as to Deka.

¶ 11 On January 29, 2009, Seater filed its second amended complaint. Count I named Deka and Unknown Owners as defendants and sought to enforce an amended mechanics lien that Seater recorded with the Recorder of Deeds on December 9, 2008. The amended mechanics lien contained the updated legal description of the subdivided property, as well as the date Seater completed work.

¶ 12 Deka again moved for summary judgment on count I. Deka argued that count I of the second amended complaint was barred by the Act's statute of limitations, which provides that any suit to enforce a mechanics lien must be commenced within two years after work is completed (see 770 ILCS 60/9 (West 2008)). Deka contended that the mechanics lien claim was untimely because Seater completed its work on the property in December 2006, but did not file its second amended complaint until January 2009, more than two years later. Seater responded that its second amended complaint was timely because it related back to its original complaint, filed in February 2007. Deka disagreed, arguing that the "relation back" doctrine did not apply because the second amended complaint was based on a different mechanics lien than the original complaint. The trial court agreed with Deka and granted summary judgment in its favor on count I.

***3** ¶ 13 Seater went on to file third and fourth amended complaints, both of which contained the heading "Count I" followed by the word "DISMISSED." Otherwise, the third and fourth amended complaints contained no mechanics lien claims.

¶ 14 B. **Piercing** the Veil

¶ 15 The matter proceeded to a bench trial on counts II through V of Seater's fourth amended complaint. Count II alleged breach of contract against Deka; count III sought recovery in the alternative under the doctrine of *quantum meruit;* count IV sought recovery against Deano under a

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veil-**piercing** theory; and count V sought recovery against Karen under a veil-**piercing** theory. The following evidence relevant to the veil-**piercing** counts, which are the only counts at issue on appeal, was presented at trial.

¶ 16 Deka was the general contractor on the Lake Tower Crossing project. Karen, as a member of Deka, oversaw the day-to-day construction and was on site nearly every day. Although Seater solicited bids from subcontractors pursuant to its obligations under the construction management contract with Deka, it was Deka that entered into contracts with the subcontractors.

¶ 17 Payment of all construction expenses was handled through the escrow account held by Chicago Title. For each payment, either Karen or Deano would submit a sworn statement and a lien waiver to Chicago Title, which would obtain approval from the lender, Home State Bank, before disbursing the payment. Karen testified that all of Deka's subcontractors were paid in full, with the sole exception of Seater. Both Karen and Deano testified to their belief that Seater failed to fulfill its obligations under the construction management and carpentry contracts.

¶ 18 Karen testified that Home State Bank approved payment to her of a $150,000 developer's fee for her services. Karen testified that a developer's fee ordinarily would equal 10% of the construction budget and that hers was less than that. Chicago Title disbursed the developer's fee to Karen in periodic payments. For each payment, Karen would submit a sworn statement and a lien waiver to Chicago Title, which would obtain approval from Home State Bank to disburse the payment. Karen's $150,000 developer's fee was paid in full by July 2007. Karen testified that the developer's fee was her only source of income during the construction project.

¶ 19 Karen further testified that Chicago Title reimbursed her for expenses she paid on Deka's behalf. At trial, documentation was presented for each reimbursement, including receipts and invoices, except for one reimbursement of $4,290.48. The reimbursements to Karen totaled approximately $180,000.

¶ 20 Deano testified that he and Karen budgeted $100,000 for leasing fees, which Home State Bank approved. Deano and Karen budgeted that amount because $5 per square foot was a typical leasing fee, and the retail complex was 20,000 square feet. Deano further testified that he had a commercial real estate and broker's license and operated a real estate company called Deano Vass Company, Inc. During the Lake Towers Crossing project, Deano earned leasing fees of $6,500 for leasing a 1,300 square foot space to a dry-cleaners; $9,500 for leasing a 1,900 square foot space to a salon; $17,090 as half of the fee for leasing a 6,838 square foot restaurant space; and $10,500 for leasing a 2,100 square foot space to a tutoring company. Deano further testified that he shared one leasing fee totaling $31,280 with Karen, who also held a commercial real estate license.

***4** ¶ 21 Deano also received a check for $5,300 as reimbursement for payments he made on Deka's behalf. At trial, documentation for the payments Deano made was admitted into evidence.

¶ 22 In April 2007, Deka sold one of the out-lots within the Lake Tower Crossing development to Community Trust Credit Union for $914,034. Because Seater already had recorded its mechanics lien in the amount of $272,664 against the property, Chicago Title required Deka to hold in a title indemnity fund an amount sufficient to cover the lien. Karen and Deano shared equally the $54, 842 brokers' commission on the sale, which equaled 6% of the purchase price.

¶ 23 Meanwhile, Karen and Deano were divorced, and, in 2008, Karen transferred her interest in Deka to Deano. Her agreement with Deano provided, "If the Seater lawsuit is void or settled without a payment or with a partial payment to Seater, Karen will receive the balance of the money plus interest in escrow." On August 12, 2009, which was after the trial court in this case granted summary judgment in Deka's favor on count I (mechanics lien) of Seater's first and second amended complaints, Chicago Title disbursed to Karen the balance of the title indemnity fund, which had grown to $274,583.65 with interest.

¶ 24 Following trial, the court issued its memorandum opinion and order. On count II (breach of contract), the court entered judgment in Seater's favor in the amount of $148,460, which consisted of $90,504 on the construction management contract and $57,956 on the carpentry contract. In light of its ruling on count II, the court dismissed count III (*quantum meruit*). Finally, the court declined to **pierce** Deka's limited liability veil and entered judgment in Karen's and Deano's favor on counts IV (Deano) and V (Karen). Seater timely appealed.

¶ 25 II. ANALYSIS

¶ 26 On appeal, Seater challenges (1) the orders entering summary judgment against it on the mechanics lien

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claims in its first and second amended complaints and (2) the judgment entered in Karen's and Deano's favor on Seater's claims to **pierce** Deka's limited liability veil.

¶ 27 A. Mechanics Lien Claims

¶ 28 Seater argues that the trial court erred in entering summary judgment in Deka's favor on count I of its first and second amended complaints. Seater argues that the perimeter metes and bounds legal description of the property did not invalidate its original mechanics lien, on which count I of its first amended complaint was based. Seater further argues that count I of its second amended complaint was not untimely, because the court granted it leave to file the amended count.

¶ 29 Because Deka has not filed an appellee's brief, we review Seater's arguments pursuant to *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill.2d 128 (1976). In *Talandis*, our supreme court held that, when no appellee's brief has been filed, a reviewing court cannot reverse a trial court's judgment *pro forma*. *Talandis*, 63 Ill.2d at 131. Rather, a reviewing court has three distinct, discretionary options:

> ***5** "(1) it may serve as an advocate for the appellee and decide the case when the court determines justice so requires, (2) it may decide the merits of the case if the record is simple and the issues can be easily decided without the aid of the appellee's brief, or (3) it may reverse the trial court when the appellant's brief demonstrates *prima facie* reversible error that is supported by the record." *Thomas v. Koe*, 395 Ill.App.3d 570, 577 (2009) (citing *Talandis*, 63 Ill.2d at 133).

Here, the issue of the enforceability of Seater's mechanics lien is difficult on its merits. Nevertheless, because of considerations of waiver and forfeiture, the issue can be easily decided without the aid of an appellee's brief.

¶ 30 Regarding Seater's arguments pertaining to count I of its first amended complaint, the record reflects that Seater has failed to preserve this issue for appeal. As the party claiming error, Seater had the burden to preserve for review all matters necessary for disposition of the appeal. *In re Marriage of Holem*, 153 Ill.App.3d 1095, 1100 (1987). Even a cursory review of the record reveals that Seater failed to preserve for review any objection to the trial court's order entering summary judgment in Deka's favor on count I of Seater's first amended complaint.

¶ 31 Our supreme court has held that, if a party files an amended complaint that is complete in itself and does not refer to or adopt a prior pleading, the party has waived any challenge to the trial court's rulings on the prior complaint. *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 96 Ill.2d 150, 154–55 (1983). The " 'earlier pleading ceases to be a part of the record for most purposes, being in effect abandoned and withdrawn.' " *Foxcroft*, 96 Ill.2d at 154 (quoting *Bowman v. County of Lake*, 29 Ill.2d 268, 272 (1963)). A party has three methods available to it for avoiding waiver and preserving dismissed claims for appellate review. *Vilardo v. Barrington Community School District 220*, 406 Ill.App.3d 713, 719 (2010). First, a party can stand on the dismissed counts, take a voluntary dismissal of any remaining counts, and argue the matter at the appellate level. *Vilardo*, 406 Ill.App.3d at 719. Second, a party can file an amended pleading that realleges, incorporates by reference, or refers to the dismissed counts. *Vilardo*, 406 Ill.App.3d at 719. A "simple paragraph or footnote" is sufficient for this purpose. *Tabora v. Gottlieb Memorial Hospital*, 279 Ill.App.3d 108, 114 (1996). Third, a party can perfect an appeal from the dismissal order prior to filing an amended pleading that does not refer to or adopt the dismissed counts. *Vilardo*, 406 Ill.App.3d at 719. The Foxcroft rule applies to summary judgment rulings. See, e.g., *Gilley v. Kiddel*, 372 Ill.App.3d 271, 274 (2007) (holding that the plaintiff waived the issue of the propriety of the trial court's grant of summary judgment on an earlier complaint, where the plaintiff filed an amended complaint that did not reference the earlier pleading).

***6** ¶ 32 Here, count I of Seater's first amended complaint named Deka, Home State Bank, Community Trust Credit Union, and Unknown Owners as defendants and sought to enforce the mechanics lien recorded on January 18, 2007. By contrast, count I of Seater's second amended complaint named Deka and Unknown Owners as defendants and sought to enforce the mechanics lien recorded on December 9, 2008. Count I of the second amended complaint did not in any way incorporate or reference count I of Seater's first amended complaint. Additionally, count I of the second amended complaint did not in any way reference the mechanics lien recorded on January 18, 2007. Nor did it reference Home State Bank or Community Trust Credit Union. In sum, Seater failed to either (1) stand on count I of its first amended complaint after summary judgment was granted; (2) file an amended pleading that realleged, incorporated by reference, or referred to the earlier count; or (3) perfect an appeal from the summary judgment order prior to filing an amended pleading. Therefore, when Seater filed its

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second amended complaint, it waived any challenge to the trial court's summary judgment ruling on count I of its first amended complaint.[3]

¶ 33 Regarding Seater's arguments pertaining to count I of its second amended complaint, we need not decide whether Seater preserved this issue for appeal by inserting the heading "Count I" followed by the word "DISMISSED" in each of its third and fourth amended complaints. Whether or not Seater preserved this issue for appeal, it has forfeited the issue on appeal by failing to comply with Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008). That rule requires an appellant's brief to include argument supported by "citation of the authorities and the pages of the record relied on." Ill. S.Ct. R. 341(h)(7) (eff. July 1, 2008). In its one-page argument addressing the trial court's entry of summary judgment on count I of its second amended complaint, Seater does not cite a single legal authority. The record reflects that the issue before the trial court—whether count I of Seater's second amended complaint related back to its original complaint—was a complicated issue fully briefed by the parties. Ultimately, the trial court agreed with Deka that the second amended complaint did not relate back to the original complaint and was untimely. On appeal, Seater's brief does not even mention the "relation back" doctrine, let alone cite relevant legal authority. Accordingly, plaintiff has forfeited this issue on appeal. See *In re Marriage of Petrik*, 2012 IL App (2d) 110495, ¶ 38 ("The appellate court is not a depository in which the appellant may dump the burden of argument and research." (Internal quotation marks omitted.)).

¶ 34 Based on the foregoing, we affirm the trial court's orders entering summary judgment in Deka's favor on count I of Seater's first and second amended complaints.

¶ 35 B. **Piercing** the Veil Claims

***7** ¶ 36 Seater next argues that the trial court erred in failing to **pierce** Deka's limited liability veil to hold Karen and Deano personally liable for Deka's breaches of the construction management and carpentry contracts. Seater contends that the court should have **pierced** Deka's veil because (1) Deka was undercapitalized; (2) Karen and Deano commingled Deka's funds with their personal funds; (3) Karen and Deano diverted assets away from Deka to Seater's detriment; (4) Deka operated as an alter ego of Karen and Deano; and (5) adherence to the fiction of Deka's separate existence would sanction a fraud, promote injustice, and promote inequitable consequences.

¶ 37 Before addressing Seater's arguments, we must comment on the quality of the brief filed by the appellees, Karen and Deano. The argument section of the brief consists primarily of boilerplate law followed by a recitation of the trial court's factual findings. Except for a single issue, the brief contains no argument, in violation of Supreme Court Rule 341, which requires an appellee's brief to include argument consisting of the appellee's contentions with citations of the pages of the record and the authorities relied on. Ill. S.Ct. R. 341(h)(7), (i) (eff.Feb.6, 2013). We would be within our authority to strike the brief and to address Seater's contentions under *Talandis* as if no appellee's brief had been filed. *Plooy v. Paryani*, 275 Ill.App.3d 1074, 1088 (1995). However, because the record on the issue of **piercing** the veil is simple, and because the claimed errors are such that this court can easily decide them on the merits, we would reach the same result whether or not we considered the brief. See *Plooy*, 275 Ill.App.3d at 1088. However, we caution Karen and Deano and their attorney that the rules governing the content of briefs are mandatory and apply with equal force to both appellants and appellees. *Plooy*, 275 Ill.App.3d at 1088.

¶ 38 The doctrine of **piercing** the **corporate veil** is an equitable remedy that permits a court to impose liability on an individual or entity that uses a corporation merely as an instrumentality to conduct that individual's or entity's business. *Fontana v. TLD Builders, Inc.*, 362 Ill.App.3d 491, 500 (2005). "A party seeking to **pierce** the **corporate veil** has the burden of making a substantial showing that one corporation is really a dummy or sham for another [citation], and courts will **pierce** the **corporate veil** only reluctantly [citation]." (Internal quotation marks omitted.) *Fontana*, 362 Ill.App.3d at 500. "We employ a two-prong test in order to determine whether to **pierce** the **corporate veil**: (1) there must be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist; and (2) circumstances must exist such that adherence to the fiction of a separate corporate existence would sanction a fraud, promote injustice, or promote inequitable consequences." *Fontana*, 362 Ill.App.3d at 500. We will not reverse a trial court's finding regarding **piercing** the **corporate veil** unless it is against the manifest weight of the evidence.[4] *Fontana*, 362 Ill.App.3d at 500. A finding is against the manifest weight of the evidence when an opposite conclusion is apparent or when the judgment is unreasonable, arbitrary, or not based on evidence. *Dargis v. Paradise Park, Inc.*, 354 Ill.App.3d 171, 177 (2004).

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***8** ¶ 39 As an initial matter, we note that no Illinois case has held that the doctrine of **piercing** the **corporate veil** applies to an Illinois **limited liability company** (LLC). The Illinois **Limited Liability Company** Act (Act) (805 ILCS 180/1–1 *et seq.* (West 2008)) provides that an LLC is a legal entity distinct from its members. 805 ILCS 180/5–1(c) (West 2008). The Act further provides:

> "(a) * * * the debts, obligations, and liabilities of a **limited liability company**, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager.
>
> * * *
>
> (c) The failure of a **limited liability company** to observe the usual company formalities or requirements relating to the exercise of its company powers or management of its business is not a ground for imposing personal liability on the members or managers for liabilities of the company." 805 ILCS 180/10–10(a), (c) (West 2008).

In *Westmeyer v. Flynn*, 382 Ill.App.3d 952 (2008), the First District Appellate Court addressed the issue of whether Delaware law permitted a plaintiff to **pierce** the veil of a Delaware LLC and held that it did. *Westmeyer*, 382 Ill.App.3d at 960. In *dicta*, the court briefly discussed Illinois law and stated, "while the [Illinois **Limited Liability Company**] Act provides specifically that the failure to observe the corporate formalities is not a ground for imposing personal liability on the members of an LLC, it does not bar the other bases for **corporate veil piercing**, such as alter ego, fraud or undercapitalization." *Westmeyer*, 382 Ill.App.3d at 960. Here, because neither party contends that the doctrine of **piercing** the **corporate veil** does not apply to an Illinois LLC, for purposes of this case, we will apply the doctrine.

¶ 40 1. Unity of Interest and Ownership Prong

¶ 41 Ordinarily, in determining whether the "unity of interest and ownership" prong of the **piercing**-the-**corporate**-**veil** test is met, a court considers many factors, including: (1) inadequate capitalization; (2) failure to issue stock; (3) failure to observe corporate formalities; (4) nonpayment of dividends; (5) insolvency of the debtor corporation; (6) nonfunctioning of the other officers or directors; (7) absence of corporate records; (8) commingling of funds; (9) diversion of assets from the corporation by or to a stockholder or other person or entity to the detriment of creditors; (10) failure to maintain arm's-length relationships among related entities; and (11) whether, in fact, the corporation is a mere facade for the operation of the dominant stockholders. *Fontana*, 362 Ill.App.3d at 503. Several of the factors are inapplicable to **piercing** the veil of an LLC, because they deal with adherence to corporate formalities. 805 ILCS 180/10–10(c) (West 2008). Seater offers argument with respect to factors (1), (8), (9), and (10).

¶ 42 a. Undercapitalization

***9** ¶ 43 Seater first argues that Deka was undercapitalized. Seater contends that Deka's only capital was the initial $2,000 investment from Karen and Deano and that the only asset Deka owned was the Lake Tower Crossing property, which was encumbered in excess of $4 million. Seater argues that Deka's debts far exceeded the value of its only asset and that Deka therefore was "extremely undercapitalized."

¶ 44 "To determine whether a corporation is adequately capitalized, one must compare the amount of capital to the amount of business to be conducted and obligations to be fulfilled." *Fiumetto v. Garrett Enterprises, Inc.*, 321 Ill.App.3d 946, 959 (2001). The consideration is based on the policy that "it is inequitable that shareholders should set up such a flimsy organization to escape personal liability." (Internal quotation marks omitted.) *Fiumetto*, 321 Ill.App.3d at 959. Rather, "shareholders should in good faith put at the risk of the business unencumbered capital reasonably adequate for the corporation's prospective liabilities." *Fontana*, 362 Ill.App.3d at 504.

¶ 45 Seater's arguments relating to undercapitalization suffer from several flaws. Most importantly, Seater does not challenge the trial court's finding that Deka had "substantial equity" in the Lake Tower Crossing property at the time of purchase. The record reflects that Deka purchased the unimproved parcel of property for $1,600,000 with a mortgage from Home State Bank in the amount of $1,225,000. Thus, the record supports the trial court's finding, since, based on the record, Deka had equity of $375,000 in the property at the time of purchase.

¶ 46 Further, Seater offered no testimony at trial regarding

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what would have been an adequate level of capitalization. This court would be speculating were it to conclude that Deka was inadequately capitalized.

¶ 47 Moreover, "undercapitalization is less significant in a contract case, where the claim arises from a consensual transaction, than in a tort case, where there is no voluntary dealing." *Fontana,* 362 Ill.App.3d at 505. "Where there is no evidence of any misrepresentation, no attempt to conceal any facts, and the parties possess a total understanding of all of the transactions involved, Illinois courts will not **pierce** the **corporate** **veil** in a breach of contract situation." *Tower Investers, LLC v. 111 East Chestnut Consultants, Inc.,* 371 Ill.App.3d 1019, 1034 (2007). Here, nothing in the record suggests that Deka misled Seater in any way when the parties entered into the contracts for construction management and carpentry services. Furthermore, the record reflects that Seater was an experienced construction company that had completed numerous commercial construction projects in Illinois and Wisconsin at the time it entered into the contracts with Deka. It is unlikely that Seater misunderstood the potential consequences of contracting with a **limited** **liability** **company**.

***10** ¶ 48 Finally with respect to undercapitalization, the policy underlying this factor is that corporate shareholders (or LLC members) should not be permitted to set up a flimsy organization merely to escape personal liability. *Fiumetto,* 321 Ill.App.3d at 959. Undoubtedly, when Deka initiated construction of the Lake Towers Crossing retail complex, which was before the collapse of the real estate market in 2007–2008, its members believed that the project would be profitable. Though the venture ultimately ended with Deka signing a deed in lieu of foreclosure, nothing in the record suggests that Karen and Deano formed Deka for the sole purpose of avoiding personal liability. Rather, the record reflects that, with the sole exception of Seater, Karen and Deano paid all of Deka's subcontractors in full. Karen and Deano both testified that they believed Deka paid Seater what it earned under the contracts because, in their view, Seater had not fully performed its obligations. This is evidence of a contract dispute, not of a sham company.

¶ 49 Based on the foregoing, we cannot say that the trial court's finding that Deka was not undercapitalized was against the manifest weight of the evidence.

¶ 50 b. Commingling of Funds

¶ 51 Seater next argues that Karen and Deano commingled Deka's funds with their personal funds. Seater points to evidence that Karen directed disbursements from the construction escrow account of $380,337 to herself; $5,300 to Deano; $43,950 to Deano Vass Company, Inc.; and $500 to the University of Illinois, her son's college. Finally, Seater points to the disbursement, in August 2009, of $274,583.65 in title indemnity funds to Karen.

¶ 52 The only authority on which Seater relies regarding the commingling-of-funds factor is *Fontana.* There, the court affirmed the trial court's decision to **pierce** a construction company's **corporate** **veil**. *Fontana,* 362 Ill.App.3d at 509. With respect to the commingling of funds, the court noted that the construction company had no employees, paid no salaries or wages, and paid no dividends or other formal distributions. *Fontana,* 362 Ill.App.3d at 507. Rather, the company's sole shareholder testified, funds were deposited into her and her husband's personal bank account by " 'cut[ing] a check from the business.' " *Fontana,* 362 Ill.App.3d at 507. The court concluded that this demonstrated the commingling of company and personal funds. *Fontana,* 362 Ill.App.3d at 507.

¶ 53 Here, every payment from Deka to Karen or Deano was documented and explained at trial. Regarding the payments to Karen, the record reflects that she received a developer's fee of $150,000 in exchange for her work overseeing the day-to-day construction of the project. For every disbursement of the developer's fee, Karen submitted a sworn statement and lien waiver to Chicago Title, which then received approval from the lender, Home State Bank, to disburse the funds. Karen also received reimbursements for expenses she incurred on Deka's behalf. For each reimbursement, she submitted documentation to Chicago Title in the form of receipts and invoices. The only exception was one reimbursement in the amount of $4,290.48, for which no documentation was introduced at trial. Karen also received half of the broker's commission for the sale of the out-lot to Community Trust Credit Union, and half of the leasing fee for the lease of one of the units of the retail complex.

***11** ¶ 54 Regarding the payments to Deano, the record reflects that he received leasing fees totaling $59,230. Deano testified that Home State Bank approved the leasing fees, and that he received payment only after he earned the fee by leasing space within the retail complex. Deano further testified that he received one payment of $5,300 reimbursing him for expenses he paid on Deka's behalf, and documentation of those expenses was introduced into evidence at trial. Deano also received half

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of the broker's commission for the sale of the out-lot to Community Trust Credit Union.

¶ 55 The trial court found that each of the payments to Karen and Deano was for a legitimate business expense and that Seater presented no evidence that the broker, leasing, or developer fees were anything other than reasonable compensation for the work Karen and Deano performed. The trial court's findings were not against the manifest weight of the evidence. The thorough documentation of each payment to Karen and Deano—along with the process of using an escrow trustee to disburse payments—suggests a clear delineation between company and personal funds. It was far different than simply " 'cut [ing] a check from the business' " to fund a personal bank account. *Fontana*, 362 Ill.App.3d at 507.

¶ 56 Regarding the disbursement, in August 2009, of $274,583.65 in title indemnity funds to Karen, the trial court found that Seater did not present any evidence that this was not fair compensation for her share of ownership in Deka. We agree. The record contains no evidence of the value of Deka at the time Karen transferred her ownership interest to Deano. Ultimately, Deka signed a deed in lieu of foreclosure when a balloon payment on its mortgage became due and it could not obtain refinancing, but this does not show that Deka had no value at the time Karen gave up her interest in the company in 2008. Moreover, the title indemnity funds were held in order to cover the potential liability arising out of Seater's mechanics lien. The title company disbursed the funds to Karen only after the trial court entered summary judgment in Deka's favor on count I (mechanics lien) of Seater's first and second amended complaints. Releasing the funds after recovery on the mechanics lien was no longer a possibility (albeit, the orders were subject to appeal) does not establish the commingling of company and personal funds.

¶ 57 Regarding the $500 payment to the University of Illinois, the college attended by Karen's son, Seater does not develop an argument with respect to this payment. At the very least, we cannot say that the trial court's judgment was against the manifest weight of the evidence due to the payment of a single personal expense (if that is what the payment was) out of the escrow account.

¶ 58 Based on the foregoing, we cannot say that the trial court's finding that Karen and Deano did not commingle company and personal funds was against the manifest weight of the evidence.

¶ 59 c. Diversion of Assets

***12** ¶ 60 Seater next argues that Karen and Deano diverted assets away from Deka to Seater's detriment. Seater contends that over $110,000 of the disbursements to Karen and Deano took place after Seater filed its original mechanics lien on January 18, 2007. Seater further points out that the disbursement of $274,583.65 in title indemnity funds to Karen took place after its mechanics lien was recorded. Finally, Seater argues that Deka paid all of its subcontractors except for Seater.

¶ 61 Seater's arguments on this factor miss the mark. As we discussed above, the trial court's finding that the payments to Karen and Deano were reasonable and proper was not against the manifest weight of the evidence. Nor was the disbursement of the title indemnity funds to Karen improper. While Seater was the only party not paid during the course of the construction project, the record reveals the reason-Karen and Deano disputed the amount that Seater claimed it was owed. Further, during the pendency of the litigation on Seater's claims, Deka failed as a company. It signed a deed in lieu of foreclosure when it could not refinance its balloon mortgage, and it was involuntarily dissolved by the Illinois Secretary of State. Simply because Seater now has a judgment against a dissolved company with no assets does not mean that Karen and Deano improperly diverted assets from Deka to Seater's detriment. The trial court's judgment on this factor was not against the manifest weight of the evidence.

¶ 62 d. Failure to Maintain Arm's Length Relationships

¶ 63 Seater next argues that Karen, Deano, and Deka "were and are interrelated and in some instances the alter ego for another." However, Seater's entire argument on this factor consists of four sentences with no citation to authority. Therefore, Seater has forfeited this argument. Ill. S.Ct. R. 341(h)(7) (eff.Feb.6, 2013); *Petrik*, 2012 IL App (2d) 110495, ¶ 38 ("The appellate court is not a depository in which the appellant may dump the burden of argument and research." (Internal quotation marks omitted.)).

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¶ 64 2. Fraud, Injustice, or Inequitable Consequences Prong

¶ 65 Because we have determined that the trial court's finding on the first prong of the piercingthe-**corporate**-**veil** test was not against the manifest weight of the evidence, we need not address Seater's arguments with respect to the second prong. Nevertheless, our discussion of the factors under the first prong dictates what our conclusion under the second prong would be. Seater contends that allowing Karen and Deano to walk away with no personal liability would sanction a fraud, promote injustice, and promote inequitable consequences. Yet, as we discussed under the first prong, nothing in the record suggests that Karen and Deano drained Deka of all funds in order to avoid paying Seater. Rather, Karen and Deano paid all of their subcontractors and attempted to continue operating Deka as a viable business, but failed when refinancing of a balloon mortgage proved impossible. The trial court found as follows:

> ***13** "Whether [the failure of the venture] was due to mismanagement by Deka or Seater, or whether the project was ultimately doomed by collapse of the commercial real estate market and plummeting property values, cannot be determined with any certainty on the record before the court. However, the fact that the project ended in foreclosure does not establish that the business was a sham, or that its members should be subjected to personal liability."

The trial court's finding was not against the manifest weight of the evidence.

¶ 66 III. CONCLUSION

¶ 67 For the reasons stated, we affirm the judgment of the circuit court of Lake County.

¶ 68 Affirmed.

Justices McLAREN and BIRKETT concurred in the judgment.

All Citations

Not Reported in N.E.2d, 2013 IL App (2d) 121140-U, 2013 WL 3272487

Footnotes

1 Under Illinois law, a **limited** **liability** **company** must have one or more members. 805 ILCS 180/5–1(b) (West 2008).

2 The record does not disclose the source of the additional $375,000 used to purchase the property.

3 It is on this basis that a different panel of this court previously granted the motions filed by Home State Bank and Community Trust Credit Union and dismissed those two parties from this appeal.

4 In its opening brief, Seater incorrectly states that the standard of review is *de novo.* In its reply brief, Seater asserts that the trial court's judgment was erroneous "under any standard of review."

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IN THE CIRCUIT COURT FOR THE EIGHTEENTH JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS

Chris Kachiroubas
e-filed in the 18th Judicial Circuit Court
******** DuPage County ********
TRAN# : 17043952425/(4251345)
2018MR000224
FILEDATE : 04/06/2018
Date Submitted : 04/06/2018 10:31 AM
Date Accepted : 04/06/2018 11:51 AM
SURGES,KELLY
****

GREGORY BAIRD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Case No. 2018MR000224
WESTMONT LINCOLN, LLC d/b/a OGDEN LINCOLN OF WESTMONT,	)	
	)	
	)	
Defendant.	)	

ANSWER AND AFFIRMATIVE DEFENSES TO COMPLAINT
FOR DECLARATORY JUDGMENT AND OTHER RELIEF

Defendant, Westmont Lincoln, LLC, d/b/a Ogden Lincoln of Westmont ("Westmont Lincoln"), by its attorneys, Burke, Warren, MacKay & Serritella, P.C., answers Plaintiff's Complaint for Declaratory Judgment and Other Relief as follows:

PARTIES

1. Baird is a natural person who resides in Hinsdale, DuPage County, Illinois.

ANSWER: Westmont Lincoln admits the allegations contained in paragraph 1.

2. Westmont Lincoln is an Illinois limited liability company with its principal place of business at 100 West Ogden Avenue, Westmont, DuPage County, Illinois. Westmont Lincoln is in the business of selling new and used Lincoln automobiles.

ANSWER: Westmont Lincoln admits the allegations contained in paragraph 2.

JURISDICTION AND VENUE

3. This Court has personal jurisdiction over Westmont Lincoln pursuant to 735 ILCS § 5/2-209 because Westmont Lincoln, *inter alia,* transacts business within this State, committed the wrongful acts out of which these causes of action arose within this State, and owns, uses or possesses real estate located within this State.

ANSWER: Westmont Lincoln admits that it transacts business in this State, but denies it has engaged in any wrongful acts.

4. Venue is proper in DuPage County pursuant to 735 ILCS § 5/2-101 because this is the county in which Westmont Lincoln resides, and because this is the

County in which the transactions or some part thereof occurred out of which these causes of action arose.

ANSWER: Westmont Lincoln admits the allegations contained in paragraph 4.

FACTUAL BACKGROUND

A. Iozzo and Ogden Lincoln's Judgment Debt to Baird.

5. Marc Iozzo ("Iozzo"), individually and doing business as a sole proprietorship known as Ogden Auto Group, owned several automobile dealerships in the Chicago area, including Ogden Lincoln-Mercury, Inc. and Ogden Chevrolet, Inc. Iozzo, individually and d/b/a Ogden Auto Group, Ogden Lincoln-Mercury, Inc., and Ogden Chevrolet, Inc. borrowed money from Baird in connection with the ownership and operation of those automobile dealerships from 2006-2009.

ANSWER: Westmont Lincoln admits that Iozzo is an individual and that he borrowed money from Baird, but denies the remaining allegations in paragraph 5.

6. In 2010, Iozzo, individually and d/b/a Ogden Auto Group, Ogden Lincoln-Mercury, Inc., and Ogden Chevrolet, Inc., stopped making payments on the loans, and the loans were never repaid.

ANSWER: Westmont Lincoln admits that the loans have not been repaid in full.

7. On August 17, 2011, Baird filed a lawsuit against Iozzo, individually and d/b/a Ogden Auto Group, Ogden Lincoln-Mercury, Inc., and Ogden Chevrolet, Inc. to recover, *inter alia,* the unpaid balance of the loans (the "2011 Litigation").

ANSWER: Westmont Lincoln admits the allegations contained in paragraph 7.

8. Ogden Lincoln-Mercury, Inc. changed its name to Ogden Lincoln, Inc. ("Ogden Lincoln") on September 30, 2011.

ANSWER: Westmont Lincoln admits the allegations contained in paragraph 8.

9. On March 19, 2012, the Circuit Court of the Eighteenth Judicial Circuit entered judgment in favor of Baird and against Ogden Lincoln-Mercury, Inc. and Ogden Chevrolet, Inc. in the amount of $6,787,609.99. A true and correct copy of that judgment is attached hereto as Exhibit A ("March 2012 Judgment Order").

ANSWER: Westmont Lincoln denies the allegations contained in paragraph 9 to the extent they imply that there was an adjudication on the merits. Answering further,

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the March 2012 Judgment Order was a consent judgment on Count III of Baird's Complaint for Quantum Meruit, which was entered following a settlement conference.

10. On January 21, 2016, this Court issued a final judgment in favor of Baird and against Iozzo, individually and doing business as Ogden Auto Group. A true and correct copy of that judgment is attached hereto as Exhibit B ("January 2016 Judgment Order").

ANSWER: Westmont Lincoln admits the allegations contained in paragraph 10.

11. By virtue of the Court's entry of the January 2016 Judgment Order, the March 2012 Judgment Order became final and enforceable. The outstanding balance on the March 2012 Judgment Order as to Ogden Lincoln is $10,334,929.48, as of February 13, 2018.

ANSWER: Paragraph 11 is a legal conclusion which requires no answer. Without waiving its objection, Westmont Lincoln denies the allegations contained in paragraph 11. The January 2016 Judgment Order relates solely to Iozzo, not to Ogden Lincoln.

B. Ogden Lincoln's Purported Asset Sale.

12. During the pendency of the 2011 Litigation, Iozzo took elaborate and improper steps to shield his business assets from creditors.

ANSWER: Westmont Lincoln denies the allegations contained in paragraph 12.

13. Iozzo was the President of Ogden Lincoln, and controlled the day to day operations of Ogden Lincoln for approximately 20 years.

ANSWER: Westmont Lincoln admits the allegations contained in paragraph 13.

14. In 2012, Iozzo transferred his personal stock in Ogden Lincoln to the Marc Iozzo Gift Trust ("Gift Trust"), which became the sole owner of Ogden Lincoln.

ANSWER: Paragraph 14 relates to allegations against a non-party and not against Westmont Lincoln. Answering further, Westmont Lincoln denies the allegations contained in paragraph 14.

15. Iozzo was the Trustee of his Gift Trust and had complete control over the Gift Trust, and consequently, Ogden Lincoln.

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ANSWER: Paragraph 15 relates to allegations against a non-party and not against Westmont Lincoln. Paragraph 15 is a legal conclusion which requires no answer. Without waiving its objection, Westmont Lincoln denies the allegations contained in paragraph 15 as it does not provide a time-frame. Answering further, the initial Trustees of the Gift Trust, which was established by Fred J. Iozzo, Jr., were Elaine Iozzo and Fred J. Iozzo, Jr.

16. Ultimately, Iozzo purported to transfer the assets of Ogden Lincoln to Westmont Lincoln.

ANSWER: Westmont Lincoln denies the allegations contained in paragraph 16.

17. The transfer of assets to Westmont Lincoln occurred while the 2011 Litigation was pending and was effectuated on or about July 31, 2015 through an Asset Purchase Agreement dated June 24, 2014 ("APA").

ANSWER: Westmont Lincoln admits that Ogden Lincoln entered into an APA with Westmont Lincoln to sell certain of the assets of Ogden Lincoln for reasonably equivalent value while the 2011 litigation was pending.

COUNT I
(Declaratory Judgment — Successor Liability)

18. Baird re-alleges and incorporates paragraphs 1 through 17 above as if fully set forth herein.

ANSWER: Westmont Lincoln re-alleges and incorporates its answers to paragraphs 1 through 17 above as if fully set forth herein.

19. The purported transfer to Westmont Lincoln was a sham in an effort to avoid paying Ogden Lincoln's obligations to creditors, including the $10,334,929.48 due and owing to Baird, and Westmont Lincoln is a mere continuation of Ogden Lincoln.

ANSWER: Westmont Lincoln denies the allegations contained in paragraph 19.

20. Westmont Lincoln, as was Ogden Lincoln, is owned by an Iozzo trust.

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ANSWER: Westmont Lincoln denies that an Iozzo trust is the sole owner of Westmont Lincoln. The balance of the allegations in paragraph 20 relate to a non-party, not Westmont Lincoln. Answering further, the phrase "Iozzo trust" is a legal conclusion which requires no answer; however, without waiving its objection, Westmont Lincoln denies the same.

21. Specifically, the Marc F. Iozzo Discretionary Trust ("Discretionary Trust") owns 92% of Westmont Lincoln.

ANSWER: Westmont Lincoln admits the allegations contained in paragraph 21.

22. Iozzo was at all relevant times a Co-Trustee of the Discretionary Trust together with his elderly mother, Elaine Iozzo, and Iozzo exercised unfettered authority over the Discretionary Trust.

ANSWER: Paragraph 22 is a legal conclusion which requires no answer. Without waiving its objection, Westmont Lincoln admits that Iozzo was Co-Trustee of the Discretionary Trust with his mother, Elaine Iozzo, and that the current Trustee is David Flerg, but denies the remaining allegations in paragraph 22.

23. Iozzo at all relevant times was in charge of the management and day to day operations of Ogden Lincoln, and remains in charge of the management and day to day operations of Westmont Lincoln.

ANSWER: Westmont Lincoln denies the allegations contained in paragraph 23. Answering further, Westmont Lincoln admits Iozzo is an employee of Westmont Lincoln, but is not its General Manager. Additionally, Douglas Laux is the sole Manager of Westmont Lincoln, LLC.

24. Most of the current Westmont Lincoln employees previously worked for Ogden Lincoln.

ANSWER: Westmont Lincoln admits the allegations contained in paragraph 24.

25. Other than Iozzo, there are at least four senior managers at Westmont Lincoln, including but not limited to Brian Rudowicz, Mike Cima, Mike Laux and Joshua

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Breen. Of those managers, Brian Rudowicz, Mike Cima and Mike Laux all previously worked at Ogden Lincoln.

ANSWER: Westmont Lincoln admits that certain former employees of Ogden Lincoln currently work at Westmont Lincoln, including managers, as is consistent with industry practice in an asset sale transaction, but denies that Mike Laux is a current employee. Westmont Lincoln denies the remaining allegations in paragraph 25.

26. Westmont Lincoln operates out of the exact same location, 100 W. Ogden, Westmont, Illinois, as Ogden Lincoln did for decades before the purported transfer of assets to Westmont Lincoln.

ANSWER: Westmont Lincoln admits the allegations contained in paragraph 26.

27. Westmont Lincoln uses the same lender, Ford Motor Credit Company, LLC, as Ogden Lincoln.

ANSWER: Westmont Lincoln admits the allegations contained in paragraph 27.

28. As part of the purported asset transfer, Westmont Lincoln assumed Ogden Lincoln's Dealer Advertising Co-Op funds.

ANSWER: Westmont Lincoln denies the allegations contained in paragraph 28.

29. Westmont Lincoln assumed Ogden Lincoln's ongoing credits and debits associated with its parts and accessories operation.

ANSWER: Westmont Lincoln denies the allegations contained in paragraph 29.

30. Westmont Lincoln assumed $835,000 of Ogden Lincoln's secured debt.

ANSWER: Westmont Lincoln admits the allegations contained in paragraph 30.

31. Westmont Lincoln has the exact same phone number as Ogden Lincoln, 630-968-5600.

ANSWER: Westmont Lincoln admits the allegations contained in paragraph 31 as is consistent with industry practice.

32. Westmont Lincoln is a mere continuation of, or a de facto merger with, Ogden Lincoln, with the same ownership and management, and is therefore liable to Baird for the unpaid amounts of the March 2012 Judgment Order.

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ANSWER: Paragraph 32 is a legal conclusion which requires no answer. Without waiving its objection, Westmont Lincoln denies the allegations contained in paragraph 32.

33. Baird has a tangible legal interest in the enforcement of the March 2012 Judgment Order.

ANSWER: Paragraph 33 is a legal conclusion to which no answer is required.

34. Westmont Lincoln's legal interest is adverse to Baird's, as it is anticipated Westmont Lincoln will deny liability to Baird for the March 2012 Judgment Order.

ANSWER: Paragraph 34 is a legal conclusion to which no answer is required.

35. There is an actual controversy between Westmont Lincoln and Baird regarding Westmont Lincoln's liability for the March 2012 Judgment Order.

ANSWER: Westmont Lincoln denies the allegations contained in paragraph 35. Answering further, under well settled Illinois law, a legal entity which purchases the assets of another legal entity does not become liable for the debts of the seller in the absence of an express agreement to assume the debts. *Myers v. Putzmeister*, 232 Ill. App. 3d 419, 422 (1st Dist. 1992). Therefore, there is no actual controversy.

WHEREFORE, Defendant Westmont Lincoln respectfully requests that this Court enter judgment in its favor on Count I of Plaintiff's Complaint and grant such further relief as it deems just and equitable.

COUNT II
(Intentional Fraudulent Transfer — 740 ILCS 160/5(a))

36. Baird re-alleges and incorporates paragraphs 1 through 35 above as if fully set forth herein.

ANSWER: Westmont Lincoln re-alleges and incorporates its answers to paragraphs 1 through 35 above as if fully set forth herein.

37. The transfer of assets from Ogden Lincoln to Westmont Lincoln by Iozzo was made with the actual intent to hinder, delay or defraud Baird.

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ANSWER: Westmont Lincoln denies the allegations contained in paragraph 37.

38. The transfer of assets from Ogden Lincoln to Westmont Lincoln was made to an insider, i.e. Iozzo, because Iozzo retained ownership and control of the assets through his ownership interest in the new entity and his managerial role.

ANSWER: Paragraph 38 is a legal conclusion which requires no answer. Without waiving its objection, Westmont Lincoln denies the allegations contained in paragraph 38. Further, Iozzo does not personally own or have any right to own any interest in Westmont Lincoln.

39. Iozzo retained possession and control of the assets of Ogden Lincoln.

ANSWER: Westmont Lincoln denies the allegations contained in paragraph 39.

40. The transfer was concealed from Baird, and Baird did not discover the transfer until Baird commenced supplemental proceedings against Ogden Lincoln to enforce the March 2012 Judgment Order.

ANSWER: Westmont Lincoln denies the allegations contained in paragraph 40.

41. The transfer from Ogden Lincoln to Westmont Lincoln consisted of all of Ogden Lincoln's assets, leaving Ogden Lincoln an empty shell unable to pay its creditors.

ANSWER: Westmont Lincoln denies the allegations contained in paragraph 41.

42. The consideration for the transfer was inadequate, and in the months following the purported transfer, Iozzo funneled over $1,000,000 into Westmont Lincoln.

ANSWER: Paragraph 42 is a legal conclusion which requires no answer. Without waiving its objection, Westmont Lincoln denies the allegations contained in paragraph 42.

43. Ogden Lincoln was at the time of the transfer insolvent or became insolvent as a result of the transfer, and was consequently unable to pay its creditors.

ANSWER: Paragraph 43 is a legal conclusion which requires no answer. Without waiving its objection, Westmont Lincoln admits that Ogden Lincoln was in

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serious financial distress at the time of the APA, but denies the remaining allegations in paragraph 43.

44. Because the transfer of assets from Ogden Lincoln to Westmont Lincoln by Iozzo was made with the actual intent to hinder, delay or defraud Baird, it was a fraudulent transfer.

ANSWER: Paragraph 44 is a legal conclusion which requires no answer. Without waiving its objection, Westmont Lincoln denies the allegations contained in paragraph 44.

45. Accordingly, pursuant to 740 ILCS 160/8 and 740 ILCS 160/9, Baird is entitled to the entry of Judgment against Westmont Lincoln in the amount that is the lesser of (a) the March 2012 Judgment Order and (b) the value of the assets transferred to Westmont Lincoln.

ANSWER: Paragraph 45 is a legal conclusion which requires no answer.

WHEREFORE, Defendant Westmont Lincoln respectfully requests that this Court enter judgment in its favor on Count II of Plaintiff's Complaint and grant such further relief as it deems just and equitable.

COUNT III
(Constructive Fraudulent Transfer — 740 ILCS 160/6(a))

46. Baird re-alleges and incorporates paragraphs 1 through 35 above as if fully set forth herein.

ANSWER: Westmont Lincoln re-alleges and incorporates its answers to paragraphs 1 through 35 above as if fully set forth herein.

47. The transfer of assets from Ogden Lincoln to Westmont Lincoln by Iozzo was constructively fraudulent as to Baird.

ANSWER: Paragraph 47 is a legal conclusion which requires no answer. Without waiving its objection, Westmont Lincoln denies the allegations contained in paragraph 47.

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48. The March 2012 Judgment Order preexisted the July 2015 transfer of assets from Ogden Lincoln to Westmont Lincoln.

ANSWER: Westmont Lincoln admits the allegations contained in paragraph 48.

49. The consideration for the transfer was inadequate, and in the months following the purported transfer, Iozzo funneled over $1,000,000 into Westmont Lincoln.

ANSWER: Paragraph 49 is a legal conclusion which requires no answer. Without waiving its objection, Westmont Lincoln denies the allegations contained in paragraph 49

50. Ogden Lincoln was at the time of the transfer insolvent or became insolvent as a result of the transfer, and was consequently unable to pay its creditors.

ANSWER: Paragraph 50 is a legal conclusion which requires no answer. Without waiving its objection, Westmont Lincoln admits that Ogden Lincoln was in serious financial distress at the time of the APA, but denies that it was unable to pay any of its creditors.

51. Because the transfer of assets from Ogden Lincoln to Westmont Lincoln by Iozzo was constructively fraudulent with respect to Baird, it was a fraudulent transfer.

ANSWER: Paragraph 51 is a legal conclusion which requires no answer. Without waiving its objection, Westmont Lincoln denies the allegations contained in paragraph 51.

52. Accordingly, pursuant to 740 ILCS 160/8 and 740 ILCS 160/9, Baird is entitled to the entry of Judgment against Westmont Lincoln in the amount that is the lesser of (a) the March 2012 Judgment Order and (b) the value of the assets transferred to Westmont Lincoln.

ANSWER: Paragraph 52 is a legal conclusion which requires no answer.

WHEREFORE, Defendant Westmont Lincoln respectfully requests that this Court enter judgment in its favor on Count III of Plaintiff's Complaint and grant such further relief as it deems just and equitable.

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AFFIRMATIVE DEFENSES

FACTS COMMON TO ALL AFFIRMATIVE DEFENSES

1. Westmont Lincoln, LLC ("Westmont") is an Illinois limited liability company. Its sole Manager is Douglas Laux.

2. Ogden Lincoln, Inc., formerly known as Ogden Lincoln-Mercury, Inc. ("Ogden"), was an Illinois corporation originally organized in 1954. It was dissolved on December 1, 2015.

3. Ogden was formed in 1954 by Fred Iozzo, Sr.

4. In 1993, Fred Iozzo, Jr. established the Marc F. Iozzo Gift Trust ("Gift Trust").

5. Marc Iozzo has never personally owned any Ogden stock, nor is he a member of Westmont.

6. Marc Iozzo was not the grantor of the Gift Trust.

7. In the mid-to-late 2000s, Marc Iozzo borrowed money from Gregory Baird. The loan was not secured.

8. On August 17, 2011, Baird filed a lawsuit against Marc Iozzo for breach of contract relating to the loan in case 2011 CH 3899 in the Eighteenth Judicial Circuit in DuPage County, Illinois (the "Litigation").

9. In the Litigation, Baird also sued Ogden on an alternative theory of liability: quantum meruit. Baird alleged that Ogden benefited from his loan to Marc Iozzo.

10. Ogden was struggling financially when the Litigation was filed, which is one of the reasons Marc Iozzo had borrowed money from Baird.

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11. On March 19, 2012, following a settlement conference, Ogden entered into a consent judgment ("Consent Judgment") with Baird on Count III of the Complaint filed in the Litigation (quantum meruit) in the sum of $6,787,609.99. (A copy of the consent judgment is attached to Plaintiff's Complaint as Exhibit A.)

12. The Consent Judgment was not deemed a final judgment until January 21, 2016 when a final and appealable judgment order was entered against Marc Iozzo on Counts I and II of Baird's Complaint ("Final Judgment"). (A copy of the Final Judgment is attached to Plaintiff's Complaint as Exhibit B.)

13. In 2014, with Ogden's financial future in doubt, Ogden explored a sale of its assets. Ultimately, Ogden entered into an Asset Purchase Agreement with Westmont.

14. The Asset Purchase Agreement, among other things, required Westmont to assume Ogden's secured debt to Ford Motor Company.

15. The Asset Purchase Agreement also provided reasonably equivalent value for Ogden's goodwill, fixed assets, parts and accessories and new and used motor vehicle inventories.

16. The monetary consideration Ogden received from the Asset Purchase Agreement with Westmont was not distributed to shareholders. The entire sum was used to pay certain debts of Ogden.

17. Ogden received fair and adequate consideration from Westmont for the assets sold under the Asset Purchase Agreement, including consideration for Ogden's goodwill.

18. Westmont did not assume Ogden's obligation to Baird under the Consent Judgment.

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19. The membership of Westmont is entirely different than the stock ownership of Ogden.

20. Westmont is not in privity with Ogden.

21. The Consent Judgment and Final Judgment relate to the same transaction – money lent to Marc Iozzo by Baird.

22. Baird is seeking to enforce two (2) judgments, relating to the same transaction, in two (2) separate proceedings.

FIRST AFFIRMATIVE DEFENSE

23. Westmont re-alleges and incorporates paragraphs 1 through 22 above of these Affirmative Defenses as if fully set forth herein.

24. "The Illinois Supreme Court has consistently held that '[t]he well-settled general rule is that a corporation that purchases the assets of another corporation is not liable for the debts or liabilities of the transferor corporation.'" *Diguilio v. Goss Intern. Corp.*, 389 Ill. App. 3d 1052, 1059 (1st Dist. 2009), *citing*, *Vernon v. Schuster*, 179 Ill. 2d 338, 344-45 (Ill. 1997).

25. Baird admits that the transaction between Ogden and Westmont relating to the transfer of Ogden's assets occurred "through an Asset Purchase Agreement." (Complaint, ¶ 17.)

26. Because the transfer in issue occurred under an Asset Purchase Agreement, Count I, seeking relief under a successor liability theory, is without merit and judgment should be entered in Westmont Lincoln's favor.

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SECOND AFFIRMATIVE DEFENSE

27. Westmont re-alleges and incorporates paragraphs 1 through 26 above of these Affirmative Defenses as if fully set forth herein.

28. An action for either an intentional (Count I) or constructive (Count II) fraudulent transfer under Illinois' Uniform Fraudulent Transfer Act (740 ILCS § 160/1, *et seq.*) requires that the transferor make the transfer "without receiving a reasonably equivalent value in exchange for the transfer." *See* 740 ILCS §§ 160/5 (a) and 160/6(a).

29. Here, there was a transfer of assets, and the transfer was supported by good and valuable consideration, which was reasonably equivalent in value.

30. Additionally, "[u]nder Illinois law … the mere preference of one or more creditors over others does not constitute a fraudulent transfer." *Liquidation of MedCare HMO, Inc.*, 294 Ill. App. 3d 42, 52 (1st Dist. 1997).

31. Because the transfer was supported by adequate consideration, and because preferring one creditor over another does not, as a matter of law, constitute a fraudulent transfer, judgment should be entered in favor of Westmont Lincoln on Counts II and III.

THIRD AFFIRMATIVE DEFENSE

32. Westmont re-alleges and incorporates paragraphs 1 through 31 above of these Affirmative Defenses as if fully set forth herein.

33. The Illinois Code of Civil Procedure permits alternative pleadings; however, a plaintiff is entitled to but one recovery for damages related to the same transaction or occurrence. *See Chuttke v. Fresen*, 2017 IL App. (2d) 161018, ¶ 10 ("A

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plaintiff is entitled to only one recovery and only one satisfaction for her injuries, regardless of the number of causes of action advanced.").

34. Baird may not seek double recovery. Additionally, he has an obligation to mitigate his damages, which he has clearly failed to do by delaying any attempt of enforcement of the Consent Judgment until almost four (4) years after its entry.

35. Judgment should be entered in favor of Westmont Lincoln on Baird's Complaint because he: (1) failed to mitigate damages; and (2) is seeking double recovery.

Dated: April 6, 2018

WESTMONT LINCOLN, LLC d/b/a
OGDEN LINCOLN OF WESTMONT

By: /s/ Gerard D. Ring
One of its attorneys

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SUMMONS - CIRCUIT COURT 1101.1 (Rev. 03/2011)

STATE OF ILLINOIS **UNITED STATES OF AMERICA** **COUNTY OF DU PAGE**

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT

GREGORY BAIRD
PLAINTIFF

VS

WESTMONT LINCOLN, LLC d/b/a OGDEN LINCOLN OF WESTMONT
DEFENDANT

2018MR000224
CASE NUMBER

File Stamp Here

SUMMONS
CIRCUIT COURT

☒ ORIGINAL ☐ ALIAS

To each Defendant: Westmont Lincoln, LLC d/b/a Ogden Lincoln of Westmont, c/o Registered Agent, Burkelaw Agents, Inc. 330 N. Wabash Ave, 21 Floor, Chicago, IL 60611

You are Summoned and Required to file an answer to the complaint in this case, a copy of which is hereto attached, or otherwise file your appearance in the office of the Clerk of the Circuit Court, 505 N. County Farm Road, Wheaton, Illinois, within 30 days after service of this summons not counting the day of service.

If you fail to do so, a judgment by default may be entered against you for the relief asked in the complaint.

To the Officer

This summons must be returned by the officer or other person to whom it was given for service, with endorsement of service and fees, if any, immediately after service and not less than three (3) days before the date of appearance. If service cannot be made, this summons shall be returned so endorsed.

This summons may not be served later than thirty (30) days after its date.

DATE OF SERVICE
TO BE INSERTED BY OFFICER ON COPY LEFT WITH DEFENDANT OR OTHER PERSON

Name: **Steven H. Leech** ☐ PRO SE

DuPage Attorney Number: **93882**

Attorney for: **Plaintiff**

Address: **One East Wacker Drive, Suite 1700**

City/State/Zip: **Chicago, Illinois 60601**

Telephone Number: **312-782-5010**

WITNESS: **Electronically Issued**

Date 02/15/2018

CHRIS KACHIROUBAS, Clerk of the Eighteenth Judicial Circuit and the Superior Court of DuPage County, Illinois

CHRIS KACHIROUBAS, Clerk

Date

By NICHOLAS TELANDER
Deputy Clerk

Deputy Clerk

4216993

NOTE:

The filing of an appearance or answer with the Circuit Court Clerk requires a statutory filing fee, payable at the time of filing.

If you need legal advice concerning your legal responsibility as a result of this summons being serviced upon you and you don't have a lawyer, you can call the DuPage Bar Association, Lawyer Referral Service at 630-653-9109.

CHRIS KACHIROUBAS, CLERK OF THE 18th JUDICIAL CIRCUIT COURT ©
WHEATON, ILLINOIS 60187-0707

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DOC. TYPE: SUMMONS
CASE NUMBER: 18MROOO224
DEFENDANT
WESTMONT LINCOLN LLC DBA OGDEN LINCOLN
330 N WABASH AVE
CHICAGO, IL 60611
21 FLR

DIE DATE
03/02/2018

SERVICE INF
INC

ATTACHED

SHERIFF'S FEES

Service and return ..... $ _____

Miles _____ ..... $ _____

Total ..... $ _____

Sheriff of _____ County

SHERIFF'S RETURN

I certify that I served this summons on defendant as follows:

☐ (a) (Individual - **personal**):
By leaving a copy and a copy of the complaint with each individual as follows:

☐ (b) (Individual - **abode**):
By leaving a copy and a copy of the complaint at the usual place of abode of each individual with a person of his family, of the age of 13 years or upwards, informing that person of the contents of the summons, and also by sending a copy of the summons and the complaint in a sealed envelope with postage fully prepaid, addressed to each individual at the usual place of abode, as follows:

☐ (c) (Corporation):
By leaving a copy and a copy of the complaint with the registered agent, officer, or agent of each corporation as follows:

☐ (d) (Other service):

☐ (e) (Unable to Serve):
By _____, Deputy Badge Number: _____

Name of Defendant _____

Name of Person summons given to _____

Sex _____ Race _____ Approx. age _____

Place of service _____

City , State _____

Date of service _____ Time _____

Date of Mailing _____

Special Process Server of _____

Name of Defendant _____

Name of Person summons given to _____

Sex _____ Race _____ Approx. age _____

Place of service _____

City , State _____

Date of service _____ Time _____

Date of Mailing _____

Sheriff of _____ County

County Illinois License # _____

By _____

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Firm I. D. #93882

IN THE CIRCUIT COURT FOR THE EIGHTEENTH JUDICIAL CIRCUIT
DU PAGE COUNTY, ILLINOIS

GREGORY BAIRD, Plaintiff, v. WESTMONT LINCOLN, LLC, d/b/a OGDEN LINCOLN OF WESTMONT, Defendant.	)	2018MR000224 Case No.

Chris Kachiroubas
e-filed in the 18th Judicial Circuit Court
DuPage County
TRAN# : 17043917539/(4216363)
2018MR000224
FILEDATE : 02/14/2018
Date Submitted : 02/14/2018 05:04 PM
Date Accepted : 02/15/2018 10:00 AM
BURGAN,KATE
04/16/2018 rm2005 9:00am

COMPLAINT FOR DECLARATORY JUDGMENT AND OTHER RELIEF

Plaintiff, Gregory Baird ("Baird"), by his attorneys, Gozdecki, Del Giudice, Americus, Farkas & Brocato LLP, for his Complaint against Defendant, Westmont Lincoln, LLC, d/b/a Ogden Lincoln of Westmont ("Westmont Lincoln"), states as follows:

PARTIES

1. Baird is a natural person who resides in Hinsdale, DuPage County, Illinois.

2. Westmont Lincoln is an Illinois limited liability company with its principal place of business at 100 West Ogden Avenue, Westmont, DuPage County, Illinois. Westmont Lincoln is in the business of selling new and used Lincoln automobiles.

JURISDICTION AND VENUE

3. This Court has personal jurisdiction over Westmont Lincoln pursuant to 735 ILCS § 5/2-209 because Westmont Lincoln, *inter alia*, transacts business within this State, committed the wrongful acts out of which these causes of action arose within this State, and owns, uses or possesses real estate located within this State.

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4. Venue is proper in DuPage County pursuant to 735 ILCS § 5/2-101 because this is the county in which Westmont Lincoln resides, and because this is the County in which the transactions or some part thereof occurred out of which these causes of action arose.

FACTUAL BACKGROUND

A. Iozzo and Ogden Lincoln's Judgment Debt to Baird.

5. Marc Iozzo ("Iozzo"), individually and doing business as a sole proprietorship known as Ogden Auto Group, owned several automobile dealerships in the Chicago area, including Ogden Lincoln-Mercury, Inc. and Ogden Chevrolet, Inc. Iozzo, individually and d/b/a Ogden Auto Group, Ogden Lincoln-Mercury, Inc., and Ogden Chevrolet, Inc. borrowed money from Baird in connection with the ownership and operation of those automobile dealerships from 2006 – 2009.

6. In 2010, Iozzo, individually and d/b/a Ogden Auto Group, Ogden Lincoln-Mercury, Inc., and Ogden Chevrolet, Inc., stopped making payments on the loans, and the loans were never repaid.

7. On August 17, 2011, Baird filed a lawsuit against Iozzo, individually and d/b/a Ogden Auto Group, Ogden Lincoln-Mercury, Inc., and Ogden Chevrolet, Inc. to recover, *inter alia*, the unpaid balance of the loans (the "2011 Litigation").

8. Ogden Lincoln-Mercury, Inc. changed its name to Ogden Lincoln, Inc. ("Ogden Lincoln") on September 30, 2011.

9. On March 19, 2012, the Circuit Court of the Eighteenth Judicial Circuit entered judgment in favor of Baird and against Ogden Lincoln-Mercury, Inc. and Ogden Chevrolet, Inc.[1]

[1] Ogden Chevrolet, Inc. dissolved in 2013 after losing its Chevrolet franchise.

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in the amount of $6,787,609.99. A true and correct copy of that judgment is attached hereto as Exhibit A ("March 2012 Judgment Order").

10. On January 21, 2016, this Court issued a final judgment in favor of Baird and against Iozzo, individually and doing business as Ogden Auto Group. A true and correct copy of that judgment is attached hereto as Exhibit B ("January 2016 Judgment Order").

11. By virtue of the Court's entry of the January 2016 Judgment Order, the March 2012 Judgment Order became final and enforceable. The outstanding balance on the March 2012 Judgment Order as to Ogden Lincoln is $10,334,929.48, as of February 13, 2018.

B. Ogden Lincoln's Purported Asset Sale.

12. During the pendency of the 2011 Litigation, Iozzo took elaborate and improper steps to shield his business assets from creditors.

13. Iozzo was the President of Ogden Lincoln, and controlled the day to day operations of Ogden Lincoln for approximately 20 years.

14. In 2012, Iozzo transferred his personal stock in Ogden Lincoln to the Marc Iozzo Gift Trust ("Gift Trust"), which became the sole owner of Ogden Lincoln.

15. Iozzo was the Trustee of his Gift Trust and had complete control over the Gift Trust, and consequently, Ogden Lincoln.

16. Ultimately, Iozzo purported to transfer the assets of Ogden Lincoln to Westmont Lincoln.

17. The transfer of assets to Westmont Lincoln occurred while the 2011 Litigation was pending, and was effectuated on or about July 31, 2015 through an Asset Purchase Agreement dated June 24, 2014 ("APA").

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COUNT I
DECLARATORY JUDGMENT – SUCCESSOR LIABILITY

18. Baird re-alleges and incorporates paragraphs 1 through 17 above as if fully set forth herein.

19. The purported transfer to Westmont Lincoln was a sham in an effort to avoid paying Ogden Lincoln's obligations to creditors, including the $10,334,929.48 due and owing to Baird, and Westmont Lincoln is a mere continuation of Ogden Lincoln .

20. Westmont Lincoln, as was Ogden Lincoln, is owned by an Iozzo trust.

21. Specifically, the Marc F. Iozzo Discretionary Trust ("Discretionary Trust") owns 92% of Westmont Lincoln.

22. Iozzo was at all relevant times a Co-Trustee of the Discretionary Trust together with his elderly mother, Elaine Iozzo, and Iozzo exercised unfettered authority over the Discretionary Trust.

23. Iozzo at all relevant times was in charge of the management and day to day operations of Ogden Lincoln, and remains in charge of the management and day to day operations of Westmont Lincoln.

24. Most of the current Westmont Lincoln employees previously worked for Ogden Lincoln.

25. Other than Iozzo, there are at least four senior managers at Westmont Lincoln, including but not limited to Brian Rudowicz, Mike Cima, Mike Laux and Joshua Breen. Of those managers, Brian Rudowicz, Mike Cima and Mike Laux all previously worked at Ogden Lincoln.

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26. Westmont Lincoln operates out of the exact same location, 100 W. Ogden, Westmont, Illinois, as Ogden Lincoln did for decades before the purported transfer of assets to Westmont Lincoln.

27. Westmont Lincoln uses the same lender, Ford Motor Credit Company, LLC, as Ogden Lincoln.

28. As part of the purported asset transfer, Westmont Lincoln assumed Ogden Lincoln's Dealer Advertising Co-Op funds.

29. Westmont Lincoln assumed Ogden Lincoln's ongoing credits and debits associated with its parts and accessories operation.

30. Westmont Lincoln assumed $835,000 of Ogden Lincoln's secured debt.

31. Westmont Lincoln has the exact same phone number as Ogden Lincoln, 630-968-5600.

32. Westmont Lincoln is a mere continuation of, or a de facto merger with, Ogden Lincoln, with the same ownership and management, and is therefore liable to Baird for the unpaid amounts of the March 2012 Judgment Order.

33. Baird has a tangible legal interest in the enforcement of the March 2012 Judgment Order.

34. Westmont Lincoln's legal interest is adverse to Baird's, as it is anticipated Westmont Lincoln will deny liability to Baird for the March 2012 Judgment Order.

35. There is an actual controversy between Westmont Lincoln and Baird regarding Westmont Lincoln's liability for the March 2012 Judgment Order.

WHEREFORE, Plaintiff Gregory Baird respectfully requests that the Court enter Judgment in his favor and against Westmont Lincoln, LLC as follows:

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A. Declaring that Westmont Lincoln is the successor to Ogden Lincoln;

B. Entering Judgment against Westmont Lincoln and in favor of Baird in the amount of the unpaid amount of the March 2012 Judgment Order; and

C. Awarding such other and further relief as this Court deems necessary and appropriate.

COUNT II
Intentional Fraudulent Transfer – 740 ILCS 160/5(a)

36. Baird re-alleges and incorporates paragraphs 1 through 35 above as if fully set forth herein.

37. The transfer of assets from Ogden Lincoln to Westmont Lincoln by Iozzo was made with the actual intent to hinder, delay or defraud Baird.

38. The transfer of assets from Ogden Lincoln to Westmont Lincoln was made to an insider, i.e. Iozzo, because Iozzo retained ownership and control of the assets through his ownership interest in the new entity and his managerial role.

39. Iozzo retained possession and control of the assets of Ogden Lincoln.

40. The transfer was concealed from Baird, and Baird did not discover the transfer until Baird commenced supplemental proceedings against Ogden Lincoln to enforce the March 2012 Judgment Order.

41. The transfer from Ogden Lincoln to Westmont Lincoln consisted of all of Ogden Lincoln's assets, leaving Ogden Lincoln an empty shell unable to pay its creditors.

42. The consideration for the transfer was inadequate, and in the months following the purported transfer, Iozzo funneled over $1,000,000 into Westmont Lincoln.

43. Ogden Lincoln was at the time of the transfer insolvent or became insolvent as a result of the transfer, and was consequently unable to pay its creditors.

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44. Because the transfer of assets from Ogden Lincoln to Westmont Lincoln by Iozzo was made with the actual intent to hinder, delay or defraud Baird, it was a fraudulent transfer.

45. Accordingly, pursuant to 740 ILCS 160/8 and 740 ILCS 160/9, Baird is entitled to the entry of Judgment against Westmont Lincoln in the amount that is the lesser of (a) the March 2012 Judgment Order and (b) the value of the assets transferred to Westmont Lincoln.

WHEREFORE, Baird respectfully prays for the entry of a judgment in his favor as follows:

A. Declaring that the transfer of assets from Ogden Lincoln to Westmont Lincoln was fraudulent as to Baird;

B. Entering judgment against Westmont Lincoln and in favor of Baird in the amount that is the lesser of (a) the March 2012 Judgment Order and (b) the value of the assets transferred to Westmont Lincoln; and

C. Awarding such other and further relief as this Court deems necessary and appropriate.

COUNT III
Constructive Fraudulent Transfer – 740 ILCS 160/6(a)

46. Baird re-alleges and incorporates paragraphs 1 through 35 above as if fully set forth herein.

47. The transfer of assets from Ogden Lincoln to Westmont Lincoln by Iozzo was constructively fraudulent as to Baird.

48. The March 2012 Judgment Order preexisted the July 2015 transfer of assets from Ogden Lincoln to Westmont Lincoln.

49. The consideration for the transfer was inadequate, and in the months following the purported transfer, Iozzo funneled over $1,000,000 into Westmont Lincoln.

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50. Ogden Lincoln was at the time of the transfer insolvent or became insolvent as a result of the transfer, and was consequently unable to pay its creditors.

51. Because the transfer of assets from Ogden Lincoln to Westmont Lincoln by Iozzo was constructively fraudulent with respect to Baird, it was a fraudulent transfer.

52. Accordingly, pursuant to 740 ILCS 160/8 and 740 ILCS 160/9, Baird is entitled to the entry of Judgment against Westmont Lincoln in the amount that is the lesser of (a) the March 2012 Judgment Order and (b) the value of the assets transferred to Westmont Lincoln.

WHEREFORE, Plaintiff Gregory Baird respectfully requests that the Court enter Judgment in his favor and against Westmont Lincoln, LLC providing for the following relief:

A. Declaring that the transfer of assets from Ogden Lincoln to Westmont Lincoln was constructively fraudulent as to Baird;

B. Entering judgment against Westmont Lincoln and in favor of Baird in the amount that is the lesser of (a) the March 2012 Judgment Order and (b) the value of the assets transferred to Westmont Lincoln; and

C. Awarding any other relief this Court may deem necessary and appropriate.

Respectfully submitted:

February 14, 2018

GREGORY BAIRD

By: _____
One of his Attorneys

Richard A. Del Giudice (r.delgiudice@gozdel.com)
David J. Ben-Dov (d.bendov@gozdel.com)
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STATE OF ILLINOIS **UNITED STATES OF AMERICA** **COUNTY OF DU PAGE**

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT

Gregory Bolid

vs

Ogden Lincoln Mercury, Inc et al

2011 CH 3899
CASE NUMBER

Chris Kachiroubas
e-filed in the 18th Judicial Circuit Court
DuPage County
TRAN# : 17043917539/(4216363)
2018MR000224
FILEDATE : 02/14/2018
Date Submitted : 02/14/2018 05:04 PM
Date Accepted : 02/15/2018 10:00 AM
BURGAN,KATE

File Stamp Here

ORDER

This matter coming on to be heard, the Court being fully advised in the premises and having jurisdiction of the subject matter, **IT IS HEREBY ORDERED:**

as to Count III for Quantum Meruit

Judgment is entered against the Defendants, Ogden Lincoln Mercury, Inc and Ogden Chevrolet Inc jointly and severally in the amount of $6,787,607.99

said amount comprised of $6,000,000 principal, $778,750 interest, and $8,857.99 in attorneys fees and costs

said judgment will be stayed until July 23, 2012

this judgment may not be a final and appealable order

Name: Hawkes Mcclister/LLP ☐ PRO SE
DuPage Attorney Number: 20508
Attorney for: II
Address: 1001 Warrenville Rd
City/State/Zip: Lisle IL 60532
Telephone: 630 434-0400

ENTER:

Judge

Date: 3/19/12

CHRIS KACHIROUBAS, CLERK OF THE 18th JUDICIAL CIRCUIT COURT ©
WHEATON, ILLINOIS 60187-0707

EXHIBIT
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Chris Kachiroubas
e-filed in the 18th Judicial Circuit Court
DuPage County
TRAN# : 17043917539/(4216363)
2018MR000224
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Firm I. BURGAN,KATE

2018MR000224

IN THE CIRCUIT COURT FOR THE EIGHTEENTH JUDICIAL CIRCUIT
DU PAGE COUNTY, ILLINOIS

11CH 3899

GREGORY BAIRD,)
)
Plaintiff,)
v.) Case No. 2011 CH 3899
)
MARC IOZZO, individually and d/b/a)
OGDEN AUTO GROUP, et al.)
)
Defendants.)

CASE CLOSED
JUDGE'S INIT.

FILED
16 JAN 27 AM 10: 56
THE CIRCUIT
DU PAGE COUNTY, ILLINOIS

JUDGMENT ORDER

On the Motion of Gregory Baird for Judgment on the Pleadings against Defendant Marc Iozzo, due notice having been given, and the Court being fully apprised in the premises;

IT IS HEREBY ORDERED:

(1) For the reasons set forth in this Court's December 29, 2015 Memorandum Opinion and Order, Judgment on Counts I and II of the Complaint is entered in favor of Gregory Baird and against Marc Iozzo, individually and doing business as Ogden Auto Group, in the amount of $8,489,931.51.

(2) Count IV of the Complaint is voluntarily dismissed without prejudice.

(3) The February 29, 2016 status hearing date is stricken.

(4) This Order is a final Order.

ENTER:

Judge

Order prepared by:
Steven H. Leech (s.leech@gozdel.com)
GOZDECKI, DEL GIUDICE, AMERICUS, FARKAS & BROCATO LLP
One East Wacker Drive
Suite 1700
Chicago, IL 60601
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EXHIBIT
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Attorney for Plaintiff
Firm I.D. #93882

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Document received on 2/14/18 5:04 PM Document accepted on 02/15/2018 10:00:11 # 4216363/17043917539

2020 IL App (3d) 180724

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Appellate Court of Illinois, Third District.

Diana ANGELL, Plaintiff-Appellant,
v.
SANTEFORT FAMILY HOLDINGS LLC, d/b/a Tri-Star Estates, Defendant-Appellee.

Appeal No. 3-18-0724
|
Opinion filed March 17, 2020

Synopsis

Background: Prospective mobile home buyer brought personal injury action against owner of mobile home park, a **limited liability company** (LLC), after she fell and was injured while touring mobile home located in park. The Circuit Court, Will County, Raymond E. Rossi, J., granted summary judgment for owner and denied prospective buyer's motion to reconsider, which requested leave to file amended complaint. Prospective buyer appealed.

Holdings: The Appellate Court, McDade, J., held that:

[1] owner of park and owner of mobile home were subject to doctrine of **piercing** the **corporate veil**, and

[2] fraud or injustice existed, as requirement to **pierce corporate veil**.

Reversed and remanded.

Schmidt, J., filed dissenting opinion.

West Headnotes (13)

[1] **Judgment**🔑Necessity that right to judgment be free from doubt

Courts should grant summary judgment only where the movant's right to it is clear and free from doubt.

[2] **Corporations and Business Organizations**🔑Nature of remedy

The doctrine of **piercing** the **corporate veil** is an equitable remedy; it is not itself a cause of action but rather is a means of imposing liability on an underlying cause of action, such as a tort or breach of contract.

[3] **Corporations and Business Organizations**🔑Disregarding Entity; **Piercing** Protective Veil

The doctrine of **piercing** the **corporate veil** allows courts to **pierce** the veil of limited liability where the corporation is merely the alter ego or business conduit of another person or entity.

[4] **Corporations and Business Organizations**🔑Disregarding Corporate Entity; **Piercing Corporate Veil**

Piercing of the **corporate veil** occurs almost exclusively in closely held corporations.

[5] **Corporations and Business Organizations**🔑Nature of remedy

As an equitable remedy, the doctrine of **piercing**

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the **corporate veil** looks to substance rather than form.

[6] **Corporations and Business Organizations**🔑Related corporations in general

Although **piercing** the **corporate veil** is often used to reach the assets of an individual for conduct of a corporation, courts may **pierce** the **corporate veil** of two affiliated or "sister" corporations.

[7] **Corporations and Business Organizations**🔑Particular occasions for determining entity

Owner of mobile home park and owner of mobile home located in park, which were both **limited liability companies** (LLCs), were so inextricably linked that they could not be considered separate entities, and thus were subject to the doctrine of **piercing** the **corporate veil**, in personal injury action brought by prospective mobile home buyer against owner of park after she fell and was injured while touring mobile home, where entities had same corporate officer, failed to keep an arm's length relationship, comingled funds, and were both formed to facilitate operations of the same trust.

[8] **Corporations and Business Organizations**🔑Reluctance to apply remedy

Courts are reluctant to **pierce** the **corporate veil**.

[9] **Corporations and Business Organizations**🔑Presumptions and burden of proof

A party seeking to **pierce** the **corporate veil** has the burden of making a substantial showing that the entities are not separate and distinct.

[10] **Corporations and Business Organizations**🔑Separate Corporations; Disregarding Separate Entities

A party seeking to **pierce** the **corporate veil** will be successful where (1) there is such a unity of interest and ownership that the separate personalities of the corporations no longer exist and (2) circumstances exist so that adherence to the fiction of a separate corporate existence would sanction a fraud, promote injustice, or promote inequitable consequences.

[11] **Corporations and Business Organizations**🔑Factors Considered

To determine if there is a unity of ownership and interest, as requirement to **pierce corporate veil**, courts consider: (1) inadequate capitalization; (2) failure to issue stock; (3) failure to observe corporate formalities; (4) nonpayment of dividends; (5) insolvency of the debtor corporation; (6) nonfunctioning of the other officers or directors; (7) absence of corporate records; (8) commingling of funds; (9) diversion of assets from the corporation by or to a stockholder or other person or entity to the detriment of creditors; (10) failure to maintain arm's-length relationships among related entities; and (11) whether, in fact, the corporation is a mere façade for the operation of the dominant stockholders.

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[12] **Appeal and Error**Corporations and other organizations

Appellate Court will not reverse the finding of the trial court regarding **piercing** the **corporate veil** unless it is against the manifest weight of the evidence.

[13] **Corporations and Business Organizations**Particular occasions for determining entity

Fraud or injustice existed, as requirement to **pierce** **corporate** **veil** between owner of mobile home park and owner of mobile home located in park, which were both **limited** **liability** **companies** (LLCs), in personal injury action brought by prospective mobile home buyer against owner of park after she fell and was injured while touring mobile home; owner of park delayed disclosure of evidence purporting to show that it was not owner of mobile home, and testimony regarding structure of organization to which owner of park belonged suggested an attempt at creating confusion and shielding various groups from liability.

Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois. Circuit No. 16-L-0232, The Honorable Raymond Rossi, Judge, presiding.

OPINION

JUSTICE McDADE delivered the judgment of the court, with opinion.

***1** ¶ 1 Plaintiff Diana Angell fell and was injured while touring a mobile home located at Tri-Star Estates in Bourbonnais, Illinois. She filed suit against Santefort Family Holdings, LLC (defendant), which owned the real-estate property where Tri-Star Estates is located. Defendant filed a motion for summary judgment, arguing that it did not own the mobile home at issue. The trial court granted defendant's motion, and Angell filed a motion to reconsider, requesting leave to file an amended complaint. The trial court denied the motion to reconsider. Angell appealed, arguing the trial court erred (1) in granting defendant's motion for summary judgment, (2) in denying her leave to file an amended complaint, and (3) in failing to **pierce** defendant's **corporate** **veil**. We reverse and remand for further proceeding.

¶ 2 I. BACKGROUND

¶ 3 On April 21, 2014, Diana Angell and her mother toured the inside of a mobile home at 38 St. Michaels Drive, in Tri-Star Estates, a mobile home park in Bourbonnais, Illinois. Angell was interested in buying or renting it. She walked into an unlit bathroom and stepped into an uncovered vent hole. As a result, Angell was seriously injured.

¶ 4 Angell obtained a title search for Tri-Star Estates, determined that defendant was its owner, and filed suit against that entity. In her complaint, she alleged that defendant carelessly and negligently removed a vent cover from the floor of the bathroom of the mobile home and neither replaced it nor warned her of the open hole. She also alleged that Santefort was negligent in that its agent showed her the bathroom of the mobile home without turning on the light.

¶ 5 In its answer, defendant objected to the question regarding whether it owned, occupied, leased, managed, or controlled the mobile home at the time of Angell's injury. Defendant contended that the question called for a legal conclusion or was otherwise vague. But, without waiving its objection, defendant denied owning the property. Defendant also objected to the question asking it to identify the entity that owned the mobile home, if Defendant was not the owner. Instead, defendant stated: "Santefort Family Homes, LLC did not own, manage, occupy, or lease the unit * * *." Defendant also denied that it had any "leases, contracts or similar agreements * * * with regard to the" mobile home.

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¶ 6 Defendant listed Brian Gallagher as its Chief Operating Officer and Chief Financial Officer. At his deposition, Gallagher testified that the Santefort Family 2012 Irrevocable Trust (irrevocable trust) owned Santefort Real Estate Group, LLC, which in turn owned and operated defendant. Gallagher was also the chief operating officer of Santefort Real Estate Group, LLC. There were at least 11 companies related to the irrevocable trust, each set up as a separate legal entity and managing a specific home community or apartment building.

¶ 7 Gallagher explained that the separate entities exist to facilitate the operations of the irrevocable trust. He believed this structure was "very common in residential real estate," as a lending industry requirement, stating:

> ***2** "Much of it is driven by lenders, and it's industry standard practice that lenders would want to have single-purpose entities and not multiple types of businesses regarding commercial or residential real estate. And so the lenders who provide mortgages to the property, that allow us to acquire properties with debt instead of all equity, expect the owner of that property to be a single-purpose entity for purposes of knowing that they can pursue that collateral directly without any other businesses being involved.
>
> As a result, we are required, and they expect us to have a separate management company, and they expect us to have a separate sales company, because they don't want, in the event of default, bankruptcy laws provide a simpler path to recovering their collateral than if there are other businesses involved in the single-purpose entity."

¶ 8 Gallagher was also the chief operating officer of Santefort Property Management, Inc. ("SPMI"), whom defendant hired under this structure to manage properties within the umbrella of the irrevocable trust. He admitted that it was "hard to keep track of" all the various entities and managing companies. Therefore, Santefort Services, LLC was created on January 1, 2016 to centrally pay the employees of the entire organization through a single entity, Santefort Services, LLC. Gallagher explained that Santefort Services, LLC is "really dedicated to processing the payroll for the entire organization * * *. So, everyone in the company is now paid by Santefort Services, LLC."

¶ 9 Neither defendant nor SPMI sold the mobile homes on defendant's property. Another entity, Midwest Home Rentals, LLC (Midwest), owned the mobile homes on the property. Midwest was "affiliated" with defendant but was solely responsible for the acquisition and sale of the mobile homes. Midwest's personnel handled the sales whereas SPMI's employees managed the property. Gallagher was also the chief operating officer of Midwest.

¶ 10 Gallagher admitted that "the operations, the revenues and expenses of operating the property [were] recorded on the books of Santefort Family Holdings," the named defendant in this case. He did not believe that defendant owned the mobile home where Angell was injured. He explained that when defendant bought the property "any home that came with it would have been assigned to" Midwest. By "assigned," he clarified, "Sold or transferred it. Not given it." He was unsure whether the assignment of each of home was memorialized "with specific paperwork or not." He believed it might have been done "with an accounting entry."

¶ 11 Gallagher testified that he investigated Angell's injuries and the circumstances of her fall. He recalled speaking with Michael Quam, a salesperson for Midwest, and Jeff Justice about their knowledge of her fall. According to Gallagher, Quam told him that he was showing Angell the mobile home when she walked away from where he was leading the tour. She then stepped into an open vent hole in the bathroom.

¶ 12 At his deposition, Michael Quam stated he was a sales assistant for Midwest and reported to Gallagher. While he was giving Angell a tour of the mobile home, she walked toward one of the bathrooms another Quam heard her scream. He found her with her leg in an uncovered vent hole. He called an ambulance because he felt that Angel was in "bad shape." He testified that he never spoke with Gallagher about this incident. Linda Quam, Michael Quam's wife, was also deposed. She worked for Midwest as a sales manager and reported to Gallagher. She said that repairs on the homes located at Tri-Star Estates, where Angell was injured, were contracted out and not done by SPMI or Midwest. Gallagher had hired both Michael and Linda Quam.

***3** ¶ 13 Defendant filed a motion for summary judgment, arguing that it did not own the mobile home at issue and, therefore, owed Angell no duty of care. Angell responded, arguing in part that Defendant was liable for the tort of Midwest under the doctrine of **piercing** the **corporate veil**. Alternatively, she requested leave to amend her complaint under Section 2-616(d) of the Illinois Code of Civil Procedure to add Midwest as a defendant. She did not include a proposed motion. One day before its response was due, Defendant submitted a supplemental answer to discovery with three attachments: (1) a tax bill for the year of 2014 on the mobile home naming "Mary Nemitz" as owing the unpaid bill, (2) an assignment of mortgage from TCF National Bank to Midwest, dated

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December 31, 2013, and (3) a certificate of title last recorded on January 27, 2007, naming Janet Warhover as the owner of the mobile home. The following day, defendant filed its reply to Angell's response.

¶ 14 The trial court granted defendant's motion for summary judgment on July 24, 2018. It ordered the case dismissed with prejudice. Angell timely filed a motion for reconsideration, which the trial court denied on November 13, 2018. Angell timely filed a notice of appeal.

¶ 15 This appeal now follows.

¶ 16 II. ANALYSIS

¶ 17 On appeal, Angell argues that the trial court erred in granting defendant's motion for summary judgment. Alternatively, Angell argues that the trial court erred in denying her motion for reconsideration and denying her leave to amend her complaint.

[1]¶ 18 We review a grant of summary judgment *de novo*. *Jackiewicz v. Vill. of Bolingbrook*, 2020 IL App (3d) 180346, ¶ 23, —— Ill.Dec. ——, —— N.E.3d ——. Summary judgment is appropriate only if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* at ¶ 22 (Internal quotation marks omitted). We review the record in "strictly against the movant and liberally for the nonmovant." *Id.* at ¶ 23. The movant need not prove her case but, to survive the motion, she "must present a factual basis that would arguably entitle [her] to judgment." *Daniels v. Corrigan*, 382 Ill. App. 3d 66, 70, 320 Ill.Dec. 124, 886 N.E.2d 1193 (2008) (Internal quotation marks omitted). Illinois courts thus should grant summary judgment only where the movant's right to it "is clear and free from doubt." *Id.*

¶ 19 The parties' arguments on appeal regarding defendant's motion for summary judgment reflect their arguments before the trial court. Defendant contends that Midwest was the owner of the mobile home, that defendant is a separate legal entity from Midwest, and that defendant had no ownership interest in the mobile home. For these reasons, defendant argues that it owed no duty of care to Angell. In response, Angell asserts that defendant and Midwest are "inextricably linked" and that the entities "function as a single business" under the Santefort Family 2012 irrevocable trust umbrella. She thus argues that the doctrine of **piercing** the **corporate veil** should apply to find defendant liable for Midwest's tort. We agree with Angell and reverse the trial court's grant of summary judgment.

[2] [3] [4] [5]¶ 20 In Illinois, "[t]he doctrine of **piercing** the **corporate veil** is an equitable remedy." (Internal quotation marks omitted.) *Fontana v. TLD Builders, Inc.*, 362 Ill. App. 3d 491, 500, 298 Ill.Dec. 654, 840 N.E.2d 767 (2005). It "is not itself a cause of action but rather is a means of imposing liability on an underlying cause of action, such as a tort or breach of contract." (Internal quotation mark omitted.) *In re Rehabilitation of Centaur Insurance Co.*, 238 Ill. App. 3d 292, 300, 179 Ill.Dec. 459, 606 N.E.2d 291 (1992), *aff'd*, 158 Ill. 2d 166, 198 Ill.Dec. 404, 632 N.E.2d 1015 (1994). It allows courts "to **pierce** the veil of limited liability where the corporation is merely the alter ego or business conduit of another person or entity." (Internal quotation marks omitted.) *Gajda v. Steel Solutions Firm, Inc.*, 2015 IL App (1st) 142219, ¶ 23, 395 Ill.Dec. 796, 39 N.E.3d 263. Veil-**piercing** occurs "almost exclusively in closely held corporations." *Buckley v. Abuzir*, 2014 IL App (1st) 130469, ¶ 11, 380 Ill.Dec. 624, 8 N.E.3d 1166. But, as an equitable remedy, the doctrine "looks to substance rather than form." *Fontana*, 362 Ill. App. 3d at 501, 298 Ill.Dec. 654, 840 N.E.2d 767.

***4** [6] [7]¶ 21 As a preliminary matter, defendant argues that the doctrine is inapplicable to it because it is not a shareholder of Midwest. We disagree. "Although **piercing** the **corporate veil** is often used to reach the assets of an individual for conduct of a corporation, courts may **pierce** the **corporate veil** of two affiliated or 'sister' corporations." *Gajda*, 2015 IL App (1st) 142219, ¶ 24, 395 Ill.Dec. 796, 39 N.E.3d 263 (citing *Tower Investors, LLC v. 111 East Chestnut Consultants, Inc.*, 371 Ill. App. 3d 1019, 1025, 309 Ill.Dec. 686, 864 N.E.2d 927 (2007)); *Main Bank of Chicago v. Baker*, 86 Ill. 2d 188, 205, 56 Ill.Dec. 14, 427 N.E.2d 94 (1981) (noting separate identities of corporations "owned by the same parent will likewise be disregarded in an appropriate case"). For the reasons stated below, we hold that defendant and Midwest are affiliates of the Santefort Family 2012 irrevocable trust and are subject to the doctrine of **piercing** the **corporate veil**.

[8] [9] [10] [11]¶ 22 Courts are reluctant to **pierce** the **corporate veil**. *Benzakry v. Patel*, 2017 IL App (3d) 160162, ¶ 65, 413 Ill.Dec. 309, 77 N.E.3d 1116. Accordingly, a party asserting the doctrine has the burden of making a substantial showing that the entities are not separate and distinct. *Id.* The asserting party will be successful where "(1) there is such a unity of interest and

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ownership that the separate personalities of the corporations no longer exist and (2) circumstances exist so that adherence to the fiction of a separate corporate existence would sanction a fraud, promote injustice, or promote inequitable consequences." (Internal quotation marks omitted.) *Gajda*, 2015 IL App (1st) 142219, ¶ 23, 395 Ill.Dec. 796, 39 N.E.3d 263. To determine if there is a unity of ownership and interest, we consider

> "(1) inadequate capitalization; (2) failure to issue stock; (3) failure to observe corporate formalities; (4) nonpayment of dividends; (5) insolvency of the debtor corporation; (6) nonfunctioning of the other officers or directors; (7) absence of corporate records; (8) commingling of funds; (9) diversion of assets from the corporation by or to a stockholder or other person or entity to the detriment of creditors; (10) failure to maintain arm's-length relationships among related entities; and (11) whether, in fact, the corporation is a mere façade for the operation of the dominant stockholders." (Internal quotation marks omitted.) *Id.* ¶ 24.

[12]¶ 23 We "will not reverse the finding of the trial court regarding **piercing** the **corporate** **veil** unless it is against the manifest weight of the evidence." *Fontana*, 362 Ill. App. 3d at 500, 298 Ill.Dec. 654, 840 N.E.2d 767. However, we do so here under the framework of a motion for summary judgment, reviewing the evidence *de novo* in the light most favorable to the nonmoving party. *Corrigan*, 382 Ill. App. 3d at 70, 320 Ill.Dec. 124, 886 N.E.2d 1193. We conclude that the manifest weight of the evidence shows that defendant and Midwest were not acting as separate and distinct entities when Angell was injured.

¶ 24 Gallagher's testimony shows that the two entities exist only to facilitate the operations of the irrevocable trust. He stated that commercial real estate industry lenders require property owners to be single-purpose entities. He explained that this requirement is in place to take advantage of the "bankruptcy laws," allowing for "a simpler path to recovering their collateral than if there are other businesses involved in the single-purpose entity." Under the irrevocable trust's structure, defendant owns the real-estate property, Midwest owns or holds the home as inventory for sale, and SPMI manages the property. Defendant contends that this structure is more than a mere façade. We disagree. Defendant provides no support, beyond Gallagher's testimony, establishing the existence of a lending industry requirement. But even if there were such a requirement, it cannot insulate defendant from the obligations of: observing corporate formalities; maintaining separate funds; and having different and independent officers from Midwest. Defendant has failed on all these factors, blurring the lines between itself and Midwest.

***5** ¶ 25 First, defendant and Midwest have the same corporate officer. Gallagher is the Chief Operating Officer for both entities, presumably managing both entities. He hired Linda and Michael Quam as salespersons at Midwest; they reported directly to him. He was also defendant's Chief Financial Officer, while being the Chief Operating Officer of its owner, Santefort Real Estate Group, LLC.

¶ 26 Second, Gallagher's testimony supports the conclusion that the entities failed to maintain an arm's length relationship. In addition to his positions in the various entities, Gallagher referred to defendant and Midwest as a single "organization." He admitted that it was hard to keep track of the entities. He also testified that the transfer of the homes between defendant and Midwest "might have [been] done * * * with an accounting entry." Such means of transfer would only be possible where the entities maintain the same accounting records. Gallagher's testimony further supports this conclusion. He testified that Midwest owned the property where Angell was injured. However, he testified that revenues from the property were recorded in defendant's accounting books. He also testified that defendant filed the taxes on the property.

¶ 27 Defendant argues that this Court should not rely on Gallagher's testimony regarding the transfer of homes because he was unsure of it. But if true, Gallagher's uncertainty shows that the entities failed to maintain proper corporate records. Gallagher was both the Chief Financial Officer for Defendant and the Chief Operating Officer for Midwest. If the transfer of homes was made between the two entities, he would have been able to determine how it was done.

¶ 28 Defendant asks instead that we look to the documents submitted in its supplemental answer to discovery, contending they showed that Midwest owned the mobile home at issue during the relevant time period. We disagree. The documents create more confusion than clarity. The certificate of title was from eight years before Angell's fall and referred to a person yet to be shown relevant in this case. Although it has "Midwest Home Rentals, LLC" written at the bottom, we have no way of knowing when this inscription was made or for what purpose. The tax bill, on the other hand, does not seem to relate to either entity. Arguably the assignment of mortgage might be indicative of ownership. But even so, it does not cure the entities' failure to maintain separate corporate identities.

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¶ 29 Finally, the record also shows that there was a comingling of funds between defendant and Midwest. We note again Gallagher's testimony regarding the recording of Midwest's property on Defendant's books and further consider his assertion that the employees of defendant and Midwest were paid from a single payroll system created under the umbrella of the irrevocable trust. Although he believed this system was created on January 1, 2016, after Angell's fall, he stated that the organization did so to streamline the previous arrangement. When viewed in the light most favorable to the nonmoving party, this suggests that the entities funds were comingled before January 1, 2016. We also note that Gallagher's various executive positions within the organization support our conclusion that the funds were comingled and centrally managed before January 1, 2016.

¶ 30 The manifest weight of the evidence here, when reviewed *de novo* and in the light most favorable to the nonmoving party, shows that defendant and Midwest are so inextricably linked that they cannot be considered separate entities. In fact, the record shows that the two entities, together with SPMI, are affiliated or sister entities under the Santefort Family 2012 irrevocable trust. We therefore hold that applying the doctrine of **piercing** the **corporate veil** to disregard the separate legal identities of defendant and Midwest is appropriate in this case. Therefore, we reverse the trial court's grant of defendant's motion for summary judgment.

***6** [13]¶ 31 The dissent argues that "no fraud or injustice exists here," and therefore affirming the grant of summary judgment is proper. We disagree. If defendant was the wrong party named in the suit, it had all the information necessary to alert Angell of this fact when it filed its answer to the complaint. However, defendant waited until after Gallagher's testimony to submit the necessary information. And again, defendant waited until a day before filing its reply in the summary judgment to submit evidence it alleges shows Midwest's ownership of the evidence. Finally, even Gallagher's testimony regarding the organization's structure suggests an attempt at creating confusion and shielding various groups from liability. The dissent also argues that without a judgment in Angell's favor, the doctrine of **piercing** the **corporate veil** is inapplicable. The dissent is incorrect. The doctrine is applicable as "a means of imposing liability on an underlying cause of action, such as a tort or breach of contract." (Internal quotation marks omitted.) *In re Rehabilitation of Centaur Insurance Co.*, 238 Ill. App. 3d at 300, 179 Ill.Dec. 459, 606 N.E.2d 291.

¶ 32 Because of our ruling, we need not address Angell's argument that the trial court erred in denying her leave to amend the complaint to add Midwest as a defendant. However, we note that nothing in our ruling precludes the amendment of Angell's complaint on remand.

¶ 33 III. CONCLUSION

¶ 34 The judgment of the circuit court of Will County is reversed, and the cause is remanded for further proceedings.

¶ 35 Reversed and remanded.

Justice O'Brien concurred in the judgment and opinion.

Justice Schmidt dissented, with opinion.

¶ 36 JUSTICE SCHMIDT, dissenting:

¶ 37 The party attempting to **pierce** the veil of a legal entity has the burden of making a substantial showing that the entity was so controlled or manipulated that it had become a mere alter ego of another. *Supra* ¶ 22. Here, plaintiff needed to make such a *substantial* showing. Reading the majority's analysis, one would assume that the financial records, corporate records, accounting records, and other crucial documents related to the legal entities involved are present in the record on appeal. They are not.

¶ 38 Instead, the majority takes plaintiff's burden upon itself, leaving defendant to rebut its *post hoc* analysis. It finds that Gallagher's various positions within the entities supports this conclusion. *Supra* ¶ 22. Also, it finds that he is "presumably" managing both entities. *Supra* ¶ 25. However, common officers and directors among entities alone is inadequate to **pierce** the veil. *Main Bank of Chicago v. Baker*, 86 Ill. 2d 188, 204-05, 56 Ill.Dec. 14, 427 N.E.2d 94 (1981). "These practices are common and exist in most parent-subsidiary relationships." *Id.*

¶ 39 The majority goes on to find that the entities failed to maintain an arm's length relationship and maintain proper corporate records. *Supra* ¶¶ 26-27. This is based on Gallagher's testimony alone, followed by speculation by

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the majority and not a substantial showing by plaintiff. Without accounting or corporate records to verify its assertion, the majority *assumes* the entities have maintained records improperly. The majority also asserts Gallagher admitted that it was hard for him to keep track of the various entities involved in this matter. *Supra* ¶ 26. A review of the testimony reveals that it was plaintiff's counsel that expressed difficulty in identifying between the entities, not Gallagher.

¶ 40 As the final support for **piercing** the veil, the majority states the "record also shows that there was a comingling of funds." *Supra* ¶ 29. Within the same paragraph, it only finds that the record, when viewed in the light most favorable to plaintiff, "suggests" comingling. *Supra* ¶ 29.

¶ 41 While seizing on Gallagher's deposition testimony as the linchpin of its analysis, in some respects, the majority refuses to accept Gallagher's unrebutted testimony that the commercial real-estate lending industry requires property owners to be single purpose-entities. It does not explain this refusal except to say that defendant has provided no support for this proposition. *Supra* ¶ 24. Defendant has no such burden.

***7** ¶ 42 Further, there must be evidence that "observance of the fiction of separate existence would, under the circumstances, sanction a fraud or promote injustice." *Baker*, 86 Ill. 2d at 205, 56 Ill.Dec. 14, 427 N.E.2d 94. I cannot find any evidence that Midwest was undercapitalized or stripped of its assets at the time of this suit. Had plaintiff sued the proper defendant, she presumably would have received any compensation awarded. No fraud or injustice exists here. The analysis above fails to convince me there has been a substantial showing by the plaintiff that requires **piercing** of the veil.

¶ 43 The fact of the matter is that plaintiff's counsel failed to name the correct party in this suit. During Gallagher's deposition the following exchanges took place:

> "Q: Okay. Who owned the trailer back in April of 2014?
>
> A: I believe it would have been Midwest Home Rentals.
>
> * * *
>
> Q: So when the accident happened, Santefort Family Holdings, LLC, would have owned that trailer?
>
> A: No. Midwest Home Rentals would have owned it."

Armed with the knowledge she was suing the wrong party, plaintiff pushed onward without attempting to amend. Compounding this error, plaintiff failed to file a motion for leave to amend her complaint. These errors prevented relation back to name Midwest as a party. See 735 ILCS 5/2-616(d)(3) (West 2018) (requiring amended pleadings to be filed with the court to relate back). If plaintiff would have filed a motion for leave to amend with the proposed amended pleading, she would likely have been able to establish Midwest had constructive notice and relation back to her original complaint. See *Owens v. VHS Acquisition Subsidiary Number 3, Inc.*, 2017 IL App (1st) 161709, ¶ 45, 413 Ill.Dec. 478, 78 N.E.3d 470.

¶ 44 What my colleagues do above is not "a means of imposing liability on an underlying cause of action," but instead is a way to overcome plaintiff's failure to follow proper procedure and give her another bite at the apple. (Internal quotation marks omitted.) *Supra* ¶ 20. In that way, the doctrine of **piercing** the veil has been improperly turned into a cause of action in this case. See *Gajda*, 2015 IL App (1st) 142219, ¶ 19, 395 Ill.Dec. 796, 39 N.E.3d 263. The majority rewards plaintiff's legal errors. It is not our job to act as plaintiff's attorneys. Affirming the court's grant of summary judgment would not result in fraud or promote injustice.

All Citations

--- N.E.3d ----, 2020 IL App (3d) 180724, 2020 WL 1281261

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321 Ill.App.3d 946 (Ill.App. 2 Dist. 2001)

749 N.E.2d 992, 255 Ill.Dec. 510

RHONDA FIUMETTO, Plaintiff-Appellant,

v.

GARRETT ENTERPRISES, INC., and CLAUDIA DUNBAR GARRETT, Defendants-Appellees.

No. 2-00-0456

Court of Appeals of Illinois Second District

April 25, 2001

Appeal from the Circuit Court of Lake County, No. 98-L-149. Honorable Charles F. Scott, Judge, Presiding.

[749 N.E.2d 993] [Copyrighted Material Omitted]

[749 N.E.2d 994] [Copyrighted Material Omitted]

[749 N.E.2d 995] [Copyrighted Material Omitted]

[749 N.E.2d 996] JUSTICE GROMETER delivered the opinion of the court:

Plaintiff, Rhonda Fiumetto, appeals an order of the circuit court of Lake County dismissing her two-count second amended complaint against defendants, Garrett Enterprises, Inc. (the corporation), and Claudia Dunbar Garrett (Garrett) (collectively defendants). In count I, plaintiff asserted an action for retaliatory discharge based on violations of portions of the Unemployment Insurance Act (Unemployment Act) (820 ILCS 405/100 et seq. (West 1996)). In count II, plaintiff sought recovery on the theory that her discharge constituted tortious interference with a business advantage. Plaintiff also appeals a grant of partial summary judgment made by the trial court prior to the filing of her second amended complaint, holding that plaintiff was not entitled to pierce the corporate veil and impose liability on Garrett individually. For the following reasons, we reverse in part, affirm in part, and remand this case for further proceedings.

I. BACKGROUND

Plaintiff was employed as a dance and gymnastics instructor by Garrett Enterprises, Inc., working between 16 and 28 hours per week. The availability of work diminished over the summer, as did the number of hours plaintiff worked; however, she was scheduled to work late in July 1997. Plaintiff alleges that on July 21, 1997, she informed Garrett that she had filed for unemployment. According to plaintiff, Garrett replied, "This is the end to a bad marriage. I can't believe you filed for unemployment. *** [Y]ou're going to cost me $100 a week." Plaintiff was then terminated. Thereafter, Garrett contested plaintiff's unemployment claim and, during that proceeding, allegedly admitted that plaintiff was terminated for filing for unemployment. Garrett filed an answer disputing plaintiff's version of events.

Plaintiff was employed with the business when Garrett purchased it in 1994. Garrett was the sole shareholder and president of the corporation. No director's meetings were held. Garrett infused money into the corporation through a series of loans. Subsequent to the initiation of this action, Garrett sold all of the assets of the corporation and used some of the proceeds to satisfy loans from herself and her ex-husband. Additional facts will be discussed as they relate to the issues raised by the parties.

II. RETALIATORY DISCHARGE

Plaintiff first contends that the trial court erred in dismissing her claim for retaliatory discharge pursuant to section 2-615 of the

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Code of Civil Procedure. 735 ILCS 5/2-615 (West 1998). The propriety of a dismissal under section 2-615 is a question of law, which we review de novo. *Board of Directors of Bloomfield*

[749 N.E.2d 997] C*lub Recreation Ass'n v. Hoffman Group, Inc.*, 186 Ill.2d 419, 424 (1999). In order to establish a cause of action for retaliatory discharge, plaintiffs must demonstrate that they were discharged in retaliation for their activities and that the discharge violated a clear mandate of public policy. *Hartlein v. Illinois Power Co.*, 151 Ill.2d 142, 160 (1992). Retaliatory discharge actions have traditionally been allowed in two situations: when an employee is discharged for seeking workers' compensation benefits and when an employee is discharged for reporting misconduct by the employer. Howard v. Zack Co., 264 Ill.App.3d 1012, 1022 (1994). It is undisputed that plaintiff was discharged, and plaintiff has alleged that the motivation for this discharge was retaliation for seeking unemployment benefits. Hence, the issue presented here is whether a discharge in retaliation for seeking benefits under the Unemployment Act (820 ILCS 405/100 et seq. (West 1996)) violates public policy such that it supports a cause of

action for retaliatory discharge. We conclude that it does.

Plaintiff asserts that her discharge violated public policy as expressed in the Unemployment Act. See 820 ILCS 405/100 (West 1996). The Unemployment Act contains the following extensive statement of its underlying purpose:

"As a guide to the interpretation and application of this Act the public policy of the State is declared as follows: Economic insecurity due to involuntary unemployment has become a serious menace to the health, safety, morals and welfare of the people of the State of Illinois. Involuntary unemployment is, therefore, a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. Poverty, distress and suffering have prevailed throughout the State because funds have not been accumulated in times of plentiful opportunities for employment for the support of unemployed workers and their families during periods of unemployment, and the taxpayers have been unfairly burdened with the cost of supporting able-bodied workers who are unable to secure employment. Farmers and rural communities particularly are unjustly burdened with increased taxation for the support of industrial workers at the very time when agricultural incomes are reduced by lack of purchasing power in the urban markets. It is the considered judgment of the General Assembly that in order to lessen the menace to the health, safety and morals of the people of Illinois, and to encourage stabilization of employment, compulsory unemployment insurance *** is necessary." 820 ILCS 405/100 (West 1996).

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Thus, the plain language of the Unemployment Act indicates that its purpose is to lessen the burden of unemployment upon unemployed workers. See Chicago Transit Authority v. Didrickson, 276 Ill.App.3d 773, 777 (1995); Jones v. Department of Employment Security, 276 Ill.App.3d 281, 284 (1995). It is well established that the Unemployment Act is remedial in nature. See, e.g., Bailey & Associates, Inc. v. Department of Employment Security, 289 Ill.App.3d 310, 318 (1997); Howard v. Forbes, 185 Ill.App.3d 148, 151 (1989). As a remedial act, it must be liberally construed. *Bridgestone/Firestone, Inc. v. Aldridge*, 179 Ill.2d 141, 155

[749 N.E.2d 998] (1997); Bethania Ass'n v. Jackson, 262 Ill.App.3d 773, 777 (1994).

The Unemployment Act, however, does not expressly grant a private right of action for individuals discharged in retaliation for seeking unemployment benefits. 820 ILCS 405/100 et seq. (West 1996). This omission does not necessarily resolve this issue against plaintiff. *Fisher v. Lexington Health Care, Inc.*, 188 Ill.2d 455, 460 (1999). In appropriate circumstances, a private right of action may be implied from a statute. *Rodgers v. St. Mary's Hospital*, 149 Ill.2d 302, 308 (1992). The existence of such a right of action may be implied if "(1) the plaintiff is a member of the class for whose benefit the statute was enacted; (2) the plaintiff's injury is one the statute was designed to prevent; (3) a private right of action is consistent with the underlying purpose of the statute; and (4) implying a private right of action is necessary to provide an adequate remedy for violations of the statute." Fisher, 188 Ill.2d at 460.

In Fisher, the supreme court emphasized that employment-at-will is the general rule in Illinois and that the tort of retaliatory discharge provides only a narrow exception. Fisher, 188 Ill.2d at 467. The court noted that it has "consistently sought to restrict" this tort. Fisher, 188 Ill.2d at 467. In the absence of explicit legislative authority, courts must hesitate to imply these actions. Fisher, 188 Ill.2d at 468. However, the Fisher court also reaffirmed that private rights of action could be implied in appropriate circumstances. Fisher, 188 Ill.2d at 460. Indeed, our supreme court recently pronounced that "[i]mplied private rights of action are an established feature of our jurisprudence." *Noyola v. Board of Education*, 179 Ill.2d 121, 128 (1997). Thus, while a court should not lightly conclude that a private right of action is implied by a statute, if the four-prong test set forth in Fisher, 188 Ill.2d at 460, is satisfied, such a right exists under Illinois law.

Under the first prong of this test, plaintiffs must be members of the class that the statute was intended to benefit. Fisher, 188 Ill.2d at 460. The purpose of the Unemployment Act must be considered as

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a whole. Fisher, 188 Ill.2d at 462-63. The primary purpose of the Unemployment Act is to lessen the burden of unemployment upon unemployed workers. *Wadlington v. Mindes*, 45 Ill.2d 447, 452 (1970), quoting *Illinois Bell Telephone Co. v. Board of Review of the Department of Labor*, 413 Ill. 37, 43 (1952) ("The primary purpose of the Illinois Unemployment [Insurance] Act is to relieve 'economic distress caused by involuntary unemployment' "). Plaintiff, as an unemployed person, is clearly a member of the class for whose benefit the statute was enacted.

Defendants argue that plaintiff is not a member of this class because she has not filed this action as a person seeking interim monetary relief to alleviate the burden of being unemployed. Additionally, according to defendants, plaintiff has already availed herself of the proper remedy by seeking benefits under the Unemployment Act (820 ILCS 405/100 (West 1996)). Defendants read this prong too

narrowly and ignore the fact that, at the time of her discharge, plaintiff was an unemployed person seeking unemployment insurance.

[749 N.E.2d 999] Whether she filed the present action as a person seeking interim benefits or as a person seeking compensation for a retaliatory discharge sheds no additional light upon whether plaintiff is a member of the class protected by the Unemployment Act. See *Midgett v. Sackett-Chicago, Inc.*, 105 Ill.2d 143, 146 (1984) (where the plaintiff, alleging he was discharged for filing a workers' compensation claim, filed an action for retaliatory discharge after the workers' compensation claim had been settled). The mere fact that plaintiff was an unemployed person places her squarely within the class the statute was intended to benefit.

The second prong of the test requires that the injury suffered by the plaintiff be one that the statute is designed to protect. Fisher, 188 Ill.2d at 460. Here, we note that the Unemployment Act is intended to provide interim economic relief to persons who become unemployed. Wadlington, 45 Ill.2d at 452. Plaintiff alleged that she had been earning $18.25 per hour. Thus, plaintiff's unemployment caused her to suffer a significant reduction in income. Alleviating the burden caused by such a reduction is the evil the Unemployment Act seeks to remedy. See 820 ILCS 405/100 (West 1996). Being discharged for seeking benefits obviously compounds this problem. In particular, it turns a temporary period of unemployment into a permanent one, subjecting the employee to continued economic distress. Furthermore, if an employer is allowed to threaten an employee with termination, the employee might be dissuaded from seeking benefits. Terminating one employee might cause other employees to refrain from seeking benefits during periods of unemployment. Thus, the defendants' conduct, as alleged, would serve to perpetuate the injury that the Unemployment

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Act seeks to cure. *Cf. Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 184 (1978) ("[W]e cannot accept a construction of section 11 which would allow employers to put employees in a position of choosing between their jobs and seeking their remedies under the [Workers' Compensation] Act [(Ill. Rev. Stat. 1973, ch. 48, par. 138.1 et seq.)]. Accordingly, defendants' argument that plaintiff's injuries are unrelated to those that the Unemployment Act was designed to prevent is untenable.

Third, implying a cause of action must be consistent with the underlying purpose of the statute. Fisher, 188 Ill.2d at 460. As noted previously, the purpose of the Unemployment Act is to lessen the burden of unemployment upon unemployed workers. 820 ILCS 405/100 (West 1996). The Unemployment Act is remedial in nature. Bailey & Associates, Inc., 289 Ill.App.3d at 318. Where an act is remedial, a private right of action is likely consistent with its purpose. See Davis v. Dunne, 189 Ill.App.3d 739, 743 (1989); Rhodes v. Mill Race Inn, Inc., 126 Ill.App.3d 1024, 1027 (1984). As discussed above, a private right of action would both benefit those that the statute was enacted to protect and dissuade employers from interfering with employees attempting to seek benefits under the Unemployment Act. Thus, a private right of action is consistent with the underlying purpose of the statute. Cases where a private right of action has been found inconsistent with the purpose of a statute generally have involved situations where such a right would impede the operation of the statute in some way. For example, where the legislature intended to vest an agency with broad discretion to address a **[749 N.E.2d 1000]** particular problem, one court refused to imply a private right of action because it would interfere with that discretion. Moore v. Lumpkin, 258 Ill.App.3d 980, 995-98 (1994). Similarly, where the purpose of a statute was to induce restaurant patrons to provide voluntary aid to choking victims, a private right of action was held inconsistent, presumably because any aid rendered would no longer be voluntary. Parra v. Tarasco, Inc., 230 Ill.App.3d 819, 825 (1992). In the present case, allowing a private right of action in no way impedes the Unemployment Act's primary purpose of lessening the burden of unemployment. Thus, a private right of action is consistent with the underlying purpose of the Unemployment Act.

Finally, implying a private right of action is necessary to provide an adequate remedy for a violation of the statute. Fisher, 188 Ill.2d at 460. A private right of action is appropriate where a statute would, as a practical matter, be ineffective if the right were not implied. *Abbasi v. Paraskevoulakos*, 187 Ill.2d 386, 395 (1999). That a statute provides for criminal penalties does not preclude the implication of a private right of action. Kelsay, 74 Ill.2d at 185. In the present case, a private

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right of action is necessary to make the Unemployment Act effective. Absent such a right, employers could freely coerce employees to refrain from seeking benefits under the Unemployment Act through threats of termination. Employers have a motivation to do so, because the amount they are required to contribute toward unemployment insurance is dependent upon the amount of benefits received by their employees. *Carson Pirie Scott & Co. v. State of Illinois Department of Employment Security*, 131 Ill.2d 23, 28-29 (1989).

Defendants point out that the Unemployment Act makes it a Class B misdemeanor for any person to "[a]ttempt to

induce any individual *** to refrain from claiming or accepting benefits *** under this Act." 820 ILCS 405/2800 (West 1996). A Class B misdemeanor is punishable by a $1,500 fine (730 ILCS 5/5-9-1 (West 1998)) and imprisonment for not more than six months (730 ILCS 5/5-8-3 (West 1998)). Where the defendant is a corporation, of course, imprisonment is not possible. According to defendants, this provision provides an adequate remedy. However, an employer who is able to successfully coerce an employee to refrain from seeking unemployment insurance can also likely coerce the employee to refrain from reporting the coercion. In *Corgan v. Muehling,* 143 Ill.2d 296, 315 (1991), our supreme court noted that "[it] is unlikely that patients, injured by unqualified and unregistered psychologists, will initiate or pursue their complaints through the administrative or criminal justice system without a potential for a tangible reward." This reasoning carries even more force here. Absent a private right of action, employees not only would lack the potential for a tangible reward but also would run the risk of retaliation. Furthermore, keeping in mind that the Unemployment Act is remedial in nature (Howard, 185 Ill.App.3d at 151), imposing criminal sanctions on an employer does nothing to alleviate the plight of a discharged employee (Kelsay, 74 Ill.2d at 185).

Courts have often recognized that inadequate criminal penalties provide insufficient motivation for an entity to comply with a statute. Compare Moore, 258 Ill.

[749 N.E.2d 1001] App. 3d at 999, and Kelsay, 74 Ill.2d at 185 (1978), with Stern v. Great Western Bank, 959 F.Supp. 478, 484 (N.D. Ill. 1997) (holding $1,000 fine adequate to insure bank's compliance with confidentiality rules where a violation of the rules provided virtually no benefit to the bank). In the present case, not only is the penalty relatively minor but also the likelihood of its being imposed is reduced because the employee being coerced is likely the only individual in a position to report a violation. Some employers conceivably would be willing to risk sanctions under these circumstances to avoid their obligations under the Unemployment Act. See Kelsay, 74 Ill.2d at 185. As such, the implication of a private right of action is necessary to make the statute effective in a practical sense.

Defendants rely extensively on Fisher, 188 Ill.2d 455, in support of their position. We find that case distinguishable. In that case, the supreme court was addressing whether a private right of action existed under the Nursing Home Care Act (210 ILCS 45/3-608 (West 1996)). Fisher, 188 Ill.2d at 456. The plaintiffs were nursing home employees who were harassed and discharged after providing information during an investigation concerning the death of a resident. Fisher, 188 Ill.2d at 457-58. The Nursing Home Care Act contained a provision making such retaliation unlawful but did not grant employees who were retaliated against a right to seek damages for such retaliation. 210 ILCS 45/3-608 (West 1996). Our supreme court concluded a private right of action could not be implied. Fisher, 188 Ill.2d at 468.

The Nursing Home Care Act was intended to benefit nursing home residents by improving their care and treatment. Fisher, 188 Ill.2d at 461. The Fisher plaintiffs were not nursing home residents and, thus, not members of the class the statute was intended to protect. Conversely, the Unemployment Act was implemented to lessen the burden of unemployment upon unemployed workers. 820 ILCS 405/100 (West 1996). Plaintiff, as an unemployed worker, is a member of the class the Unemployment Act was intended to benefit. Additionally, plaintiff, unlike the Fisher plaintiffs, suffered the type of injury the Unemployment Act was intended to prevent. Plaintiff was subjected to an economic burden arising out of her unemployment. The Nursing Home Care Act was intended to prevent abuse and neglect of residents, an injury that the Fisher plaintiffs did not suffer. Fisher, 188 Ill.2d at 462.

The Nursing Home Care Act contains a provision requiring employees to report the abuse and neglect of residents. Fisher, 188 Ill.2d at 459, citing 210 ILCS 45/2--107 (West 1996). Such an affirmative duty has been held to be an adequate safeguard to insure public policy is not violated. See *Jacobson v. Knepper & Moga, P.C.,* 185 Ill.2d 372, 377-78 (1998) (rejecting a retaliatory discharge claim where an attorney was discharged for reporting ethical violations because the ethical rules imposed a duty upon the attorney to report such violations). The Unemployment Act imposes no affirmative duty to report retaliatory conduct. 820 ILCS 405/100 et seq. (West 1996). Because no individual has a duty to report violations of the Unemployment Act, it is more likely that retaliatory conduct will remain hidden and unremedied. Moreover, the Nursing Home Care Act **[749 N.E.2d 1002]** granted a private cause of action allowing residents to seek damages for violations of that statute. Fisher, 188 Ill.2d at 461. Thus, the possibility of actions brought by residents served to deter violations of the Nursing Home Care Act. Conversely, in the present case, there is no alternate class of potential plaintiffs to deter employers from violating the Unemployment Act.

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Furthermore, as a practical matter, a violation of the Nursing Home Care Act is more visible, and hence more likely to be reported, than retaliation for seeking unemployment insurance benefits. Threats and retaliation can take place without any witnesses other than the employer and employee. In a nursing home, " '"friends, relatives and community supporters can regularly keep an eye on the conditions existing in facilities." '[Citation.]" Fisher, 188 Ill.2d at 465. Thus, others are available to report the abuse and neglect of residents, which are the primary

evils the Nursing Care Home Act is aimed at curing. Fisher, 188 Ill.2d at 462.

Finally, we note that violations of the Nursing Home Care Act are punishable by a fine over six times greater than that imposed for retaliation against unemployment claimants. The Nursing Home Care Act makes such conduct punishable by a fine of up to $10,000 and may also result in the suspension or revocation of a facility's license. Fisher, 188 Ill.2d at 466-67. Retaliation against unemployment claimants carries a fine of up to $1,500. 820 ILCS 405/2800 (West 1996).

Thus, the situation confronting the Fisher court was markedly different from the instant case, and defendants' reliance on that case is misplaced. We believe the reasoning that supports implying a private right of action under the Workers' Compensation Act provides sounder guidance. See Kelsay, 74 Ill.2d 172. Applying the four-pronged test set forth in Fisher, 188 Ill.2d at 460, the parallels between the two acts become clear. The purpose of the Workers' Compensation Act is to provide "efficient remedies for and protection of employees and, as such, [the Workers' Compensation Act] promotes the general welfare of th[e] State." Kelsay, 74 Ill.2d at 181. Thus, like the Unemployment Act, the Workers' Compensation Act is intended to benefit employees, who are the individuals to whom a cause of action is granted, and the first prong of the test is satisfied. Regarding the second prong, that the injury is one the statute was designed to prevent (Fisher, 188 Ill.2d at 460), both Acts provide mechanisms for employees to seek compensation for matters related to their employment. Being discharged for seeking workers' compensation benefits, like being discharged for seeking unemployment benefits, would compound the injuries the acts seek to alleviate. Regarding the third prong, that a cause of action is consistent with the purpose of the statute (Fisher, 188 Ill.2d at 460), a private right of action under both acts would dissuade an employer from interfering with employees attempting to invoke their protections. Furthermore, the Workers' Compensation Act, like the statute at issue here, is remedial in nature. Kelsay, 74 Ill.2d at 181.

Finally, the reasons a private cause of action is necessary under [321 Ill.App.3d 956] the Workers' Compensation Act are identical to the reasons one is necessary under the Unemployment Act. As in the present case, an **[749 N.E.2d 1003]** employer facing a workers' compensation claim has a financial incentive to dissuade the employee from going forward with the claim. See Palos Electric Co. v. Industrial Comm'n, 314 Ill.App.3d 920, 923 (2000). While both acts forbid retaliation (820 ILCS 305/4(h) (West 1998); 820 ILCS 405/2800(A)(7) (West 1996)), in neither case will this sanction be imposed unless the employee reports the retaliation. In both cases, a retaliating employer could also coerce an employee to refrain from reporting the retaliation. In the absence of a private right of action, employers, subject to only limited criminal liability, which may not even be imposed, would be able to put employees in a position where they are required to choose between their jobs and their rights under the Unemployment Act. See Kelsay, 74 Ill.2d at 184.

Furthermore, we note that both acts create a body to adjudicate claims made under them. The Workers' Compensation Act is enforced through the Industrial Commission (820 ILCS 305/13 (West 1998)), while unemployment claims are adjudicated by the Department of Employment Security (820 ILCS 405/800 (West 1996)). Although both acts provide an enforcement mechanism, both mechanisms are dependent upon an employee initiating a complaint. Thus, if an employer is able to coerce an employee to refrain from claiming benefits and reporting threats, both mechanisms are ineffective.

In Kelsay, the supreme court reasoned that the workers' compensation system "would be seriously undermined if employers were permitted to abuse their power to terminate by threatening to discharge employees for seeking compensation under the [Workers' Compensation] Act." Kelsay, 74 Ill.2d at 182. This reasoning is equally applicable to the unemployment insurance system. The implication of a private right of action under the Unemployment Act satisfies the four-part test set forth in Fisher, 188 Ill.2d at 460, and serves the same policies underlying our supreme court's decision in Kelsay, 74 Ill.2d 172. Accordingly, we conclude that such an action is implied under the Unemployment Act.

III. TORTIOUS INTERFERENCE WITH A BUSINESS ADVANTAGE

In the second count of her complaint, plaintiff attempts to set forth against Garrett individually a cause of action for tortious interference with a business advantage, based on Garrett's alleged violation of section 2800 of the Unemployment Act. 820 ILCS 405/2800 (West 1996). Section 2800 provides that, if an entity that violates the Unemployment Act "is a corporation, the president *** shall *** be subject to the aforesaid [criminal]

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penalties for the violation of any provisions of this Section of which he *** had or, in the exercise of his *** duties, ought to have had knowledge." 820 ILCS 405/2800(B) (West 1996). Thus, if Garrett violated the Unemployment Act in her capacity as president, she committed a Class B misdemeanor. 820 ILCS 405/2800(B) (West 1996). Plaintiff's theory, although somewhat ambiguous, is that Garrett's action in discharging plaintiff was a violation of section 2800 and, because Garrett is individually liable

under the statute, her actions also constitute an interference with the business relationship between plaintiff and the corporation.

Plaintiff's argument suffers from two fatal flaws. First, in count II of her complaint, plaintiff has alleged that Garrett was acting in her official capacity **[749 N.E.2d 1004]** when she discharged plaintiff. It is well established that a party cannot tortiously interfere with a contract to which he is a party. Douglas Theater Corp. v. Chicago Title & Trust Co., 288 Ill.App.3d 880, 884 (1997). Since Garrett was acting in her official capacity, she was acting on behalf of the corporation. Thus, plaintiff's claim amounts to an assertion that the corporation tortiously interfered with a contract to which it was a party. This claim must be rejected.

Second, inherent in plaintiff's argument is the proposition that a private right of action against corporate officers can be implied under the Unemployment Act. We reject this contention. One of the elements necessary to imply a private right of action under a statute is that a private action is necessary to provide an adequate remedy. Fisher, 188 Ill.2d at 460. In the preceding section of this opinion, we held that such a right was implied against employers. Given the availability of this remedy against the actual employer, and the incentive it provides for complying with the statute, there is no need to imply a second right of action against corporate officers in their individual capacity.

Plaintiff argues that, if the trial court was correct in granting summary judgment in favor of Garrett on the issue of piercing the corporate veil, then Garrett must be a third party capable of interfering with the contract between plaintiff and the corporation. In this count of her complaint, plaintiff seeks to impose liability upon Garrett in her capacity as president for conduct alleged to violate the Unemployment Act. See 820 ILCS 405/2800 (West 1996). Piercing the corporate veil involves Garrett's conduct regarding the establishment and maintenance of the corporate entity. See Jacobson v. Buffalo Rock Shooters Supply, Inc., 278 Ill.App.3d 1084, 1088 (1996). Whether plaintiff can pierce the corporate veil is immaterial as to whether Garrett can be held individually liable under the Unemployment Act in her individual capacity.

Finally, [321 Ill.App.3d 958] plaintiff's contention that the business judgment rule does not bar this claim is inapposite. The business judgment rule is merely a presumption that corporate officers make business decisions in good faith. Ferris Elevator Co. v. Neffco, Inc., 285 Ill.App.3d 350, 354 (1996). Negating this presumption says nothing as to whether plaintiff has adequately pleaded a cause of action. We conclude that plaintiff has failed to state a cause of action in the second count of her complaint.

IV. PIERCING THE CORPORATE VEIL

Prior to dismissing plaintiff's second amended complaint, the trial court granted partial summary judgment for defendant, holding that plaintiff could not impose liability on Garrett personally. Summary judgment is appropriate only where no genuine issues of material fact exist and the movant is entitled to judgment as a matter of law. Amsted Industries, Inc. v. Pollak Industries, Inc., 65 Ill.App.3d 545, 549 (1978). Because it is a drastic means of disposing of litigation, it should only be granted where the movant's right to judgment is clear and free from doubt. Rivas v. Westfield Homes of Illinois, Inc., 295 Ill.App.3d 304, 307-08 (1998). In assessing the propriety of a grant of summary judgment, the record must be construed liberally in favor of the opposing party and strictly against the movant. Largosa v. Ford Motor Co., 303 Ill.App.3d. 751, 753

[749 N.E.2d 1005] (1999). Review is de novo. Corona v. Malm, 315 Ill.App.3d 692, 694 (2000).

In order to pierce the corporate veil, a plaintiff must demonstrate the following: "(1) there must be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, (2) and circumstances must be such that an adherence to the fiction of a separate corporate existence would promote injustice or inequitable consequences." Pederson v. Paragon Pool Enterprises, 214 Ill.App.3d 815, 819-20 (1991). Piercing the corporate veil is an equitable remedy. Graham v. Mimms, 111 Ill.App.3d 751, 768 (1982). The trial court's summary judgment order appears to be based entirely on the first prong of this test. Accordingly, we will confine our review to this prong as well.

Several factors are relevant in determining whether a sufficient unity of interest exists between a corporation and an individual to warrant piercing the corporate veil. These factors include "(1) inadequate capitalization; (2) failure to issue stock; (3) failure to observe corporate formalities; (4) nonpayment of dividends; (5) insolvency of the debtor corporation at the time; (6) nonfunctioning of other officers or directors; (7) absence of corporate records; and (8) whether the corporation is a mere facade for the operation of dominant

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stockholders." Ted Harrison Oil Co. v. Dokka, 247 Ill.App.3d 791, 795 (1993). Generally, the decision to disregard the corporate entity will not rest upon a single factor. Hills of Palos Condominium Ass'n v. I-Del, Inc., 255 Ill.App.3d 448, 480 (1993). While courts are normally reluctant to pierce the corporate veil (In re Estate of Wallen, 262 Ill.App.3d 61, 68 (1994)), the issue before us is merely

whether sufficient evidence exists in the record to preclude summary judgment against plaintiff on this issue.

Such evidence does exist. Construing the record liberally in plaintiff's favor, significant evidence indicates the corporation was undercapitalized from its inception. The capitalization of a corporation is a major factor in assessing whether a legitimate separate corporate entity existed. McCracken v. Olson Cos., 149 Ill.App.3d 104, 111 (1986). The policy behind this consideration has been described as follows:

" ' "If a corporation is organized and carries on business without substantial capital in such a way that the corporation is likely to have no sufficient assets available to meet its debts, it is inequitable that shareholders should set up such a flimsy organization to escape personal liability. *** It is coming to be recognized as the policy of the law that shareholders should in good faith put at the risk of the business unencumbered capital reasonably adequate for its prospective liabilities. *** " ' [Citation.]" Gallagher v. Reconco Builders, Inc., 91 Ill.App.3d 999, 1005 (1980).

To determine whether a corporation is adequately capitalized, one must compare the amount of capital to the amount of business to be conducted and obligations to be fulfilled. Jacobson, 278 Ill.App.3d at 1090. Absent adequate capitalization, a corporation becomes a mere liability shield, rather than an independent entity capable of carrying on its own business.

[749 N.E.2d 1006] In her deposition, Garrett testified that the corporation was set up with a $1,000 capital investment in January 1995. Garrett also testified that the corporation had five employees when she bought it in 1995. In July of that year, the corporation received the first of a series of monthly loans. These loans ranged from between $1,000 and $4,000, the last occurring in July 1997. Given that the corporation had five employees, it is reasonable to infer that payroll expenses were more than de minimis. Additionally, at the time she was discharged, plaintiff was making over $18 per hour, which further supports the inference that the corporation's payroll was a significant expense. Finally, the corporation started receiving significant sums through loans taken shortly after its inception. Nothing in the record indicates any change in circumstances between incorporation and the first loan that would

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explain the necessity for these loans. These facts suggest that the initial $1,000 capital contribution was wholly insufficient for the corporation to do business. Thus, a reasonable trier of fact could conclude that the corporation was undercapitalized.

Furthermore, it is uncontroverted that no director's meetings were held. The trial court noted that this was not unusual, since Garrett was the sole shareholder. For summary judgment purposes, however, plaintiff was entitled to have the record construed in her favor. The trial court's explanation of this fact amounted to construing the record in Garrett's favor. See Largosa, 303 Ill.App.3d. at 753. Thus, the record also contains evidence that Garrett disregarded the corporate formalities.

Finally, many corporate documents were not executed until after this action was filed and then ratified. While this action was not per se improper (see Dannen v. Scafidi, 75 Ill.App.3d 10, 15-17 (1979)), this informality indicates at least a possible neglect for the necessary corporate formalities. The casual manner in which these matters were handled supports an inference that the corporation was a mere facade through which Garrett, as the dominant stockholder, conducted business.

In her brief, Garrett argues that plaintiff was never misled into believing she was working for Garrett personally and never relied on Garrett personally to pay her for anything that was due her. Because plaintiff seeks recovery for a tort, we find these considerations to be of little significance. When a party enters into a contractual relationship with a corporation, a relevant consideration is whether the party is misled into believing a shareholder or director is also a party. Philip S. Lindner & Co. v. Edwards, 13 Ill.App.3d 365, 369 (1973). However, tort victims, like plaintiff, do not choose to become victims of particular tortfeasors or rely upon the tortfeasor's ability to compensate them. The significance of the distinction between tort victims and parties to a contract may be summarized as follows:

"The obvious difference between consensual and nonconsensual transactions is that the claimants in consensual transactions generally have chosen the parties with whom they have dealt and have some ability *** to protect themselves from loss. For example, the fact that a company is undercapitalized can be overcome in many contractual settings, because the parties can allocate a risk of financial failure as they see fit. But in nonconsensual cases, there is 'no element of voluntary dealing, and the question is whether it is reasonable for businessmen to transfer a risk of loss or injury to members of the general public through the device of conducting business in the name of a corporation that **[749 N.E.2d 1007]** may be marginally financed.' [Citation.]" *Cascade Energy & Metals Corp. v. Banks*, 896 F.2d 1557, 1577 (10th Cir. 1990).

Because the present case involves a tort, whether plaintiff relied on Garrett to satisfy the corporation's obligations is irrelevant. Material issues of fact exist regarding this issue; therefore, the trial court erred in granting summary

judgment.

V. CONCLUSION

For the foregoing reasons, we reverse the trial court's grant of summary judgment regarding Garrett's individual liability and the dismissal of count I of plaintiff's complaint, affirm the trial court's dismissal of count II, and remand the cause for further proceedings.

Affirmed in part and reversed in part; cause remanded.

HUTCHINSON, P.J., and McLAREN, J., concur.

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2011 IL App (1st) 102765
Appellate Court of Illinois,
First District, Fourth Division.

Donna CAROLLO, f/k/a Donna Syracusa,
Plaintiff–Appellee,
v.
Lawrence IRWIN, Realty Consulting Services,
Inc., and DL Realty Partnership,
Defendants–Appellants.

No. 1–10–2765.
|
Sept. 22, 2011.

Synopsis
Background: Former business partner brought action against partnership and her former partner alleging breach of settlement agreement. The Circuit Court, Cook County, Sandra Tristano, J., granted plaintiff summary judgment. Defendants appealed.

Holdings: The Appellate Court, Pucinski, J., **held** that:

[1] articles of agreement for deed constituted merely an executory agreement for the sale of the property and did not constitute an actual sale of the property;

[2] sale of commercial property did not occur after the agreement was executed because the buyer did not fulfill the conditions precedent of the articles of agreement;

[3] **limited liability company** (LLC) that was never formed could not be liable on sales contract for property; and

[4] **member** of unformed **limited liability company** (LLC) could not be individually liable for signing the property sales contract on behalf of the unformed LLC.

Affirmed.

[1] **Vendor and Purchaser**🔑Option or executory contract

The articles of agreement for deed constituted merely an executory agreement for the sale of the property and did not constitute an actual sale of the property; a sale required the actual transfer of title.

2 Cases that cite this headnote

[2] **Vendor and Purchaser**🔑Option or executory contract

Under property law, a contract for the sale of real estate does not constitute a "sale."

[3] **Vendor and Purchaser**🔑Sale Distinguished from Other Transactions
Vendor and Purchaser🔑Option or executory contract

A difference exists in the established law of property between the legal significance of a sale of an interest in land and a contract to sell an interest in land; whereas the sale of the interest in land results in the actual transfer of the title from the grantor to the grantee, the contract for sale is only an agreement to be performed in the future and which, if fulfilled, results in a sale.

2 Cases that cite this headnote

[4] **Vendor and Purchaser**🔑Option or executory contract

An actual transfer of legal title to real estate, not equitable title, is required for an actual sale.

West Headnotes (27)

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2 Cases that cite this headnote

[5] **Equitable Conversion**🔑Time of conversion
Vendor and Purchaser🔑Effect of executory contract on title to property

When the seller enters into a valid and enforceable contract for the sale of realty, the seller continues to **hold** legal title in trust for the buyer; the buyer becomes equitable owner and **holds** purchase money in trust for seller, and this equitable conversion occurs at the time the parties enter into an installment contract.

[6] **Compromise and Settlement**🔑Rights of parties on breach
Vendor and Purchaser🔑Conditions and provisos

A sale of commercial property did not occur after the agreement was executed because the buyer did not fulfill the conditions precedent of the articles of agreement and there was never a transfer of title to the property, and thus, because there was no sale, former partner was entitled to the additional payment of $30,000 under the terms of her settlement agreement with realty partnership, which allowed for additional payment in the event property did not sell by a certain date; the installment payment and due date for accrued interest, and final payment of the purchase price and all accrued interest due on the final closing were conditions precedent to the transfer of title to the property.

[7] **Contracts**🔑What are conditions precedent in general

A "condition precedent" is one that must be met before a contract becomes effective or that is to be performed by one party to an existing contract before the other party is obligated to perform.

4 Cases that cite this headnote

[8] **Vendor and Purchaser**🔑Conditions and provisos

Conditions precedent in a real estate contract are those that prevent the vesting of title until the condition is complied with.

[9] **Contracts**🔑What are conditions precedent in general

Whether an act is necessary to formation of the contract or to the performance of an obligation under the contract depends on the facts of the case.

1 Cases that cite this headnote

[10] **Contracts**🔑Conditions Precedent in General

If a condition goes solely to the obligation of the parties to perform, existence of such a condition does not prevent the formation of a valid contract.

[11] **Contracts**🔑Conditions Precedent in General

If parties agree to formation of a binding contract, agreed-on conditions only affect the duty to perform and the contract is valid.

1 Cases that cite this headnote

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[12] **Contracts** Ambiguity in general

The intent of the parties to create a condition precedent to the formation of a contract is a question of law where the language in the instrument is unambiguous.

1 Cases that cite this headnote

[13] **Contracts** Conditions Precedent in General

Express conditions precedent in contracts that affect a party's performance are subject to rules of strict compliance.

1 Cases that cite this headnote

[14] **Contracts** Conditions Precedent in General

Where a contract contains a condition precedent, the contract is neither enforceable nor effective until the condition is performed or the contingency occurs; if the condition remains unsatisfied, the obligations of the parties are at an end.

3 Cases that cite this headnote

[15] **Corporations and Business Organizations** Contracts and indebtedness

Limited liability company (LLC) that was never formed could not be liable on sales contract for property; because the LLC was never formed, the contract was never ratified and execution of the agreement by individual on behalf of the LLC was unauthorized. S.H.A. 805 ILCS 5/1.01 et seq.

1 Cases that cite this headnote

[16] **Corporations and Business Organizations** Adoption or ratification by corporation or shareholders in general

In Illinois, if an individual enters into a contract on behalf of a corporation before the corporation is formed, the corporation is not liable unless it is later formed and ratifies the contract.

3 Cases that cite this headnote

[17] **Corporations and Business Organizations** Who is a promoter

A "promoter" of a corporation is one who actively assists in creating, projecting and organizing a corporation.

[18] **Corporations and Business Organizations** Adoption or ratification by corporation or shareholders in general

The general rule is that a contract made with a promoter of a corporation before its organization is not enforceable against the corporation unless such contract is ratified by the corporation after its organization.

[19] **Corporations and Business Organizations** Liability for acts and **debts** of **company**

Member of unformed **limited liability company** (LLC) could not be individually liable for signing the property sales contract on behalf of the unformed LLC due to insulation from liability under the **Limited Liability Company**

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Act. S.H.A. 805 ILCS 180/10–10.

3 Cases that cite this headnote

[20] **Corporations and Business Organizations**Contracts and Guaranties

In determining whether a corporate officer has contracted in his own behalf, courts apply the general rules of agency.

1 Cases that cite this headnote

[21] **Principal and Agent**Questions for jury

The question of whether an agency relationship exists is normally a question of fact; however, a court may decide the issue as a matter of law if only one conclusion may be drawn from the undisputed facts.

[22] **Evidence****Personal**, official, or representative capacity
Principal and Agent Contracts in general

The common law rule is that where an agent signs contract in his own name and the contract nowhere mentions the existence of agency or the identity of the principal, the agent is **personally** liable and parol evidence is not admissible to rebut the presumption of the agent's **personal** liability.

3 Cases that cite this headnote

[23] **Corporations and Business Organizations**Contracts and Guaranties

A corporate officer who signs his name on a contract, without more, is individually liable on the contract.

4 Cases that cite this headnote

[24] **Corporations and Business Organizations**Acting in corporate capacity as opposed to acting in **personal** capacity

When an agent signs a document and indicates next to his signature his corporation affiliation, then, absent evidence of contrary intent in the document, the agent is not **personally** bound.

5 Cases that cite this headnote

[25] **Corporations and Business Organizations**Nature and Grounds in General
Corporations and Business Organizations Contracts and Guaranties

Directors or other officers of corporations are not liable for the **debts** contracted in the name of, and on behalf of, the corporation and which are binding upon it unless they are expressly made liable by statute or unless they also contract on their own behalf.

4 Cases that cite this headnote

[26] **Corporations and Business Organizations**Contracts and Guaranties

One of the purposes of a corporate entity is to immunize the corporate officer from individual liability on contracts entered into in the corporation's behalf.

1 Cases that cite this headnote

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[27] **Principal and Agent**Agent's Contracts

An unauthorized agent purporting to enter into a contract for a principal is **personally** liable.

Attorneys and Law Firms

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OPINION

Justice PUCINSKI delivered the judgment of the court, with opinion.

****52** ¶ 1 Plaintiff, Donna Carollo, entered into a settlement agreement with her former business partner, defendant Lawrence Irwin, and the partnership, defendant DL Realty Partnership (DL Realty), in settlement of claims she asserted against defendants for sexual harassment. That settlement agreement provided for an additional payment of $30,000 if a certain property owned by DL Realty did not sell by December 31, 2008. Defendants argue that the property sold when articles of agreement for deed were executed on December 31, 2008. The agreement indicated the buyer was an unformed **limited liability company** (the LLC) and was signed by an individual on behalf of the unformed LLC. The agreement provided for certain installment payments and payments of interest, as well as an initial closing, prior to the final closing and final payment of the balance of the purchase price, when the title to the property would transfer. It is undisputed that no payments were ever made and no closing occurred. The circuit court granted summary judgment in favor of plaintiff, finding that no sale occurred, and awarded her the additional payment under her settlement agreement with defendants.

¶ 2 We affirm and **hold**: (1) there was no sale because (a) the execution of the articles of agreement did not constitute a sale but merely an executory contract to sell ****53 *81** property and did not transfer legal title and (b) there was no sale after the execution of the articles of agreement because no payments were ever made and no closing was **held**, which were conditions precedent of the transfer of title to the property. We also **hold**: (2) the contract in any event was not enforceable because there was no buyer bound by the contract where (a) the LLC was never subsequently formed and never ratified the contract or authorized Scott Mason to enter into it, and (b) Scott Mason cannot be individually liable on the contract because he is statutorily protected under the **Limited Liability Company** Act (805 ILCS 180/10–10 (West 2006)).

¶ 3 BACKGROUND

¶ 4 The amended complaint alleges that plaintiff, Donna Carollo, formerly known as Donna Syracusa, worked for defendant Lawrence Irwin and was a partner with Irwin in defendant DL Realty Partnership. Plaintiff filed complaints of sexual harassment against Irwin with the Equal Employment Opportunity Commission (EEOC) and the Illinois Department of Human Rights. Plaintiff also filed a separate lawsuit for dissolution of DL Realty Partnership. Plaintiff and defendants agreed to settle both the sexual harassment complaint and the dissolution of partnership litigation, and executed a settlement agreement on October 18, 2007. Pursuant to the terms of the settlement agreement, defendants made certain guaranteed payments to plaintiff.

¶ 5 DL Realty owned a property referred to as the River Oaks apartment complex, which it had been trying to sell for about two years, and for more than eight months before plaintiff and defendants entered into the settlement agreement. Defendants wished to obtain a selling price of $4.2 million. Pursuant to paragraph 3 of the settlement agreement, plaintiff was also entitled to an additional payment of $30,000 if the River Oaks property either did not sell on or before December 31, 2008, or sold for an amount in excess of $4.2 million. Paragraph 4 of he settlement agreement further provided:

> "Any Additional Payment that becomes due to [plaintiff] pursuant

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> to Paragraph 3 of this Agreement shall be sent to [plaintiff] within seven (7) days following the earlier of: (i) the closing date of the sale of River Oaks or (ii) December 31, 2008. If River Oaks is sold on or prior to December 31, 2008, Irwin shall provide [plaintiff] with copies of the final sales contract and closing statement within seven (7) calendar days after the closing date."

¶ 6 On or about January 6, 2009, defendants sent plaintiff a copy of articles of agreement for deed dated December 31, 2008, listing the buyer as Cal City Apartments, LLC, "or its Nominee, Assignee, or Transferee." The articles were signed by Lawrence Irwin, on behalf of DL Realty Partnership, and Scott Mason, on behalf of Cal City Apartments, LLC, "an Illinois **Limited Liability Company** yet to be formed." Cal City Apartments, LLC, was not incorporated at the time of agreement and was not ever subsequently incorporated. Cal City Apartments, LLC, also never provided for a nominee, assignee, or transferee for its interest in the articles of agreement for deed.

¶ 7 The articles provided for an installment payment from the buyer on June 30, 2009, consisting of the difference between the purchase price and the amount of the principal of the seller's mortgage on the property, and 7% accrued interest between December 31, 2008, and June 30, 2009. The final payment of the purchase price and all accrued interest was due at the final closing. The "initial closing" was ****54 *82** scheduled to occur on December 31, 2008, but the "final closing" was not scheduled to occur until the date the underlying mortgage was due to be paid. Title would not transfer until the final closing. The articles provided that if the buyer does not make the required payments to the seller on June 30, 2009, as required in paragraph 3(f), the "Agreement shall be terminated and **held** for naught." Further, paragraph 17 of the articles provided that at the initial closing the buyer shall execute an assignment of all the buyer's right, title and interest to the seller in the event the buyer defaults under the terms and conditions of the articles.

¶ 8 The articles did not provide for a completed sale and transfer of title to the property prior to December 31, 2008. Rather, the articles provided the following regarding the deed in paragraph 2:

> "(a) If the Buyer shall first make all the payments and perform all the covenants and agreements in this Articles of Agreement for Deed as required to be made and performed by said Buyer, at the time and in the manner hereinafter set forth, Seller shall convey or cause to be conveyed to Buyer or his nominee, by a recordable, stamped general warranty deed with release of homestead rights, good title to the premises * * *.
>
> * * *
>
> (b) The performance of all the covenants and conditions herein to be performed by Buyer shall be a condition precedent to Seller's obligation to deliver the deed aforesaid."

¶ 9 The articles further provided that the buyer was entitled to an affidavit of title at any time upon payment of all amounts due under the articles. A DL Realty's attorney, Allen Gabe, who is the attorney who represented DL Realty and drafted the articles of agreement for deed, **held** the title to the property in trust until the buyer complied with the terms and conditions of the articles.

¶ 10 Additionally, the memorandum of articles of agreement for warranty deed stated that "the terms of said Agreement provide for the future conveyance of said property to the Contract Purchasers at a date certain, provided the Contract Purchasers shall perform in accordance with the terms contained in said Agreement." The record on appeal also includes an affidavit of Allen Gabe, who averred that "[w]hen seller-financing is involved, Articles of Agreement for Deed provide a measure of security to the Seller because title to the Property is not transferred to the Buyer until the Buyer fulfills it payment obligations to the Seller."

¶ 11 Cal City Apartments, LLC, did not make the payment required on June 30, 2009, nor did it make any payments, and it did not perform any of the covenants in the articles of agreement for deed. Scott Mason also did not make any payments and did not perform any of the covenants in the articles of agreement for deed. On July 15, 2009, Gabe sent a letter to Cal City Apartments, LLC, c/o Scott Mason, of notice of default. Neither Cal City Apartments, LLC, nor Scott Mason cured the default.

¶ 12 Defendants refused to pay plaintiff the additional $30,000 under their settlement agreement. Plaintiff filed the instant cause of action for breach of contract. Count I of her first amended complaint was based on breach of the settlement agreement. Count II was for a declaratory judgment that the articles of agreement did not constitute a sale of the property, and that the invalid execution of the articles by a nonexistent LLC did not affect plaintiff's right under the settlement agreement to the additional

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$30,000 payment. Count III and IV were alternative breach of contract claim ****55 *83** and declaratory judgment claims alleging that if the court found the articles of agreement to be an effective sale, plaintiff was still entitled to the additional payment because the property sold for more than $4,350,000.

¶ 13 Plaintiff filed a motion for summary judgment on counts I and II on the basis that there was no sale of the River Oaks property. The court granted summary judgment on counts I and II and awarded plaintiff $30,000 and costs. Counts III and IV were voluntarily dismissed. Defendants appeal the grant of summary judgment and award to plaintiff.

¶ 14 ANALYSIS

¶ 15 Defendants argue that plaintiff was not entitled to summary judgment because a "sale" of the River Oaks property occurred when DL Realty entered into the articles of agreement for deed on December 31, 2008. Summary judgment is appropriate where the pleadings, depositions, affidavits, and admissions on file, when viewed in the light most favorable to the nonmoving party, show that no genuine issue of material fact exists and that the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2–1005(c) (West 2006). The purpose of summary judgment is not to try a question of fact, but rather to determine whether a genuine issue of material fact exists. *Robidoux v. Oliphant*, 201 Ill.2d 324, 335, 266 Ill.Dec. 915, 775 N.E.2d 987 (2002) (citing *Gilbert v. Sycamore Municipal Hospital*, 156 Ill.2d 511, 517, 190 Ill.Dec. 758, 622 N.E.2d 788 (1993)); *Bagent v. Blessing Care Corp.*, 224 Ill.2d 154, 162, 308 Ill.Dec. 782, 862 N.E.2d 985 (2007) (citing *Adams v. Northern Illinois Gas Co.*, 211 Ill.2d 32, 42–43, 284 Ill.Dec. 302, 809 N.E.2d 1248 (2004), and *Gilbert*, 156 Ill.2d at 517, 190 Ill.Dec. 758, 622 N.E.2d 788). "Genuine" is construed to mean that there is evidence to support the position of the nonmoving party. *Ralston v. Casanova*, 129 Ill.App.3d 1050, 85 Ill.Dec. 76, 473 N.E.2d 444 (1984). "In determining the existence of a genuine issue of material fact, courts must consider the pleadings, depositions, admissions, exhibits, and affidavits on file in the case and must construe them strictly against the movant and liberally in favor of the opponent." *Purtill v. Hess*, 111 Ill.2d 229, 240, 95 Ill.Dec. 305, 489 N.E.2d 867 (1986) (citing *Kolakowski v. Voris*, 83 Ill.2d 388, 398, 47 Ill.Dec. 392, 415 N.E.2d 397 (1980)). This court reviews a grant of summary judgment *de novo*. *Roth v. Opiela*, 211 Ill.2d 536, 542, 286 Ill.Dec. 57, 813 N.E.2d 114 (2004); *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill.2d 90, 102, 180 Ill.Dec. 691, 607 N.E.2d 1204 (1992).

¶ 16 I. There Was No Sale

¶ 17 A. There Was Only an Executory Contract for Sale

[1] ¶ 18 Defendants argue that a sale occurred by virtue of the articles of agreement for deed executed on December 31, 2008, because under articles of agreement for deed, " 'equitable conversion takes place at the instant a valid and enforceable contract is entered into and * * * the buyer at that time acquires an equitable title,' " quoting *Shay v. Penrose*, 25 Ill.2d 447, 450, 185 N.E.2d 218 (1962). Plaintiff responds with a definition of "sell" from Webster's New World College Dictionary and argues there was no sale because there was no exchange or giving up the property for money or its equivalent.

[2] [3] ¶ 19 However, under property law, a contract for the sale of real estate does not constitute a "sale." As our supreme court explained in long-standing precedent:

> "A difference exists in the established law of property between the legal significance ****56 *84** of a sale of an interest in land and a contract to sell an interest in land. Whereas the sale of the interest in land results in the actual transfer of the title from the grantor to the grantee, the contract for sale is only an agreement to be performed in the future and which, if fulfilled, results in a sale." *8930 South Harlem, Ltd. v. Moore*, 77 Ill.2d 212, 219, 32 Ill.Dec. 888, 396 N.E.2d 1 (1979) (citing *In re Estate of Frayser*, 401 Ill. 364, 373, 82 N.E.2d 633 (1948)).

See also *In re Estate of Martinek*, 140 Ill.App.3d 621, 627, 94 Ill.Dec. 939, 488 N.E.2d 1332 (1986) (citing *Moore* and **holding** that there is a clear legal distinction between a sale of interest in land and a contract to sell interest in realty; the former results in the actual transfer of title, whereas the latter is merely an executory agreement that will result in a sale once performance of the contract is complete).

[4] ¶ 20 Thus, it is clear that an actual transfer of legal title,

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not equitable title, is required for an actual sale. Under property law a contract for the sale of real estate does not transfer legal title and is not equivalent to an actual sale. We **hold** as a matter of law that the articles of agreement for deed constituted merely an executory agreement for the sale of the property and did not constitute an actual sale.

¶ 21 B. The Conditions Precedent of the Articles of Agreement for Deed Were Not Fulfilled

[5] [6] ¶ 22 We further determine that although equitable conversion occurred upon the signing of the articles of agreement for deed, the conditions precedent to the transfer of legal title were not fulfilled and, therefore, no sale occurred after the execution of the agreement. When the seller enters into a valid and enforceable contract for the sale of realty, the seller continues to **hold** legal title in trust for the buyer; the buyer becomes equitable owner and **holds** purchase money in trust for seller, and this equitable conversion occurs at the time the parties enter into an installment contract, as was the case here. *Martinek,* 140 Ill.App.3d at 628, 94 Ill.Dec. 939, 488 N.E.2d 1332.

[7] [8] [9] [10] [11] [12] ¶ 23 However, a sale did not occur after the agreement was executed because the buyer did not fulfill the conditions precedent of the articles of agreement and there was never a transfer of title to the River Oaks property. A "condition precedent is one that must be met before a contract becomes effective or that is to be performed by one party to an existing contract before the other party is obligated to perform." *Catholic Charities of the Archdiocese of Chicago v. Thorpe,* 318 Ill.App.3d 304, 307, 251 Ill.Dec. 764, 741 N.E.2d 651 (2000) (citing *McAnelly v. Graves,* 126 Ill.App.3d 528, 532, 81 Ill.Dec. 677, 467 N.E.2d 377 (1984)). Conditions precedent in a real estate contract are those that prevent the vesting of title until the condition is complied with. *Koch v. Streuter,* 232 Ill. 594, 597, 83 N.E. 1072 (1908). " 'Whether an act is necessary to formation of the contract or to the performance of an obligation under the contract depends on the facts of the case.' " *Thorpe,* 318 Ill.App.3d at 307, 251 Ill.Dec. 764, 741 N.E.2d 651 (quoting *McAnelly,* 126 Ill.App.3d at 532, 81 Ill.Dec. 677, 467 N.E.2d 377). If " 'a condition goes solely to the obligation of the parties to perform, existence of such a condition does not prevent the formation of a valid contract.' " *Thorpe,* 318 Ill.App.3d at 307, 251 Ill.Dec. 764, 741 N.E.2d 651 (quoting *McAnelly,* 126 Ill.App.3d at 532, 81 Ill.Dec. 677, 467 N.E.2d 377). "The factual analysis hinges on the mutual assent of the parties; if they agree to formation of a binding contract, agreed-on conditions only affect the duty ****57 *85** to perform and the contract is valid." *Regency Commercial Associates, LLC v. Lopax, Inc.,* 373 Ill.App.3d 270, 282, 311 Ill.Dec. 636, 869 N.E.2d 310 (2007) (citing *Thorpe,* 318 Ill.App.3d at 307–08, 251 Ill.Dec. 764, 741 N.E.2d 651, quoting *Edmund J. Flynn Co. v. Schlosser,* 265 A.2d 599, 601 (D.C.1970)). The intent of the parties to create a condition precedent to the formation of a contract is a question of law where the language in the instrument is unambiguous. *Thorpe,* 318 Ill.App.3d at 308, 251 Ill.Dec. 764, 741 N.E.2d 651 (citing *IK Corp. v. One Financial Place Partnership,* 200 Ill.App.3d 802, 810, 146 Ill.Dec. 198, 558 N.E.2d 161 (1990)).

¶ 24 The articles of agreement for deed had several conditions precedent to the vesting of title. The articles required an installment payment from the buyer on June 30, 2009, consisting of the difference between the purchase price and the amount of the principal of the seller's mortgage on the property, and 7% accrued interest between December 31, 2008, and June 30, 2009. The "initial closing" was scheduled to occur on December 31, 2008, but the "final closing" was not scheduled to occur until the date the underlying mortgage was due to be paid. The final payment of the purchase price and all accrued interest was due at the final closing. The articles of agreement specifically provided that title would not transfer until the final closing. The articles provided that if the Buyer does not make the required payments to the seller on June 30, 2009, as required in paragraph 3(f), then the "Agreement shall be terminated and **held** for naught." The installment payment and accrued interest due on June 30, 2009, and final payment of the purchase price and all accrued interest due on the final closing were conditions precedent to the transfer of title to the property. Thus, the conditions were not conditions precedent to contract formation but, rather, conditions precedent to the seller's transfer of title. Prior to the buyer's default, the contract was in effect. See *McAnelly,* 126 Ill.App.3d at 533, 81 Ill.Dec. 677, 467 N.E.2d 377 (**holding** a contract contingency of obtaining necessary permits within 24 months which, if not obtained, would make the lease of no effect, was not a condition precedent to contract formation because neither party had the privilege of revocation prior to the 24–month period ending and no further expression of assent by the parties was necessary to proceed with the lease).

[13] [14] ¶ 25 However, even if the contract was initially valid, by its terms the contract was not enforceable if the conditions were not fulfilled. Express conditions

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precedent in contracts that affect a party's performance are subject to rules of strict compliance. *Regency Commercial Associates, LLC,* 373 Ill.App.3d at 282, 311 Ill.Dec. 636, 869 N.E.2d 310 (citing *MXL Industries, Inc. v. Mulder,* 252 Ill.App.3d 18, 26, 191 Ill.Dec. 124, 623 N.E.2d 369 (1993)). " '[W]here a contract contains a condition precedent, the contract is neither enforceable nor effective until the condition is performed or the contingency occurs.' " *Perry v. Estate of Carpenter,* 396 Ill.App.3d 77, 82, 335 Ill.Dec. 343, 918 N.E.2d 1156 (2009) (quoting *Jones v. Seiwert,* 164 Ill.App.3d 954, 958, 115 Ill.Dec. 869, 518 N.E.2d 394 (1987), citing *Dodson v. Nink,* 72 Ill.App.3d 59, 64, 28 Ill.Dec. 379, 390 N.E.2d 546 (1979)). If the condition remains unsatisfied, the obligations of the parties are at an end. *McKee v. First National Bank of Brighton,* 220 Ill.App.3d 976, 983, 163 Ill.Dec. 389, 581 N.E.2d 340 (1991).

¶ 26 Here, even if there was a proper party as the buyer, the conditions precedent were never fulfilled and the contract was terminated. It is undisputed that ****58 *86** both the unformed Cal City Apartments, LLC, and Scott Mason never paid any amount owed under the contract as a condition precedent to the transfer of title to the River Oaks property. It is also undisputed that no initial closing occurred, and no final closing with final payment ever occurred. Further, DL Realty's attorney, Allen Gabe, **held** the title to the property in trust until the buyer complied with the terms and conditions of the articles, and title to the property was never released from trust. After nonpayment of the installment amount, Gabe sent a notice of default to Cal City Apartments, LLC, c/o Scott Mason, and the default was never cured. Thus, due to the failure to fulfill the conditions precedent, the agreement was terminated and the contract for deed was not enforceable. See *Estate of Barth v. Schlangen,* 249 Ill.App.3d 70, 77, 188 Ill.Dec. 565, 618 N.E.2d 1135 (1993) (**holding** summary judgment on behalf of a decedent's estate to quiet title to property was proper because the buyer admitted that he had made no installment payments on the contract for the sale of the land). Under the terms of the agreement, the buyer defaulted and the contract was "**held** for naught." We **hold** that under these facts the contract was terminated and there clearly was no sale.

¶ 27 According to defendants, however, "[t]his Court and the Illinois Supreme Court have made clear that a 'sale' occurs at the moment at which the parties enter into their purchase transaction, even if the buyer ultimately defaults." Defendants cite to *Stephen L. Winternitz, Inc. v. National Bank of Monmouth,* 289 Ill.App.3d 753, 225 Ill.Dec. 324, 683 N.E.2d 492 (1997), where the defendant bank refused to pay the plaintiff its broker's commission for the sale of equipment when the buyer failed to pay the purchase price and defaulted on the transaction. The defendant bank ultimately sold the equipment at a public auction and refused to pay the plaintiff the commission. The court **held** that if, on remand, the plaintiff proved that the defendant entered into a valid, binding contract with the buyer, then a "sale" occurred and the plaintiff was entitled to its commission. *Stephen L. Winternitz, Inc.,* 289 Ill.App.3d at 760, 225 Ill.Dec. 324, 683 N.E.2d 492.

¶ 28 However, *Winternitz* is easily distinguishable and does not stand for the blanket proposition urged by defendants. *Winternitz* dealt with the issue of a broker's commission upon the production of a ready, willing and able buyer, whereas here the additional payment under the settlement agreement was contingent upon an actual sale. *Winternitz* based its **holding** that, for purposes of the brokerage commission contract, a "sale" occurred upon the **holding** of *Fox v. Ryan,* 240 Ill. 391, 88 N.E. 974 (1909), also cited by defendants. *Fox* states the rule that a broker is entitled to his or her commission if the purchaser presented enters into a valid, binding and enforceable contract, even though the contract is merely executory, and cannot be deprived of his or her commission if the sale is not completed. *Fox,* 240 Ill. at 396, 88 N.E. 974.

¶ 29 Here, we are not presented with a contract for a broker's commission. Plaintiff did not procure the alleged buyer, and had nothing to do with DL Realty's further efforts to sell the River Oaks property after she entered into the settlement agreement with defendants. In fact, plaintiff would not be entitled to the additional payment if the River Oaks property actually sold. Thus, any broker commission analysis has no bearing in this context. Here, the additional payment owed to plaintiff was part of a separate settlement agreement, and was conditioned upon whether an actual sale occurred, not whether a valid contract was executed with ****59 *87** a ready, willing, and able buyer. Because there was no sale, plaintiff was therefore entitled to the additional payment of $30,000 under the terms of her settlement agreement with defendants.

¶ 30 II. The Contract Was Not Enforceable Because Neither the Unformed LLC Nor Scott Mason Could Be **Held** Liable as a Party to the Contract

¶ 31 Although we have determined that there was no sale, in the interest of clarifying some confusion as to the liability of LLC's and individual promoters on behalf of LLCs, we further **hold** and explain that under the facts of

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this particular case the contract was not in any event enforceable. Defendants argue that a party may legally contract with a "to be formed" LLC. Defendants further maintain that Scott Mason would be deemed the buyer if Cal City Apartments, LLC, could not be a proper party to the contract. Plaintiff responds that the unformed LLC did not make any payments or perform any of the covenants in the articles of agreement for deed and that the unformed LLC did not, and legally could not, comply with any of the terms and conditions of the articles of agreement. Plaintiff further responds that Scott Mason would not be liable under the contract because the intent of the parties was that the LLC was the buyer. We determine that the contract was not enforceable because there was no buyer bound by the contract where (a) the LLC was never subsequently formed and never ratified the contract, and (b) Scott Mason cannot be individually liable on the contract because he is statutorily protected under the **Limited Liability Company** Act.

¶ 32 A. The LLC Could Not Be Liable on the Contract Because it Was Never Subsequently Formed and the Contract Was Never Ratified

[15] ¶ 33 We first address plaintiff's contention that there was no sale because Cal City Apartments, LLC, was never formed as an Illinois **limited liability company** and legally could not comply with the terms and conditions of the articles of agreement. We begin our analysis with a recognition that an LLC is a corporate form of business in Illinois that has many of the same statutory powers as a corporation. Under the Business Corporation Act of 1983 (805 ILCS 5/1.01 et seq. (West 2006)), in relevant part, a corporation has the following powers:

> "(d) To purchase, take, receive, lease as lessee, take by gift, legacy, or otherwise acquire, and to own, **hold**, use, and otherwise deal in and with any real or **personal** property * * *.
>
> * * *
>
> (h) To incur liabilities; to borrow money for its corporate purposes at such rates of interest as the corporation may determine without regard to the restrictions of any usury law of this State, to issue its notes, bonds, and other obligations; to secure any of its obligations by mortgage, pledge, or deed of trust of all or any of its property, franchises, and income; and to make contracts, including contracts of guaranty and suretyship, but a corporation may not be organized hereunder for the purpose of insurance." 805 ILCS 5/3.10(d), (h) (West 2006).

¶ 34 Under the **Limited Liability Company** Act, LLC's similarly have the power to:

> "(3) Purchase, take, receive, lease as lessee, take by gift, legacy, or otherwise acquire, own, **hold**, use, and otherwise deal in and with any real or **personal** property, or any interest therein, wherever situated.
>
> * * *
>
> (7) Incur liabilities, borrow money for its proper purposes at any rate of interest ****60 *88** the **limited liability company** may determine without regard to the restrictions of any usury law of this State, issue notes, bonds, and other obligations, secure any of its obligations by mortgage or pledge or deed of trust of all or any part of its property, franchises, and income, and make contracts, including contracts of guaranty and suretyship." 805 ILCS 180/ 1–30 (3), (7) (West 2006).

[16] [17] [18] ¶ 35 In Illinois, if an individual enters into a contract on behalf of a corporation before the corporation is formed, the corporation is not liable unless it is later formed and ratifies the contract. Under the facts of this case, Scott Mason is in a position similar to that of a preincorporation promoter who enters into contracts on behalf of a corporate entity not yet in existence. "A promoter of a corporation is one who actively assists in creating, projecting and organizing a corporation." *Tin Cup Pass Ltd. Partnership v. Daniels,* 195 Ill.App.3d 847, 850, 142 Ill.Dec. 732, 553 N.E.2d 82 (1990). See also *Stap v. Chicago Aces Tennis Team, Inc.,* 63 Ill.App.3d 23, 26, 20 Ill.Dec. 230, 379 N.E.2d 1298 (1978) ("A promoter is one who alone or with others forms a corporation and procures for it the rights, instrumentalities and capital to enable it to conduct its business."). The general rule is that "[a] contract made with a promoter of a corporation before its organization is not enforceable against the corporation unless such contract is ratified by the corporation after its organization." *New Illinois Athletic Club v. Genslinger,* 211 Ill.App. 220, 232 (1918).

¶ 36 Defendants cite to *H.F. Philipsborn & Co. v. Suson,* 59 Ill.2d 465, 322 N.E.2d 45 (1974), *Tin Cup Pass,* 195 Ill.App.3d 847, 142 Ill.Dec. 732, 553 N.E.2d 82, and *In re Estate of Plepel,* 115 Ill.App.3d 803, 71 Ill.Dec. 365, 450 N.E.2d 1244 (1983), and argue that these cases stand for the proposition that courts will impose liability for corporate **debts** prior to corporate formation. However, *H.F. Philipsborn* and *Tin Cup Pass* are easily distinguishable from the facts in this case where the

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corporations in those cases were eventually incorporated and ratified the contracts.

¶ 37 In *H.F. Philipsborn,* the plaintiff prepared an application for a construction and mortgage loan, which was signed by the defendant as " 'North Shore Estates, Inc., by Morris Suson Pres.' " *H.F. Philipsborn,* 59 Ill.2d at 467, 322 N.E.2d 45. The application provided that upon acceptance by plaintiff within 60 days the application would constitute a binding contract to make the loan and that North Shore Estates would then agree to pay a commission of 2% of the loan. *H.F. Philipsborn,* 59 Ill.2d at 467, 322 N.E.2d 45. The following words were also printed on the loan application form: " 'Title to be in the name of' " followed by " 'Trust to be formed' " and the words " 'or corporation to be formed,' " which were added by defendant Suson. *H.F. Philipsborn,* 59 Ill.2d at 467, 322 N.E.2d 45.

¶ 38 The court in *H.F. Philipsborn* relied on the Supreme Court case of *Whitney v. Wyman,* 101 U.S. 392, 393, 25 L.Ed. 1050 (1879). In that case the defendants sent a letter to the plaintiff stating, " 'Our **company** being so far organized, by direction of the officers, we now order from you' " certain machinery and was signed " 'Charles Wyman, Edward P. Ferry, Carlton L. Storrs, Prudential Committee Grand Haven Fruit Basket Co.' " *Whitney,* 101 U.S. at 393. The plaintiff accepted the order for the machinery. *Whitney,* 101 U.S. at 393. The order was dated February 1, 1869, and the acceptance was dated February 10, 1869, before the articles of incorporation were filed with the Secretary of State. *Whitney,* 101 U.S. at 393. The machinery was delivered but the plaintiff's ****61 *89** draft on the defendants was protested because it was addressed to them individually. *Whitney,* 101 U.S. at 394. The plaintiff filed an action against the defendants individually to recover the value of the machinery. The Court applied the rule that whether liability will be imposed upon the promoter depends upon the intent of the parties (*Whitney,* 101 U.S. at 395–96) and found from the exchange of letters "that both parties understood and meant that the contract was to be and, in fact, was with the corporation, and not with the defendants individually." *Whitney,* 101 U.S. at 396. The Court in *Whitney* further **held** that "[t]he corporation subsequently ratified the contract by recognizing and treating it as valid. This made it in all respects what it would have been if the requisite corporate power had existed when it was entered into." *Whitney,* 101 U.S. at 396–97.

¶ 39 In *H.F. Philipsborn,* the corporation also was subsequently formed and ratified the contract. North Shore Estates was organized within 60 days of the execution of the loan application, and it approved and adopted Suson's acts and its assumption of liability. *H.F. Philipsborn,* 59 Ill.2d at 472, 322 N.E.2d 45. Thus, the court **held** that under these circumstances, the plaintiff looked only to the corporation for its commission and that there was no basis for the imposition of **personal** liability on Suson individually for the payment of the loan commission merely because the corporation was not yet formed at the time the application was executed. *H.F. Philipsborn,* 59 Ill.2d at 472–73, 322 N.E.2d 45. The court **held** that, "[o]n this record," whether the corporation existed at the time the contract was entered into was "not controlling," and **held** that the corporation, and not the individual, was liable. *H.F. Philipsborn,* 59 Ill.2d at 472–73, 322 N.E.2d 45.

¶ 40 The court in *Tin Cup Pass* likewise **held** that the actions of the parties after the lease, whereby the corporation ratified the contract, "rendered the lease as valid as if the requisite corporate authority had existed when it was entered into." *Tin Cup Pass,* 195 Ill.App.3d at 851, 142 Ill.Dec. 732, 553 N.E.2d 82. In *Tin Cup Pass*, it was undisputed that the plaintiff's predecessor who signed the lease knew that a corporation had yet to be formed. *Tin Cup Pass,* 195 Ill.App.3d at 850–51, 142 Ill.Dec. 732, 553 N.E.2d 82. The lease listed a corporate name as the lessee, and the defendants signed in their capacities as corporate officers and not as individuals, and there were no individual guarantees. *Tin Cup Pass,* 195 Ill.App.3d at 851, 142 Ill.Dec. 732, 553 N.E.2d 82. The court **held** that under these facts, "[i]t was clearly the intent of the parties to the lease to create a lease with a corporation as the lessee." *Tin Cup Pass,* 195 Ill.App.3d at 851, 142 Ill.Dec. 732, 553 N.E.2d 82.

¶ 41 Defendants argue that the agreement in this case establishes that Cal City Apartments, LLC, was the intended entity to be bound by the agreement, and that under *Tin Cup Pass* and *H.F. Philipsborn* the unformed LLC was bound by the contract. However, contrary to defendants' contention, the same result in *Tin Cup Pass* and *H.F. Philipsborn* does not obtain here. In both *Tin Cup Pass* and *H.F. Philipsborn,* the corporations were later formed and ratified the contract. The **holding** of *H.F. Philipsborn* has been applied only in similar cases where the intent was to **hold** the corporation liable on a contract *and* the corporation was later incorporated and adopted and ratified the actions of the individual promoter. See, *e.g., Tin Cup Pass,* 195 Ill.App.3d at 851, 142 Ill.Dec. 732, 553 N.E.2d 82. See *Peter J. Hartmann Co. v. Capital Bank & Trust Co.,* 296 Ill.App.3d 593, 607, 230 Ill.Dec. 830, 694 N.E.2d 1108 (1998) (citing *H.F.* ****62 *90** *Philipsborn,* the court **held** the corporation ratified one of the individual counterplaintiffs' conduct as president and a shareholder of a corporation who negotiated before its

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incorporation); *Deerpath Investment, Inc. v. Barack,* 112 Ill.App.3d 692, 696, 68 Ill.Dec. 353, 445 N.E.2d 1206 (1983) (citing *H.F. Philipsborn* and **holding** that the promoter of a corporation was not individually liable on a lease entered into on behalf of an as-yet-unformed corporation where the corporation was later incorporated and ratified and adopted the subject lease); *Stap v. Chicago Aces Tennis Team, Inc.,* 63 Ill.App.3d 23, 27, 20 Ill.Dec. 230, 379 N.E.2d 1298 (1978) (**holding** that an individual promoter was not liable for a salary contract where the provisions of the contract established that the plaintiff tennis player entered into the contract with a to-be-formed corporation, and the evidence showed that the corporation was later incorporated and an amendment was signed by the parties).

¶ 42 Here, unlike *H.F. Philipsborn* and *Tin Cup Pass,* the LLC was never formed, and so it never adopted and ratified the articles of agreement for deed. The legal existence of an LLC does not begin until articles of organization have been filed with the Secretary of State. 805 ILCS 180/5–40(a) (West 2006). It is undisputed that articles of organization for Cal City Apartments, LLC, were never filed and, therefore, Cal City Apartments, LLC, never existed. As the LLC never existed, it could not have ratified the actions of Scott Mason.

¶ 43 Also, because Cal City Apartments, LLC, was not yet formed, it could not have been bound by the agreement because Scott Mason had no authority to bind the LLC. Under the **Limited Liability Company** Act:

> "Each **member** is an agent of the **limited liability company** for the purpose of its business, and an act of a **member**, including the signing of an instrument in the **company's** name, for apparently carrying on, in the ordinary course, the **company's** business or business of the kind carried on by the **company** binds the **company**, *unless the **member** had no authority to act for the **company** in the particular matter and the person with whom the **member** was dealing knew or had notice that the **member** lacked authority.*" (Emphasis added.) 805 ILCS 180/13–5(a)(1) (West 2006).

¶ 44 Further, "[a]n act of a manager which is not apparently for carrying on, in the ordinary course, the **company's** business or business of the kind carried on by the **company** binds the **company** only if the act was authorized under Section 15–1." 805 ILCS 180/13–5(b)(2) (West 2006). Section 15–1 provides that in a **member**-managed LLC, except in certain circumstances not applicable here, any matter relating to the business of the LLC may be decided by a majority of the **members**. 805 ILCS 180/15–1(a)(2) (West 2006). In a manager-managed **company**, also subject to exceptions which are not applicable here, any matter relating to the business of the **company** may be decided by the manager or by a majority of the managers if there is more than one manager. 805 ILCS 180/15–1(b)(2) (West 2006).

¶ 45 Here, the record is not clear whether the agreement entered into for the purchase of property would have been for carrying on the regular course of business of Cal City Apartments, LLC, but under either section 13–5(a)(1) or section 13–5(b)(2) and section 15–1, it is clear that there was no act by the LLC authorizing Scott Mason because the LLC was not in existence yet. Thus, the act of Scott Mason in entering the contract to purchase the River Oaks property was unauthorized.

***91 **63** ¶ 46 Also, under the notice provision of section 13–5(a)(1), defendants could not enforce the agreement against Cal City Apartments, LLC, because the articles of agreement clearly indicated that Cal City Apartments, LLC, was "an Illinois **Limited Liability Company** *yet to be formed.*" (Emphasis added.) Thus, defendants had notice that Scott Mason could not have authority from the LLC to bind the LLC because the LLC was not yet in existence. Therefore, we **hold** that because the LLC was never formed, the contract was never ratified and Scott Mason's execution of the agreement was unauthorized, the LLC could not be liable for the agreement.

¶ 47 B. Scott Mason Is Not Individually Liable Because the **Limited Liability Company** Act Shields **Members** of LLCs From **Personal** Liability

[19] ¶ 48 Defendants argue that the articles of agreement were valid even if the unformed LLC could not be **held** liable because the individual who signed, Scott Mason, would then be **personally** liable. However, here there is an important distinction between corporations and LLCs that neither party recognizes which is dispositive of this issue. We explain that, by statute, as a matter of law Scott Mason cannot be **personally** liable.

¶ 49 Defendants contend that *H.F. Philipsborn, Tin Cup Pass,* and *Estate of Plepel* all stand for the proposition that courts will impose **personal** liability on individuals who incur corporate **debts** prior to corporate formation. However, we note that the result in *H.F. Philipsborn* and *Tin Cup Pass* was the opposite of the result sought here by defendants; the corporations were **held** liable, not the individual, because the corporations were ultimately

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formed and adopted and ratified the contracts. See *H.F. Philipsborn*, 59 Ill.2d at 472, 322 N.E.2d 45; *Tin Cup Pass*, 195 Ill.App.3d at 851, 142 Ill.Dec. 732, 553 N.E.2d 82. In *Estate of Plepel*, on the other hand, the decedent's estate was liable because there was no evidence that the parties intended to **hold** the corporation liable, or that the claimants even knew they were dealing with a corporation. *Estate of Plepel*, 115 Ill.App.3d at 807–08, 71 Ill.Dec. 365, 450 N.E.2d 1244.

[20] [21] [22] [23] ¶ 50 In determining whether a corporate officer has contracted in his own behalf, we apply the general rules of agency. *Polivka v. Worth Dairy, Inc.*, 26 Ill.App.3d 961, 966, 328 N.E.2d 350 (1974). The question of whether an agency relationship exists is normally a question of fact; however, a court may decide the issue as a matter of law if only one conclusion may be drawn from the undisputed facts. *Ioerger v. Halverson Construction Co.*, 232 Ill.2d 196, 202, 327 Ill.Dec. 524, 902 N.E.2d 645 (2008) (citing *Churkey v. Rustia*, 329 Ill.App.3d 239, 243, 263 Ill.Dec. 761, 768 N.E.2d 842 (2002)). The common law rule is that where an agent signs contract in his own name and the contract nowhere mentions the existence of agency or the identity of the principal, the agent is **personally** liable and parol evidence is not admissible to rebut the presumption of the agent's **personal** liability. *Bank of Pawnee v. Joslin*, 166 Ill.App.3d 927, 935, 118 Ill.Dec. 484, 521 N.E.2d 1177 (1988). A corporate officer who signs his name on a contract, without more, is individually liable on the contract. *84 Lumber Co. v. Denni Construction Co.*, 212 Ill.App.3d 441, 443, 156 Ill.Dec. 644, 571 N.E.2d 231 (1991).

[24] [25] [26] [27] ¶ 51 On the other hand, when an agent signs a document and indicates next to his signature his corporation affiliation, then, absent evidence of contrary intent in the document, the agent is not **personally** bound. ****64 *92** *Central Illinois Public Service Co. v. Molinarolo*, 223 Ill.App.3d 471, 475, 165 Ill.Dec. 803, 585 N.E.2d 199 (1992) (citing *Knightsbridge Realty Partners, Ltd.–75 v. Pace*, 101 Ill.App.3d 49, 53, 56 Ill.Dec. 483, 427 N.E.2d 815 (1981)). Directors or other officers of corporations are not liable for the **debts** contracted in the name of, and on behalf of, the corporation and which are binding upon it unless they are expressly made liable by statute or unless they also contract on their own behalf. *Polivka*, 26 Ill.App.3d at 966, 328 N.E.2d 350. " 'One of the purposes of a corporate entity is to immunize the corporate officer from individual liability on contracts entered into in the corporation's behalf.' " *People ex rel. Madigan v. Tang*, 346 Ill.App.3d 277, 284, 281 Ill.Dec. 875, 805 N.E.2d 243 (2004) (quoting *National Acceptance Co. of America v. Pintura Corp.*, 94 Ill.App.3d 703, 706, 50 Ill.Dec. 120, 418 N.E.2d 1114 (1981)). However, an unauthorized agent purporting to enter into a contract for a principal is **personally** liable. *Polivka*, 26 Ill.App.3d at 966, 328 N.E.2d 350.

¶ 52 Here, Scott Mason clearly indicated he was signing the articles of agreement on behalf of Cal City Apartments, LLC, thus seemingly insulating himself from liability. See *Baker v. Daniel S. Berger, Ltd.*, 323 Ill.App.3d 956, 969, 257 Ill.Dec. 268, 753 N.E.2d 463 (2001) (**holding** that the individual's signature on the face of the agreement was clear that he signed the agreement in his representative capacity on behalf of the corporation and therefore would not be **personally** bound). However, the LLC was never formed and so it never adopted and ratified the articles of agreement for deed. Thus, it would appear that Scott Mason should be liable on the contract, as he acted without authority of the LLC because the LLC was never formed and therefore never ratified his action in entering the articles of agreement.

¶ 53 However, there is an important statutory distinction between LLCs and corporations that provides **members** or managers of unformed LLCs with more protection from **personal** liability than officers of corporations in this context. Section 3.20 of the Business Corporation Act of 1983 specifically directs:

> "All persons who assume to exercise corporate powers without authority to do so shall be jointly and severally liable for all **debts** and liabilities incurred or arising as a result thereof." 805 ILCS 5/3.20 (West 2006).

¶ 54 The **Limited Liability Company** Act had a provision similar to section 3.20 of the Business Corporation Act. Prior to its amendment, section 10–10 provided:

> "(b) A manager of a **limited liability company** shall be **personally** liable for any act, **debt**, obligation, or liability of the **limited liability company** or another manager or **member** to the extent that a director of an Illinois business corporation is liable in analogous circumstances under Illinois law." 805 ILCS 180/10–10(b) (West 1996).

¶ 55 However, when the legislature amended section 10–10 of the **Limited Liability Company** Act in 1997, it specifically removed the provision that allowed a **member** or manager of an LLC to be **held personally** liable for the unauthorized exercise of corporate powers in the same manner as provided in the Business Corporation Act. *Puleo v. Topel*, 368 Ill.App.3d 63, 69–70, 306 Ill.Dec. 57, 856 N.E.2d 1152 (2006). See Pub. Act 90–424 (eff.Jan.1, 1998) (deleting 805 ILCS

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180/10–10(b) (West 1996)).

¶ 56 In addition, the remaining provisions of the **Limited Liability Company** Act provide that a **member** or manager is not liable for acting on behalf of an LLC:

> "A **member** or manager is not **personally** liable for a **debt**, obligation, or liability of the **company** solely by reason of being ****65 *93** or acting as a **member** or manager." 805 ILCS 180/10–10(a) (West 2006).

¶ 57 Section 10–10(a) of the **Limited Liability Company** Act provides the only means by which an individual can be liable for contracts entered into on behalf of an LLC:

> "(a) Except as otherwise provided in subsection (d) of this Section, the **debts**, obligations, and liabilities of a **limited liability company**, whether arising in contract, tort, or otherwise, are solely the **debts**, obligations, and liabilities of the **company**." 805 ILCS 180/10–10(a) (West 2006).

¶ 58 Subsection (d) in turn provides that an LLC **member** can be liable to a third party for **debts** or obligations only if: (1) there is a provision to that effect in the LLC's articles of organization; and (2) the **member** has consented in writing to that provision. 805 ILCS 180/10–10(d) (West 2006).

¶ 59 Subsection (c) further provides that "[t]he failure of a **limited liability company** to observe the usual **company** formalities or requirements relating to the exercise of its **company** powers or management of its business is not a ground for imposing **personal** liability on the **members** or managers for liabilities of the **company**." 805 ILCS 180/10–10(c) (West 2006).

¶ 60 We have recognized the clear legislative intent to shield individuals from **personal** liability in transactions on behalf of LLCs, where the LLC did not exist because it was dissolved. In Puleo, we **held** that a managing **member** was not **personally** liable for **debts** that an LLC incurred after its dissolution because there was no evidence of a provision establishing the managing **member's personal** liability was contained in the LLC's articles of organization or that the managing **member** consented in writing to the adoption of such a provision, which are the requirements of section 10–10(d) of the **Limited Liability Company** Act. *Puleo*, 368 Ill.App.3d at 68, 306 Ill.Dec. 57, 856 N.E.2d 1152. We declined to imply into the Limited Liability Act a provision similar to section 3.20 of the Business Corporation Act that would **hold** an individual **member** liable for obligations incurred when the **member** was without authority because the LLC was not in existence. *Puleo*, 368 Ill.App.3d at 69, 306 Ill.Dec. 57, 856 N.E.2d 1152. We **held** that "[a]s we have not found any legislative commentary regarding that amendment, we presume that by removing the noted statutory language, the legislature meant to shield a **member** or manager of an LLC from **personal** liability." *Puleo*, 368 Ill.App.3d at 69, 306 Ill.Dec. 57, 856 N.E.2d 1152. Thus, other than the very limited circumstances specified in section 10–10(d), there is no individual liability for **members** for any **debts** and obligations entered into on behalf of an LLC even where, as here, such acts were unauthorized due to the fact that the LLC had not yet been formed.

¶ 61 Here, there is no evidence that the requirements of section 10–10(d) were met, and thus there is no basis for **holding** Scott Mason bound by the contract. While in *Puleo* the LLC was dissolved at the time the contract was entered into, whereas here the LLC was never formed in the first place, the **holding** of *Puleo* is equally applicable, as in both instances the LLC was not in existence at the time of contract. In this case it is undisputed that the LLC was never formed, and there is no evidence offered by defendants that there were articles of organization providing for Mason's liability, nor any writing in which Scott Mason agreed to be liable. See *Puleo*, 368 Ill.App.3d at 68, 306 Ill.Dec. 57, 856 N.E.2d 1152 (independent contractors could not establish a managing **member's personal** liability for **debts** that ****66 *94** the LLC incurred after its dissolution without showing that a provision establishing the managing **member's personal** liability was contained in the LLC's articles of organization and that the managing **member** consented in writing to the adoption of such a provision). Thus, Scott Mason could not be **held** individually liable for the articles of agreement for deed because he is statutorily shielded from liability. Therefore, neither the unformed LLC nor Scott Mason could be **held** liable on the contract and the articles of agreement could not be enforced.

¶ 62 CONCLUSION

¶ 63 We conclude that there was no sale of the River Oaks property and that, therefore, plaintiff was correctly awarded the additional settlement payment. First, there was no sale of the River Oaks property by virtue of the articles of agreement for deed because the agreement constituted merely an executory contract to sell the property and did not transfer legal title. Also, there was no sale after the execution of the contract because no payments were ever made and no closing was **held**, which

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were conditions precedent of the transfer of title to the property under the contract. Second, we also **hold** that there was no sale because there was no enforceable contract due to the fact that there was no party who could be **held** liable as a buyer. The LLC was never formed and thus never ratified the contract on behalf of the LLC or gave Scott Mason authority to enter into the contract. Also, statutorily as a matter of law Scott Mason could not be individually liable for signing the contract on behalf of the unformed LLC due to insulation from liability under the **Limited Liability Company** Act. Thus, there is no genuine issue of material fact that there was no sale of the River Oaks property. The circuit court correctly granted summary judgment in favor of plaintiff and awarded plaintiff the additional payment of $30,000 she was due under her settlement agreement with defendants.

¶ 64 Affirmed.

Justices FITZGERALD SMITH and STERBA concurred in the judgment and opinion.

All Citations

2011 IL App (1st) 102765, 959 N.E.2d 77, 355 Ill.Dec. 49

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2013 IL App (1st) 122520
Appellate Court of Illinois,
First District, Fifth Division.

Biplob DASS and Brett Garry,
Plaintiffs–Appellants,
v.
Craig YALE, Defendant–Appellee (LDC, Inc., f/k/a Lexus Development Corporation, an Illinois Corporation, Defendant).

Docket No. 1–12–2520.
|
Dec. 20, 2013.

Synopsis
Background: Condominium unit purchasers brought common law fraud and Consumer Fraud Act claims against manager of limited liability company (LLC) that sold them the condominium unit. The manager moved to dismiss. The Circuit Court, Cook County, No. 08 L 12717, Lynn M. Egan, J., granted the motion. The purchasers appealed.

[Holding:] The Appellate Court, Gordon, P.J., held that manager was not personally liable for alleged frauds of the LLC.

Affirmed.

West Headnotes (4)

[1] **Statutes**Statute as a Whole; Relation of Parts to Whole and to One Another
StatutesSuperfluousness

Statutes should be read as a whole with all relevant parts considered, and they should be construed, if possible, so that no term is rendered superfluous or meaningless.

[2] **Statutes**Plain language; plain, ordinary, common, or literal meaning

When the plain language of a statute is unambiguous, the legislative intent discernible from the language must prevail and to resort to other interpretive aids is unnecessary.

[3] **Corporations and Business Organizations**Rights, duties, and liabilities

Manager of limited liability company (LLC) that sold condominium unit to purchasers was not personally liable to purchasers for alleged frauds perpetrated by the LLC during the sale of the unit; LLC's articles of organization did not contain a provision for manager liability, manager never consented in writing to such a provision, and express language of statute governing LLC liability had been changed to prevent manager liability. S.H.A. 805 ILCS 180/10–10.

5 Cases that cite this headnote

[4] **Statutes**Presumptions

Generally, a change to the unambiguous language of a statute creates a rebuttable presumption that the amendment was intended to change the law.

Attorneys and Law Firms

***858** J. Eric Vander Arend, of Hughes Socol Piers Resnick & Dym, Ltd., of Chicago, for appellants.

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Mario A. Sullivan, of Law Offices of Peter Anthony Johnson, P.C., of Chicago, for appellee.

OPINION

Presiding Justice GORDON delivered the judgment of the court, with opinion.

****293** ¶ 1 According to plaintiffs, the instant case provides a case of first impression. They claim that the legislature never intended section 10–10 of the Limited Liability Company Act (the LLC Act) (805 ILCS 180/10–10 (West 2010)) to shield limited liability company members or managers who commit fraud. The trial court found immunity under the LLC Act, which caused the instant appeal arising from the dismissal of plaintiffs' fifth amended complaint pursuant to sections 2–619(a)(5) and ****294 *859** (a)(9) of the Code of Civil Procedure (the Code) (735 ILCS 5/2–619(a)(5), (a)(9) (West 2010)).

¶ 2 Plaintiffs' complaint alleges that plaintiffs, Dr. Biplob Dass and Brett Garry, owned a garden condominium unit that they purchased in 2006 from Wolcott LLC (Wolcott), a limited liability company of which defendant Craig Yale is the managing member. Their unit flooded in 2007 and, after plaintiffs had the sewer lines serving the unit inspected, plaintiffs discovered a number of problems with the building's sewer lines and drainage system, and further discovered that the existing sewer pipes were not as represented when they purchased the unit. Plaintiffs filed suit against Wolcott; LDC, Inc. (LDC); and Property Consultants Realty, Inc. (Property Consultants); the three entities involved in the sale of the unit. Plaintiffs also, in their fifth amended complaint, named Yale as a defendant, suing him for common-law and statutory fraud. Currently, LDC and Yale are the only remaining defendants, and Yale is the sole defendant that is a party to the instant appeal.[1]

¶ 3 Yale filed a motion to dismiss the claims against him pursuant to sections 2–619(a)(5) and (a)(9) of the Code, claiming that he was insulated from liability under section 10–10 of the LLC Act and that plaintiffs' claim based on the Consumer Fraud and Deceptive Business Practices Act (the Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (West 2010)) was time-barred and that Wolcott, not Yale, sold the unit to plaintiffs. The trial court granted Yale's motion to dismiss, finding that Yale was insulated from liability under section 10–10 of the LLC Act and that plaintiffs' claim under the Consumer Fraud Act was time-barred. Plaintiffs appeal, and we affirm.

¶ 4 BACKGROUND

¶ 5 The following facts are taken from plaintiffs' fifth amended complaint, the complaint at issue in the case at bar, and from the procedural history of the case as established by the record on appeal.

¶ 6 I. Plaintiffs' Condominium Unit

¶ 7 Plaintiffs, a married couple, owned a garden condominium unit at 4845–4851 North Wolcott in Chicago (the Wolcott Court condominiums) from December 2006 to July 2010. When the building was originally constructed, the unit purchased by plaintiffs was a one-bedroom, one-bath unit; however, the unit was being converted to a two-bedroom, two-bath unit at the time plaintiffs purchased it. In order to expand plaintiffs' unit, the floor of the unit had to be lowered to satisfy City of Chicago (the City) ceiling-height code requirements, among other changes not relevant to the instant appeal.

¶ 8 When plaintiffs purchased the unit, LDC was named as the general contractor for construction of the Wolcott Court condominiums in a property report provided to plaintiffs, Wolcott was the developer of the Wolcott Court condominiums, and Property Consultants was the sales agent for the Wolcott Court condominiums. "Until the [Allen] Liss and [Bruce] Teitelbaum[2] depositions in 2011, Dass' only knowledge of Yale's involvement in the ****295 *860** project was his signature as manager of Wolcott, L.L.C. on the Property Report and on the Listing Agreement with Property Consultants for condominium sales."[3]

¶ 9 During heavy rains in June and August 2007, and again in the summer of 2009, plaintiffs experienced extensive flooding in their unit. The flooding was primarily caused by water entering the unit at the bathrooms' toilets and drains and at the HVAC drain. The flood damage included warping and cracking of the

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hardwood floors throughout the unit, damage to subflooring, and mold on the subfloors and walls in the unit.

¶ 10 After the flood damage in 2007, plaintiffs arranged for multiple inspections of the sewer lines servicing their unit. On October 29, 2007, Kerrigan Plumbing inspected the sewer lines and discovered:

> "A. The Dass Unit was tied directly into the house sewer line going from the rear of the building, underneath the Dass Unit, to ultimately connect with the city sewer at the street;
>
> B. The house sewer line under the Dass Unit was back-pitched[4], and was severely broken which allowed dirt and sand to enter and block all but 10–15% of the line;
>
> C. The Dass Unit is the lowest point in the Wolcott Court condominiums, a condition created by construction of the Dass unit; and
>
> D. The gutters and drains at the Wolcott Court condominiums direct rainwater to the main house sewer system at points in the back-pitched sewer line both ahead of and behind the points where the drains from the Dass Unit were tied in."
>
> Kerrigan Plumbing concluded that new sewer piping and an independent system for insulating plaintiffs' unit from the main house sewer were necessary to significantly decrease the chance of future flooding of the unit.

¶ 11 Furthermore, the deteriorated condition of the sewer lines servicing plaintiffs' unit existed prior to the construction of plaintiffs' unit and the condition of the sewer lines in October 2007 was not as reported to plaintiffs in the property report provided to them prior to closing on their purchase of the unit. The property report stated that the contractor would conduct a closed-circuit television examination of the entire sewer system in the presence of the City's sewer inspector to confirm the condition of the system; that the existing underground sanitary waste lines would be inspected and cleared of any obstructions discovered and that damaged or otherwise unusable sections of sewers would be removed and replaced; that all existing waste lines and vents serving bathroom fixtures would be inspected for any deteriorating lines and repaired; and that all existing cast-iron soil stacks would be inspected for loose or cracked fittings or pipe and repaired. Additionally, in a feature sheet incorporated into the property report, Property Consultants represented that the building would have " '[a]ll new plumbing.' " Finally, "[a]t page 15 of the Property Report, Wolcott, L.L.C., through its manager Yale, expressly 'affirm[ed] that this Property Report and any supplements, modifications and amendments hereto, are or will be true, full, complete and correct.' " Based on these representations, plaintiffs believed ****296 *861** that the building sewer and waste systems would be functionally new.

¶ 12 However, at no time were any of the inspections or repairs performed, based on the fact that no permit for such work was provided by the City and no videotape of the inspection was provided to the City, as is required when rehabbing a building such as the Wolcott Court condominiums while keeping the existing house sewer system. Defendants knew or should have known that none of the inspections or repairs had been done and that the representations in the property report were false, and they also knew or should have known of the measures necessary to prevent flooding of plaintiffs' unit, because they were included in the drawings for construction of the unit submitted to the City with the application for a construction permit, but chose not to implement them.

¶ 13 On December 7, 2007, plaintiffs made a demand on LDC, Wolcott, and Property Consultants to repair the flood damage and pay for all costs and expenses and all professional fees plaintiffs incurred in addressing the flood damage. When resolution of the dispute was unsuccessful, plaintiffs filed suit on November 13, 2008, against LDC, Wolcott, and Property Consultants for breach of warranty, common-law fraud, and fraud under the Consumer Fraud Act. Plaintiffs amended their complaint a number of times in response to motions to dismiss from Wolcott and Property Consultants. The original complaint and first four amended complaints include allegations that Allen Liss was both the president of LDC and had a significant interest in Wolcott, and make no mention of Yale; instead, the complaints all state that Wolcott "through its manager" affirmed the property report as true.

¶ 14 In May 2009, a second plumbing contractor, hired by LDC, Wolcott, and Property Consultants, inspected the sewer lines servicing plaintiffs' unit and, like Kerrigan Plumbing, also concluded that installation of new sewer piping and a system for insulating plaintiffs' unit from the main house sewer were necessary to significantly decrease the chance of future flooding of the unit.

¶ 15 On July 1, 2009, plaintiffs filed a motion for an order of default against LDC and, on July 15, 2009, the trial court entered an order of default against LDC. On September 22, 2009, the trial court entered judgment in

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favor of plaintiffs and against LDC in the amount of $56,521.46. On October 7, 2009, a citation to discover assets to a third party was issued to Wolcott, and Wolcott answered the citation on October 14, 2009; Wolcott's answer was certified to be true and correct by Wolcott's agent, Craig G. Yale. This document is the first place in the record where Yale's name appears.[5]

¶ 16 On April 14, 2010, plaintiffs filed a fourth amended complaint, attached to which was the property report provided to plaintiffs prior to their purchase of the condominium unit. Page 15 of the property report contains the signature of Wolcott's "Manager," but the signature is illegible.

¶ 17 II. Fifth Amended Complaint

¶ 18 On October 11, 2011, plaintiffs filed a motion for leave to file their fifth amended complaint *instanter*, and plaintiffs' fifth amended complaint was filed on October 24, 2011.

¶ 19 In addition to the facts set forth above, the fifth amended complaint also ****297 *862** alleges that although LDC was named as the general contractor for construction of the Wolcott Court condominiums in the property report provided to plaintiffs, when a rehab permit was sought in May 2005, a different general contractor for the project was named because neither LDC nor Allen Liss, its principal, had a general contractor's license. The other general contractor performed no work on the building and work was performed by Liss' workers. The complaint alleges that Yale (1) directed or approved of work by Liss and his workers on the Wolcott Court condominiums in advance of a construction permit, resulting in a stop work order from the City; (2) directed or approved the application for the rehab permit that stated that the owner of the Wolcott Court condominiums would not be performing any work on the project when he knew that was not true and knew that the amount certified on the application for construction work by the other general contractor did not reflect the lower amount that would be spent on Liss' unlicensed crew; (3) knew that neither Liss nor LDC had a general contractor's license but purposefully directed or approved the unlicensed crew to do the work in order to obtain cost savings; (4) directed or approved the use of a roofing contractor that was unlicensed to perform work on a building the size of the Wolcott Court condominiums; (5) directed or approved completion of all significant construction in plaintiffs' unit prior to applying for permits for its renovation as a two-bedroom, two-bath unit while leading Property Consultants and, by extension, plaintiffs, to believe that permitting was completed during construction; (6) directed or approved drawings of plaintiffs' unit submitted with the application for a permit that showed the unit as a renovation of an existing two-bedroom, two-bath unit when that was not true so that the permit could be obtained through a " 'self-certification' " process that would not have otherwise been available; and (7) directed or approved the submission of an application for a permit for plaintiffs' unit that listed a different general contractor, when he knew that Liss' unlicensed crew would perform the construction.

¶ 20 The complaint alleges that Yale attempted to cover his participation in the fraudulent misrepresentations regarding plaintiffs' unit by (1) directing that Liss' name and a forged signature appear for the owner on the contract executed with the other general contractor; (2) directing that Liss' name and a forged signature appear as owner of the Wolcott Court condominiums in a November 30, 2006, letter to the City's department of construction and permits that agreed that, "in 'consideration of the issuance of a building permit under the Ezpaned Self–Certification program,' " Liss would indemnify the City against any claims " 'in any way connected with design, construction and/or code compliance review' " of the Wolcott Court condominiums; (3) directing that Liss' name and a forged signature appear as the owner of the Wolcott Court condominiums on the December 12, 2006, application for the permit to rehab plaintiffs' unit; and (4) directing that Liss' name and a forged signature appear on a December 14, 2006, letter on Wolcott letterhead, with Liss as " 'Member/Manager,' " to the City's department of construction and permits in support of the permit to rehab plaintiffs' unit. At his deposition, Liss denied that any of the signatures were his and, at his deposition, Teitelbaum denied involvement in any aspect of the Wolcott Court condominiums other than securing financing.

¶ 21 III. Yale's Motion to Dismiss

¶ 22 On March 27, 2012, Yale filed a motion to dismiss plaintiffs' fifth amended ****298 *863** complaint pursuant to sections 2–619(a)(5) and (a)(9) of the Code. Yale argued that both counts should be dismissed because under the LLC Act, members are shielded from personal liability. Yale also argued that the count concerning the

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Consumer Fraud Act should be dismissed because (1) it was barred by the statute of limitations and (2) Yale was not a seller or merchant under the Consumer Fraud Act.

¶ 23 In the portion of Yale's motion concerning the statute of limitations, Yale stated the following: "The Articles of Organization for Wolcott were filed with the Illinois Secretary of State on July 7, 2004. See Exhibit B. Pursuant to the Wolcott Articles of Organization, Yale has at all times been listed and identified as sole member thereof. The information set forth in the Articles of Organization is a matter of public record and ha[s] at all times relevant hereto, been listed and easily accessible to the Owners through the Illinois Secretary of State and on its website. A true and accurate copy of the printouts from Secretary of State LLC File Detail Report are attached hereto as Exhibit 'D'." Exhibit B, the Wolcott articles of organization, are dated July 7, 2004, and list the manager as "Allen Liss"; the articles are signed by Charles J. Mack as the organizer. Yale's name does not appear on the articles of organization. Exhibit D purports to be a printout from the Secretary of State's website dated February 13, 2012, and has "Yale, Craig" listed under "LLC Managers" of Wolcott. Yale's motion to dismiss further states that "Yale has signed all relevant documents pertaining to the development of Wolcott Court Condominiums," including the purchase agreement, declaration and bylaws, property report, permit applications, and deed and other sale documents, all of which were provided to plaintiffs either prior to or at the closing of the purchase of their unit. Consequently, Yale argued that plaintiffs should have known since December 2006 that Yale was the sole member and manager of Wolcott.

¶ 24 In their response to Yale's motion, plaintiffs argued that Yale fraudulently concealed his affiliation with Wolcott and stated that Wolcott, during discovery, refused to produce any information regarding its managers or members and that it was only during depositions in 2011 that plaintiffs discovered that Yale, not Liss, was the culpable party. Attached to their response was correspondence between plaintiffs' attorney and Wolcott's attorney, in which Wolcott's attorney, in a letter dated November 6, 2009, first informed plaintiffs that the property report was executed by Craig Yale as agent for Wolcott.

¶ 25 In his reply to plaintiffs' response, Yale pointed to several documents that he signed on behalf of Wolcott that had been attached to plaintiffs' fifth amended complaint. While two of those documents, the condominium declaration and certificate of developer, do not contain Yale's signature, both include Yale's name as "Manager of THE WOLCOTT COURT LLC." The third document, the certificate of limited warranty, which was not attached to plaintiffs' fifth amended complaint but had previously been attached to plaintiffs' second, third, and fourth amended complaints, contains Yale's signature, which is illegible, and does not contain Yale's name.

¶ 26 On June 26, 2012, plaintiffs filed a motion for leave to file a surreply *instanter*, and on July 3, 2012, the trial court entered an order indicating that plaintiffs' motion "is stricken."

¶ 27 On July 24, 2012, the trial court entered a written order granting Yale's motion to dismiss, determining that Yale was shielded from liability under section 10–10 of the LLC Act and that plaintiffs' claims under the Consumer Fraud Act ****299 *864** were time-barred; the court also found no just reason to delay enforcement of or appeal from its order. In its recitation of the facts, the trial court stated: "Plaintiffs claim that defendant's earlier absence from the litigation was due to the fact they did not learn of his involvement in any fraudulent acts until June 14, 2011. However, plaintiffs admit they were aware of defendant's role at Wolcott since his signature appeared on the Property Report they received prior to their purchase of the condominium unit. Plaintiffs further admit they first learned of the alleged misrepresentations that form the basis of their fraud claims in October 2007."

¶ 28 In considering whether Yale was protected by section 10–10 of the LLC Act, the trial court concluded that the language of the statute indicated that Yale was protected since all of the allegations of the complaint occurred while he was acting solely in his capacity as a manager of Wolcott, and supported its conclusion by citing to two cases: *Puleo v. Topel*, 368 Ill.App.3d 63, 306 Ill.Dec. 57, 856 N.E.2d 1152 (2006), and *Carollo v. Irwin*, 2011 IL App (1st) 102765, 355 Ill.Dec. 49, 959 N.E.2d 77. With regard to the statute of limitations, the trial court noted that the statute of limitations for the Consumer Fraud Act was three years from the time that the cause of action accrued. The court rejected plaintiffs' argument that they were unaware of Yale's involvement in the misrepresentations until June 2011[6] noting that actual knowledge was not necessary for the cause of action to accrue. The court found that, "[b]ecause plaintiffs concede they learned of Wolcott's misrepresentations in late 2007, and also knew defendant was the managing member of Wolcott, they had an obligation to further investigate at that time." Since they failed to investigate, they were time-barred from raising their claim under the Consumer Fraud Act.

¶ 29 Plaintiffs filed a notice of appeal, and this appeal

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follows.

¶ 30 ANALYSIS

¶ 31 On appeal, plaintiffs argue that the trial court erred in granting Yale's motion to dismiss, claiming: (1) the trial court erred in its interpretation of section 10–10 of the LLC Act and (2) the trial court erred in determining that plaintiff's Consumer Fraud Act claims were time-barred. Additionally, while not decided by the trial court, plaintiffs argue that Yale is liable under the Consumer Fraud Act despite the fact that plaintiffs purchased their condominium unit through Wolcott, not Yale. We note that, since the argument concerning section 10–10 of the LLC Act applies to both plaintiffs' common-law fraud and Consumer Fraud Act claims, if we affirm on the basis of the LLC Act, we have no need to discuss plaintiffs' arguments concerning the Consumer Fraud Act.

¶ 32 I. Standard of Review

¶ 33 "A motion to dismiss, pursuant to section 2–619 of the Code, admits the legal sufficiency of the plaintiffs' complaint, but asserts an affirmative defense or other matter that avoids or defeats the plaintiffs' claim." *DeLuna v. Burciaga*, 223 Ill.2d 49, 59, 306 Ill.Dec. 136, 857 N.E.2d 229 (2006); *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill.2d 558, 579, 304 Ill.Dec. 369, 852 N.E.2d 825 (2006). For a section 2–619 dismissal, our standard of review is *de novo*. ****300 *865** *Solaia Technology*, 221 Ill.2d at 579, 304 Ill.Dec. 369, 852 N.E.2d 825; *Morr–Fitz, Inc. v. Blagojevich*, 231 Ill.2d 474, 488, 327 Ill.Dec. 45, 901 N.E.2d 373 (2008). *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill.App.3d 564, 578, 350 Ill.Dec. 63, 948 N.E.2d 132 (2011).

¶ 34 When reviewing "a motion to dismiss under section 2–619, a court must accept as true all well-pleaded facts in plaintiffs' complaint and all inferences that can reasonably be drawn in plaintiffs' favor." *Morr–Fitz*, 231 Ill.2d at 488, 327 Ill.Dec. 45, 901 N.E.2d 373. "In ruling on a motion to dismiss under section 2–619, the trial court may consider pleadings, depositions, and affidavits." *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill.2d 248, 262, 282 Ill.Dec. 815, 807 N.E.2d 439 (2004). Even if the trial court dismissed on an improper ground, a reviewing court may affirm the dismissal if the record supports a proper ground for dismissal. *Raintree*, 209 Ill.2d at 261, 282 Ill.Dec. 815, 807 N.E.2d 439 (when reviewing a section 2–619 dismissal, we can affirm "on any basis present in the record"); *In re Marriage of Gary*, 384 Ill.App.3d 979, 987, 323 Ill.Dec. 783, 894 N.E.2d 809 (2008) ("we may affirm on any basis supported by the record, regardless of whether the trial court based its decision on the proper ground").

¶ 35 II. Section 10–10 of the LLC Act

¶ 36 In the case at bar, the trial court found that Yale was shielded from both counts of plaintiffs' fifth amended complaint based on his status as a member of Wolcott, a limited liability company (LLC). As an initial matter, it is important to note what plaintiffs are *not* arguing: plaintiffs do not argue that Yale defrauded them in his individual capacity and do not argue that Yale should be liable through the doctrine of piercing the corporate veil. Instead, plaintiffs argue that section 10–10 of the LLC Act does not exempt LLC members or managers from personal liability for torts or fraud committed in their capacity as members or managers of the LLC. Plaintiffs argue that, "[g]iven that Yale would be liable to plaintiffs for fraud based on plaintiffs' allegations if Yale acted individually, that he defrauded plaintiffs while a member/manager of Wolcott LLC should not provide him protection."

¶ 37 The trial court's decision was based on section 10–10 of the LLC Act, which provides:

> "(a) Except as otherwise provided in subsection (d) of this Section, the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager.
>
> (b) (Blank).
>
> (c) The failure of a limited liability company to observe the usual company formalities or requirements relating to the exercise of its company powers or management of its business is not a ground for imposing personal

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liability on the members or managers for liabilities of the company.

(d) All or specified members of a limited liability company are liable in their capacity as members for all or specified debts, obligations, or liabilities of the company if:

(1) a provision to that effect is contained in the articles of organization; and

(2) a member so liable has consented in writing to the adoption of the provision or to be bound by the provision." 805 ILCS 180/10–10 (West 2010).

***866 **301** [1] [2] ¶ 38 When interpreting statutes, our goal is to " ascertain and give effect to the true intent of the legislature." *In re Marriage of Kates*, 198 Ill.2d 156, 163, 260 Ill.Dec. 309, 761 N.E.2d 153 (2001). " 'The best evidence of legislative intent is the language used in the statute itself, which must be given its plain and ordinary meaning.' " *Kates*, 198 Ill.2d at 163, 260 Ill.Dec. 309, 761 N.E.2d 153 (quoting *Paris v. Feder*, 179 Ill.2d 173, 177, 227 Ill.Dec. 800, 688 N.E.2d 137 (1997)). When the plain language is unambiguous, the legislative intent discernible from the language must prevail and to resort to other interpretive aids is unnecessary. *Kates*, 198 Ill.2d at 163, 260 Ill.Dec. 309, 761 N.E.2d 153. "Statutes should be read as a whole with all relevant parts considered, and they should be construed, if possible, so that no term is rendered superfluous or meaningless." *Kates*, 198 Ill.2d at 163, 260 Ill.Dec. 309, 761 N.E.2d 153 (citing *Kraft, Inc. v. Edgar*, 138 Ill.2d 178, 189, 149 Ill.Dec. 286, 561 N.E.2d 656 (1990), and *Advincula v. United Blood Services*, 176 Ill.2d 1, 16–17, 26, 223 Ill.Dec. 1, 678 N.E.2d 1009 (1996)).

[3] ¶ 39 In the case at bar, the plain language of section 10–10 states that, "[e]xcept as otherwise provided in subsection (d) of this Section, the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager." 805 ILCS 180/10–10(a) (West 2010). Thus, "[s]ection 10–10 clearly indicates that a member or manager of an LLC is not personally liable for debts the company incurs unless each of the provisions in subsection (d) is met." *Puleo*, 368 Ill.App.3d at 68, 306 Ill.Dec. 57, 856 N.E.2d 1152. Here, there is no claim that Yale is liable under subsection (d), so Yale is not personally liable for the tort claim against Wolcott.

¶ 40 Plaintiffs argue that such a result is contrary to "[t]he legislative history published with [section] 10–10" of the LLC Act. Plaintiffs' argument relies on comparison of section 10–10 of the LLC Act to section 303 of the Uniform Limited Liability Company Act (1996) (the Uniform Act), which contains substantively the same language as section 10–10. Section 303 of the Uniform Act includes a comment stating:

"A member or manager, as an agent of the company, is not liable for the debts, obligations, and liabilities of the company simply because of the agency. A member or manager is responsible for acts or omissions to the extent those acts or omissions would be actionable in contract or tort against the member or manager if that person were acting in an individual capacity." Uniform Limited Liability Company Act § 303, Comment (1996).

Plaintiffs claim that the comment to section 303 of the Uniform Act was "incorporated" into the LLC Act by "the Illinois legislature," pointing to the "Historical and Statutory Notes" to section 10–10 that indicate that "[t]his section is similar to" section 303 of the Uniform Act (805 ILCS Ann. 180/10–10, Historical and Statutory Notes, at 42 (Smith–Hurd 2010)). However, the "Historical and Statutory Notes" are not part of the LLC Act itself but were added by West, the publisher of the annotated statutes. See Style Manual for the Supreme and Appellate Courts of Illinois § III(B)(3) (4th ed. rev.2012) ("Quoting Illinois Statutes"). Furthermore, while some states adopting the Uniform Act have also adopted the comment to section 303, Illinois has not done so. See, *e.g.*, *16* ****302 *867** *Jade Street, LLC v. R. Design Construction Co., LLC*, 398 S.C. 338, 728 S.E.2d 448, 453 (2012) (discussing South Carolina's analogue to section 303 of the Uniform Act). Accordingly, while section 303 of the Uniform Act and the comment accompanying it are persuasive authority in interpreting section 10–10 of the LLC Act due to the similar language used, neither is formally part of the LLC Act. Furthermore, here, we find plaintiffs' reliance on the cases interpreting section 303 of the Uniform Act and its comment to be of little value, since our interpretation of the LLC Act must take into account the LLC Act's history and other cases interpreting it.

[4] ¶ 41 Indeed, examining the history of LLC Act itself demonstrates that the trial court was correct in interpreting section 10–10 to shield Yale from liability. The current language of section 10–10 has been in effect since January 1, 1998. See Pub. Act 90–0424 (eff. Jan. 1, 1998). Prior to that, section 10–10 read:

"(a) A member of a limited liability company shall be personally liable for any act, debt, obligation, or

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> liability of the limited liability company or another member or manager to the extent that a shareholder of an Illinois business corporation is liable in analogous circumstances under Illinois law.
>
> (b) A manager of a limited liability company shall be personally liable for any act, debt, obligation, or liability of the limited liability company or another manager or member to the extent that a director of an Illinois business corporation is liable in analogous circumstances under Illinois law." 805 ILCS 180/10–10 (West 1996).

Generally, a change to the unambiguous language of a statute creates a rebuttable presumption that the amendment was intended to change the law. *State v. Mikusch*, 138 Ill.2d 242, 252, 149 Ill.Dec. 704, 562 N.E.2d 168 (1990). Here, the language of the LLC Act was changed by removing language explicitly providing for personal liability. As we noted in *Puleo*, "[a]s we have not found any legislative commentary regarding that amendment, we presume that by removing the noted statutory language, the legislature meant to shield a member or manager of an LLC from personal liability." *Puleo*, 368 Ill.App.3d at 69, 306 Ill.Dec. 57, 856 N.E.2d 1152.

¶ 42 Additionally, we have interpreted section 10–10 in several cases, most notably in *Puleo*. There, we considered whether the defendant could be personally liable for obligations incurred on behalf of an LLC after the company was involuntarily dissolved. *Puleo*, 368 Ill.App.3d at 64, 306 Ill.Dec. 57, 856 N.E.2d 1152. We examined the language of section 10–10 and noted that, under the express language of the LLC Act, since the plaintiffs had not demonstrated that the provisions of subsection (d) were satisfied, the plaintiffs could not establish the defendant's personal liability for debts that the LLC incurred after its dissolution. *Puleo*, 368 Ill.App.3d at 68, 306 Ill.Dec. 57, 856 N.E.2d 1152. We also considered the amendment to section 10–10 and found that the amendment was meant to shield a member or manager of an LLC from personal liability. *Puleo*, 368 Ill.App.3d at 68, 306 Ill.Dec. 57, 856 N.E.2d 1152. Consequently, we affirmed the trial court's dismissal of the plaintiff's complaint. *Puleo*, 368 Ill.App.3d at 70, 306 Ill.Dec. 57, 856 N.E.2d 1152.

¶ 43 We again interpreted section 10–10 the same way in *Carollo*, where we considered whether the defendant could be personally liable for debts incurred on behalf of an LLC prior to its formation. *Carollo*, 2011 IL App (1st) 102765, ¶ 2, 355 Ill.Dec. 49, 959 N.E.2d 77. There, we noted that, under general principles of agency, the ****303 *868** defendant would ordinarily be personally liable under a contract he executed on behalf of the unformed LLC. *Carollo*, 2011 IL App (1st) 102765, ¶ 52, 355 Ill.Dec. 49, 959 N.E.2d 77. However, we noted that section 10–10 of the LLC Act provided "an important statutory distinction between LLCs and corporations that provides members or managers of unformed LLCs with more protection from personal liability than officers of corporations in this context." *Carollo*, 2011 IL App (1st) 102765, ¶ 53, 355 Ill.Dec. 49, 959 N.E.2d 77. Relying on the language of section 10–10 and our earlier holding in *Puleo*, we found that the defendant could not be personally liable under the LLC Act. *Carollo*, 2011 IL App (1st) 102765, ¶¶ 54–61, 355 Ill.Dec. 49, 959 N.E.2d 77.

¶ 44 Plaintiffs distinguish *Puleo* and *Carollo* by arguing that neither case involved application of section 10–10 to a LLC member or manager's tort or fraud and only involved the member or manager acting without authority because the LLC did not exist. However, the express language of section 10–10 provides that "the debts, obligations, and liabilities of a limited liability company, *whether arising in contract, tort, or otherwise*, are solely the debts, obligations, and liabilities of the company." (Emphasis added.) 805 ILCS 180/10–10(a) (West 2010). We see no reason why the reasoning of *Puleo* and *Carollo*, which focused on the language of the LLC Act and its amendment, would not apply to a liability arising in tort, as in the case at bar, when such a scenario is expressly contemplated by the language of section 10–10.[7] Accordingly, we affirm the trial court's dismissal of plaintiffs' complaint.

¶ 45 III. Consumer Fraud Act

¶ 46 Plaintiffs also raise several arguments concerning the dismissal of their claim based on the Consumer Fraud Act. However, since we have determined that Yale is shielded from personal liability by section 10–10 of the LLC Act, there is no need for us to consider plaintiffs' arguments focusing on the Consumer Fraud Act claim.

¶ 47 CONCLUSION

¶ 48 We find that Yale was shielded from personal liability based on section 10–10 of the LLC Act.

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Accordingly, the trial court properly dismissed plaintiffs' claim under section 2–619 of the Code.

¶ 49 Affirmed.

Justices McBRIDE and TAYLOR concurred in the judgment and opinion.

All Citations

2013 IL App (1st) 122520, 3 N.E.3d 858, 378 Ill.Dec. 293

Footnotes

1 Wolcott filed for bankruptcy on July 7, 2011, and was discharged from bankruptcy on September 22, 2011, on a finding of no assets; plaintiffs voluntarily removed Wolcott from the case as of the fifth amended complaint. Property Consultants settled with plaintiffs in December 2009 and was dismissed from the case on January 4, 2011. Default judgment was entered against LDC on September 22, 2009, and LDC was involuntarily dissolved on October 9, 2009.

2 Liss was the principal of LDC and Teitelbaum was LDC's sole shareholder.

3 We quote this portion of the complaint because it was relied upon by the trial court to determine that the Consumer Fraud Act claim was time-barred.

4 Plaintiffs' appellate brief explains that the house sewer line being back-pitched means that "water has to run uphill to get to the street."

5 A "Certificate of Limited Warranty" attached to plaintiffs' second amended complaint and dated December 28, 2006, included the signature of Wolcott's "Manager," but that signature is illegible.

6 We note that, on appeal, plaintiffs no longer argue that the June 2011 date should govern the statute of limitations but claim that they first became aware of Yale and his connection to Wolcott during the November 6, 2009, correspondence involving Wolcott's objections to discovery.

7 We note that *Puleo* was somewhat limited in *Westmeyer v. Flynn,* 382 Ill.App.3d 952, 960, 321 Ill.Dec. 406, 889 N.E.2d 671 (2008), where we found that section 10–10 did not bar actions involving piercing the corporate veil. However, in the case at bar, there has been no claim that the corporate veil should be pierced.

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95 Ill.App.3d 461 (Ill.App. 2 Dist. 1981)

420 N.E.2d 251, 50 Ill.Dec. 934

Frank MACALUSO and Image II, Incorporated,

Plaintiffs-Appellants Cross- Appellees,

v.

John JENKINS and Industrial Police Association, Defendants

and Cross- Appellants,

and

Paulette Zecca, Defendant-Appellee.

Nos. 79-677, 80-116.

Court of Appeals of Illinois, Second District.

April 28, 1981.

[420 N.E.2d 252] [Copyrighted Material Omitted]

[420 N.E.2d 253]

[95 Ill.App.3d 462] [50 Ill.Dec. 936] De Rose & Russo, John P. DeRose, Oak Brook, for plaintiffs-appellants cross-appellees.

Anthony Bruno, Melrose Park, Sidney Z. Karasik, Chicago, for defendants and cross-appellants.

VAN DEUSEN, Justice:

The plaintiffs, Frank Macaluso and Image II, Inc., brought suit to recover payment of an amount due under a contract for artwork and printing completed by plaintiffs in 1977. The defendants named in the suit include: Industrial Police Association, a non-profit corporation; John Jenkins, individually, and as chairman of the board and treasurer of the Industrial Police Association; Paulette Zecca, individually, and as secretary of the Industrial Police Association, and Shirley Blanford, individually, and as an agent of International Cleaning Services, Inc.

Trial by jury commenced on October 2, 1979. At the close of plaintiffs' case, the trial court granted Paulette Zecca's and Shirley Blanford's motion to dismiss them as defendants. The case went to the jury as to the defendants John Jenkins and the Industrial Police Association. On October 12, 1979, the jury rendered a verdict for the plaintiffs and against the

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defendants John Jenkins, individually, and the Industrial Police Association. The verdict awarded to the plaintiffs the sum of $28,860.71. The plaintiffs take this appeal from the dismissal of Paulette Zecca as a defendant. The defendant, Jenkins, cross-appeals from the jury verdict holding him personally liable. Industrial Police Association has not appealed the jury verdict.

In 1973 the defendant, John Jenkins, founded Continental Security (Continental), a corporation. Jenkins was not only the founder of Continental, but also the president and chairman of the board. Continental provided armed guards and night watchmen

[420 N.E.2d 254] [50 Ill.Dec. 937] for various offices and industrial sites. At that time, Jenkins was also employed as a police officer and ran his own private investigation firm. In 1975, Jenkins employed the defendant, Paulette Zecca, as a guard with Continental. Her prior employment had been as a secretary. Initially, Ms. Zecca also did secretarial work at Continental. Within a year, she became an assistant director of security for Continental.

During this time, Jenkins conducted both of his businesses out of offices located at 1127 South Mannheim Road in Westchester, Illinois. In January of 1977, Zecca, who continued to work for Jenkins at the 1127 Mannheim Road address, founded a janitorial service for commercial buildings, the International Cleaning Service (International). She had about four or five employees and she states that she originally operated her business out of her home and that she later moved that business to Downers Grove. In a recent telephone directory, however, the address for International was listed as 1127 Mannheim Road, Westchester, Illinois. Moreover, Zecca indicated that she spent a considerable amount of time, sometimes 7 days a week, working at that address.

The evidence also indicated that International often paid the rent for the offices at the Mannheim Road address. These offices contained three desks. One desk was used by Jenkins, another by Zecca and a third by Shirley Blanford. Mrs. Blanford did secretarial work, including answering the phones, for International. As late as 1978, a phone call to the 1127 Mannheim Road address would enable the caller to hire a security guard, to contract with a cleaning service or to join the Industrial Police Association.

In February of 1977, Jenkins founded the Industrial Police

Association (I. P. A.), a non-profit, professional organization for security guards. I. P. A.'s offices are also located at 1127 Mannheim Road, Westchester, Illinois. Jenkins is not only the founder of I. P. A., but also the treasurer and chairman of the board of directors. Zecca is the secretary and also a member of the board of directors of I. P. A. Officially, I. P. A. has no salaried employees; Jenkins and Zecca volunteer their time to I. P. A. Membership dues are the primary source of income for I. P. A.

[95 Ill.App.3d 464] In early 1977, the plaintiff, Macaluso, and Jenkins engaged in several discussions, which led to the contract at issue in this case. As a result of these discussions, Macaluso and his firm, Image II, Inc., designed, printed and delivered numerous printed materials to the I. P. A. At trial, the jury found that under this contract, I. P. A. and Jenkins owed $28,860.71 to Macaluso and firm. Neither I. P. A. nor Jenkins challenges the jury's finding that $28,860.71 was due on the contract. The only issue Jenkins raises on appeal is whether he can be held personally liable.

On appeal, Jenkins asserts that the contract is only between I. P. A., a non-profit corporation, and Macaluso or his firm and, therefore, Jenkins is not personally liable. Macaluso on the other hand asserts that due to Jenkins' method of handling I. P. A.'s assets, the corporate existence should be disregarded and Jenkins should be held personally liable.

Under Illinois law, a corporation is a legal entity that exists separate and distinct from its shareholders, officers and directors. As a general rule, the officers and directors are not liable for the corporation's debts and obligations. (*Gallagher v. Reconco Builders, Inc. (1980),* 91 Ill.App.3d 999, 1004, 47 Ill.Dec. 555, 415 N.E.2d 560; *Stap v. Chicago Aces Tennis Team, Inc. (1978),* 63 Ill.App.3d 23, 27, 20 Ill.Dec. 230, 379 N.E.2d 1298. See also *Bevelheimer v. Gierach (1975),* 33 Ill.App.3d 988, 339 N.E.2d 299; *Divco-Wayne Sales Financial Corp. v. Martin Vehicle Sales, Inc. (1963),* 45 Ill.App.2d 192, 195 N.E.2d 287.) However, a corporate entity will be disregarded and the veil of limited liability pierced where it would otherwise present an obstacle to the protection of private rights, or when the corporation is merely the alter ego or business conduit of a governing or a dominating personality. (*Stap v. Chicago Aces Tennis Team, Inc. (1978),* 63 Ill.App.3d 23, 27, 20 Ill.Dec. 230, 379 N.E.2d 1298.) Thus,

[420 N.E.2d 255] [50 Ill.Dec. 938] "(f)or the doctrine of traditionally known as the 'piercing of the corporate veil' to apply two requirements must be met: first, there must be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist; and second, circumstances must be such that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice." *Gallagher v. Reconco Builders, Inc. (1980),* 91 Ill.App.3d 999, 1004, 47 Ill.Dec. 555, 415 N.E.2d 560; *People ex rel. Scott v. Pintozzi (1971),* 50 Ill.2d 115, 128-29, 277 N.E.2d 844; see also *Central States Southeast & Southwest Areas Pension Fund v. Gaylur Products, Inc. (1978),* 66 Ill.App.3d 709, 23 Ill.Dec. 487, 384 N.E.2d 123.

Jenkins contends that because I. P. A. is a not for profit corporation organized under the General Not For Profit Corporation Act (Ill.Rev.Stat.1977, ch. 32, par. [95 Ill.App.3d 465] 163a et seq.), the remedy of piercing the corporate veil is not available to the plaintiffs. In his brief, Jenkins points out that the General Not For Profit Corporation Act contains no exception to the limitation of directors' liabilities similar to the exception found in section 42 of the Business Corporation Act. (Ill.Rev.Stat.1977, ch. 32, par. 157.42.) We note that this section of the Business Corporation Act merely creates statutory liabilities that are in addition to those already imposed by law; moreover, piercing the corporate veil is an equitable remedy which "completely disregards this statutory network creating and supporting corporate structures." (Broida: The History of the Development of the Remedy of "Piercing the Corporate Veil" 65 Ill.B.J. 522, 523 (1977)). I. P. A.'s status as a not for profit corporation in and of itself should not bar a court from applying the equitable remedy of piercing the corporate veil. In the case of *People ex rel. Brown v. Illinois State Troopers Lodge No. 41 (1972),* 7 Ill.App.3d 98, 286 N.E.2d 524, the court pierced the corporate veil of a non-profit corporation in order to avoid the evasion of a statutory duty imposed by the state.

In State Troopers, however, the court did not address the issue of ownership of a not for profit corporation and, under Gallagher and Pintozzi, the first requirement of piercing the corporate veil is finding a "unity of interest and ownership." Thus, it can be argued that because a not for profit corporation has no shareholders and Jenkins, therefore, cannot and does not own the I. P. A., the ownership aspect of the first requirement, at least from a technical standpoint, cannot be met. However, piercing the corporate veil is essentially equitable in character (*Stap v. Chicago Aces Tennis Team, Inc. (1978),* 63 Ill.App.3d 23, 20 Ill.Dec. 230, 379 N.E.2d 1298), and an equitable remedy looks to the substance rather than to form (*People ex rel. Scott v. Pintozzi (1971),* 50 Ill.2d 115, 131, 277 N.E.2d 844).

There is evidence that Jenkins exercised ownership control over the corporation. While Jenkins testified that there was a president and one or more vice-presidents of I. P. A., and that there were six other directors of I. P. A., he failed to introduce evidence which would indicate that these persons played any role in the management of the organization. Rather, Jenkins indicates that he made most or all of the decisions concerning the I. P. A. At trial, he testified that

even Zecca, who was both an officer and on the board of directors, had no input into the decisions he made concerning I. P. A. His testimony also indicates that when the contract was being negotiated with plaintiffs, he was the sole representative for I. P. A. The evidence also shows that Jenkins made all the decisions concerning seminars held by the I. P. A. and that Jenkins had the power to authorize loans to I. P. A. Apparently, without holding an election or consulting the board of directors, Jenkins also had the authority to appoint vice-presidents of I. P. A. The evidence also indicates that he unilaterally decided to start, and later, to dissolve an I. P. A. office in Florida.

Moreover, the evidence indicates that Jenkins intended to profit from the "non-profit" corporation. At trial, Zecca testified that originally I. P. A. was to pay all of

[420 N.E.2d 256] [50 Ill.Dec. 939] the rent for the 1127 Mannheim Road offices. The evidence further indicates that Jenkins' other enterprises were to continue

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to function out of these offices subsidized with I. P. A. funds. Although the evidence indicates that I. P. A. did provide some services for its members, there is also evidence from which a jury could infer that Jenkins created the organization with an eye towards the profitable fringe benefits which might befall him as chairman of the board and treasurer of the corporation.

From this, and other evidence presented at trial, a jury could have found that, even though Jenkins did not and could not own shares of I. P. A., he did exercise ownership control over the corporation to such a degree that the separate personalities of I. P. A. and Jenkins did not exist, and that I. P. A. was a business conduit of Jenkins.

Similarly, there is evidence from which a jury could have found that the second requirement of Pintozzi and Gallagher has been met. In this case, there exists at least three of the circumstances which justify the piercing of the corporate veil.

One of these circumstances is a failure on the part of the defendant to maintain adequate corporate records or to comply with corporate formalities. (*Berlinger's Inc. v. Beef's Finest, Inc. (1978),* 57 Ill.App.3d 319, 14 Ill.Dec. 764, 372 N.E.2d 1043; *Matter of Bowen Transports, Inc. (7th Cir. 1977),* 551 F.2d 171.) At trial, Jenkins admitted that he alone was responsible for the receipts and disbursements and that in 1977, while treasurer of I. P. A., he kept no books or financial records for I. P. A.

Another condition that can be considered when disregarding corporate existence is the commingling of funds or assets. (*Wikelund Wholesale Company, Inc. v. Tile World Factory Tile Warehouse (1978),* 57 Ill.App.3d 269, 14 Ill.Dec. 743, 372 N.E.2d 1022.) Macaluso contends that Jenkins commingled the funds of his various enterprises. In support of his position, he introduced into evidence a check for $2,000 drawn on I. P. A.'s account and made out to Jenkins' other corporation, Continental. The evidence also indicates that I. P. A. shared the same office and phone number with other enterprises of John Jenkins and Paulette Zecca, including Jenkins' private investigation firm and Continental Security, as well as Zecca's International Cleaning Services. When testifying, Zecca admitted that the original plan was to have I. P. A. pay the phone bills and the rent for the 1127 Mannheim Road offices. From this and other evidence presented at trial, the jury could have concluded that Jenkins commingled the funds of his various enterprises.

A third circumstance which justifies piercing the corporate veil can be found when the defendant treats the assets of the corporation as his own. (*Stap v. Chicago Aces Tennis Team, Inc. (1978),* 63 Ill.App.3d 23, 28, 20 Ill.Dec. 230, 379 N.E.2d 1298; *Finazzo v. Mid-States Finance Company (1965),* 63 Ill.App.2d 161, 211 N.E.2d 290.) At trial, Macaluso introduced, among other things, the following evidence: a check drawn for $275.48 for automobile repairs on Jenkins' car; a considerable number of checks payable to various restaurants and lounges to

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cover amounts due on Jenkins' personal account; several checks, all over $100, payable to John Jenkins; and several checks made out to cash and endorsed by Zecca or Jenkins. Furthermore, Jenkins admitted that he personally made donations to charitable causes and then authorized Zecca to issue a check reimbursing him for part of that donation. He also authorized the issuance of a check for $350, drawn on an I. P. A. account, to help a friend make a payment on the friend's Florida condominium.

Overall a significant amount of evidence was introduced at the trial from which a jury could have concluded that Jenkins treated the assets of I. P. A. as his own. As was stated in *State Bank of Cerro Gordo v. Benton (1974),* 22 Ill.App.3d 1007, 1010, 317 N.E.2d 578:

"Thus the defendant attempts here to use the corporate entity for his own personal benefit to the exclusion of the plaintiff, and thereby becomes unjustly enriched at the expense of corporate creditors. Under

[420 N.E.2d 257] [50 Ill.Dec. 940] such circumstances, we are of the opinion that the authorities require that the corporate veil be pierced and the defendant be held personally liable for the payment of this indebtedness. It seems perfectly clear that the protective cloak of corporate

entity is sought to be used for his own personal enrichment and to accomplish an unjust result."

In the case at bar, there was sufficient evidence for a jury to find that Jenkins exercised control over I. P. A. in such a manner that I. P. A. became the alter ego of Jenkins. The jury verdict which pierced the corporate veil and held Jenkins personally liable was not against the manifest weight of the evidence, and the judgment in favor of the plaintiffs and against the defendant Jenkins in the sum of $28,860.71 is affirmed.

The other issue before this court on appeal is whether the trial court erred in granting Zecca's motion for a directed verdict. The plaintiffs assert that sufficient evidence was introduced from which a jury could have found Zecca personally liable on the following four bases: (1) that the corporate entity should be disregarded and Zecca, as an alter ego of I. P. A., should be held personally liable; (2) that Zecca should be held personally liable for the corporate debts of I. P. A. because she assisted Jenkins in his conversion of corporate assets into his own personal assets; (3) that Zecca is personally liable because she was guilty of and assisted in perpetrating a fraud upon the plaintiffs; (4) finally, that Zecca should be held liable because she breached a fiduciary duty owed the plaintiffs.

The evidence introduced at trial indicated that Zecca was only a part-time voluntary clerical worker who occasionally made out and signed the checks authorized by the treasurer, Jenkins. The evidence indicates that while she was the secretary of I. P. A., she neither had nor assumed any responsibility for keeping the I. P. A.'s financial records. Zecca's uncontroverted testimony reveals that she did only what Jenkins

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authorized her to do and that she had little or no input into corporate decisions. No evidence was introduced from which a jury could have found that Zecca exercised sufficient ownership and control to be the alter ego of I. P. A. Rather, the evidence overwhelmingly indicates that Zecca was, in fact, merely a clerical volunteer for the I. P. A.

Nor is there sufficient evidence to support plaintiffs' contention that Zecca commingled funds. Plaintiffs argue that Zecca and her corporation commingled funds by loaning the I. P. A. over $9,000 and by paying I. P. A.'s phone bills and rent. Plaintiffs can hardly argue that Zecca's "commingling" harmed them. Plaintiffs have only benefitted from Zecca's "commingling" which only increased I. P. A.'s assets. It should be noted that the equitable remedy of piercing the corporate veil will be applied only when failure to use it would promote an injustice. *People ex rel. Scott v. Pintozzi (1971)*, 50 Ill.2d 115, 128-29, 277 N.E.2d 844.

Plaintiffs also assert that the corporate veil should be pierced and Zecca should also be held liable on the ground that I. P. A. was thinly capitalized. The General Not For Profit Corporation Act does not establish a duty to capitalize non-profit corporations. Plaintiffs were well aware that I. P. A. had little or no assets. Plaintiffs, who consented to contract with a non-profit corporation, knowingly assumed the risk that the I. P. A. was thinly capitalized. The trial court properly refused to apply the equitable remedy of piercing the corporate veil with regard to Zecca.

Nor is there sufficient evidence to support a finding that Zecca is personally liable because she assisted Jenkins in his conversion of corporate assets. Plaintiffs rely on the case of *Blocker v. Drain Line Sewer & Water Company (1972)*, 5 Ill.App.3d 289, 282 N.E.2d 207, for the proposition that officers of a corporation who assist in the conversion of corporate assets into personal assets to the detriment of creditors may be held personally liable. They attempt to assert that this proposition imposes personal liability to third party

[420 N.E.2d 258] [50 Ill.Dec. 941] creditors upon officers who knew or should have known of the conversion. Blocker does not go that far. While Blocker holds that prior to filing a bankruptcy petition, a party may not convert corporate assets to personal assets, the court did not impose upon the parties to the conversion personal liability for all debts to third party creditors. The court held only that the converted funds were assets of the bankrupt estate. Blocker does not create an exception to the general rule that officers and directors are not personally liable for the corporation's debts and obligations. While there is evidence that at the direction of the treasurer, Jenkins, Zecca signed checks which assisted him in converting corporate assets into his own personal assets, and while this negligent conduct as a secretary may have created some liability to the corporation, it does not create a personal liability for all corporate debts.

Nor is there any basis for plaintiffs' charge that defendant Zecca was

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personally liable because she was guilty of and assisted in perpetrating a fraud upon the plaintiffs. An essential element of fraud or misrepresentation is that the plaintiffs were induced by the fraud to act to their detriment. (*Zaborowski v. Hoffman Rosner Corp. (1976)*, 43 Ill.App.3d 21, 23, 1 Ill.Dec. 465, 356 N.E.2d 653.) At trial, the plaintiffs failed to introduce any evidence of any

misrepresentation or fraudulent concealment made by Zecca which induced their decision to enter into or perform the contract in question.

Finally, plaintiffs argue that defendant Zecca is personally liable because she breached a fiduciary duty owed to third party creditors. Generally, an officer or employee of a corporation has no fiduciary duty to creditors of the corporation; such persons deal at arms length. *Richards v. North Henderson Grain Co. (1941),* 308 Ill.App. 386, 32 N.E.2d 189, cited by plaintiffs, is distinguishable from the facts in this case. In that case, the directors of the defendant corporation over a period of years had allegedly developed a practice of wrongfully selling plaintiff's stored grain in order to secure cash to carry on the corporation's business. In that case, a bailor-bailee relationship existed between the parties, and the converted goods belonged to the plaintiffs. Because of these unusual circumstances and because the acts complained of were not isolated acts, but were pursuant to a practice that had allegedly been engaged in by the corporate officers over a period of years, the court found that, unless properly explained, the corporate officers' lack of knowledge would present a case of gross negligence and thus personal liability to the bailee. In the instant case, no assets of the plaintiffs were converted, nor is there any evidence that the conduct of Zecca in following Jenkins' directions amounted to gross negligence. Thus, under the circumstances, there was not a breach of any duty owed by Zecca to plaintiffs.

To summarize, Zecca cannot be held personally liable for the debts of I. P. A. unless it can be shown that she has fraudulently made misrepresentations which induced the plaintiffs to enter into its contract with I. P. A., or that conditions are such that the corporate veil can be pierced, or that she actively converted and misappropriated funds, or that by gross negligence she breached a fiduciary duty owed to the plaintiffs. Considering all the evidence in this case viewed in its aspect most favorable to the plaintiffs, it so overwhelmingly favored the defendant, Zecca, that a contrary verdict based on this evidence could not stand and the trial court properly directed a verdict in favor of the defendant Zecca. The order of the trial court directing a verdict in favor of the defendant, Zecca, and against the plaintiffs is affirmed.

AFFIRMED.

UNVERZAGT and REINHARD, JJ., concur.

KeyCite Yellow Flag - Negative Treatment
Disagreed With by Born v. Simonds Intern., Corp., Mass.Super., December 30, 2009

224 Ill.2d 274
Supreme Court of Illinois.

Marguerite FORSYTHE et al., Appellees,
v.
CLARK USA, INC., Appellant.

No. 101570. | Feb. 16, 2007.

Synopsis

Background: After employer paid the estates of deceased employees pursuant to the Workers' Compensation Act, estates brought a wrongful death suit against employer's parent corporation. The Circuit Court, Cook County, Carol Pearce McCarthy, J., granted summary judgment to parent corporation, and estates appealed. The Appellate Court, 361 Ill.App.3d 642, 297 Ill.Dec. 119, 836 N.E.2d 850, reversed and remanded.

Holdings: After granting parent corporation's petition for leave to appeal, the Supreme Court, Garman, J., held that:

[1] as a matter of first impression, direct participant liability was a valid theory of recovery against a parent corporation, when there was evidence of budgetary mismanagement accompanied by actions surpassing the control exercised as a normal incident of ownership;

[2] genuine issue of material fact precluded summary judgment on estates' direct participant liability claims; and

[3] estates' claims were not barred by the exclusive remedy provision of the Workers' Compensation Act.

Appellate Court affirmed.

Freeman, J., specially concurred and filed opinion, in which Burke, J., joined.

West Headnotes (23)

[1] Judgment
Nature of summary judgment

The purpose of summary judgment is not to try a question of fact but simply to determine if one exists. S.H.A. 735 ILCS 5/2–1005.

13 Cases that cite this headnote

[2] Appeal and Error
Extent of Review Dependent on Nature of Decision Appealed from

In reviewing a summary judgment disposition, the Supreme Court will construe the record strictly against the movant and liberally in favor of the nonmoving party. S.H.A. 735 ILCS 5/2–1005.

13 Cases that cite this headnote

[3] Judgment
Necessity that right to judgment be free from doubt

Summary judgment dispositions should not be allowed unless the moving party's right to judgment is clear and free from doubt. S.H.A. 735 ILCS 5/2–1005.

20 Cases that cite this headnote

[4] Judgment
Existence or non-existence of fact issue

If the undisputed material facts could lead reasonable observers to divergent inferences, or where there is a dispute as to a material fact, summary judgment should be denied and the issue decided by the trier of fact. S.H.A. 735 ILCS 5/2–1005.

17 Cases that cite this headnote

[5] Appeal and Error
Cases Triable in Appellate Court

Supreme Court reviews a grant of summary judgment de novo. S.H.A. 735 ILCS 5/2–1005.

13 Cases that cite this headnote

[6] Negligence
Elements in general

To state a cause of action for negligence, plaintiffs must show that defendant owed and breached a duty of care, proximately causing the plaintiffs injury.

8 Cases that cite this headnote

[7] Negligence
Duty as question of fact or law generally

In a negligence action the existence of a duty is a question of law for the court to decide.

7 Cases that cite this headnote

[8] Negligence
Relationship between parties

The touchstone of a court's duty analysis in a negligence action is to ask whether a plaintiff and a defendant stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff.

9 Cases that cite this headnote

[9] Negligence
Necessity and Existence of Duty

Four factors inform the inquiry of a duty analysis in a negligence action: (1) the reasonable foreseeability of injury; (2) the likelihood of injury; (3) the magnitude of the burden of guarding against the injury; and (4) the consequences of placing the burden upon the defendant.

9 Cases that cite this headnote

[10] Corporations and Business Organizations
Participation in unauthorized or wrongful acts of corporation

Budgetary mismanagement of a subsidiary corporation, accompanied by the parent corporation's negligent direction or authorization of the manner in which the subsidiary accomplishes that budget, can lead to a valid cause of action against the parent corporation under the direct participant theory of liability.

2 Cases that cite this headnote

[11] Corporations and Business Organizations
Participation in unauthorized or wrongful acts of corporation

Direct participant liability is a valid theory of recovery against a parent corporation, when there is evidence sufficient to prove that a parent corporation mandated an overall business and budgetary strategy for its subsidiary corporation and carried that strategy out by its own specific direction or authorization, surpassing the control exercised as a normal incident of ownership in disregard for the interests of the subsidiary.

15 Cases that cite this headnote

[12] Corporations and Business Organizations
Participation in unauthorized or wrongful acts of corporation

The key elements to the application of direct participant liability are a parent corporation's specific direction or authorization of the manner in which an activity is undertaken and foreseeability; if a parent corporation specifically directs an activity, where injury is foreseeable, that parent could be held liable.

8 Cases that cite this headnote

[13] Corporations and Business Organizations
Participation in unauthorized or wrongful acts of corporation

Under the direct participant theory of liability, if a parent corporation mandates an overall course of action for a subsidiary and then authorizes the manner in which specific activities contributing to that course of action are undertaken, it can be liable for foreseeable injuries.

7 Cases that cite this headnote

[14] Corporations and Business Organizations
Participation in unauthorized or wrongful acts of corporation

Allegations of mere budgetary mismanagement alone by a parent corporation do not give rise to the application of direct participant liability.

1 Cases that cite this headnote

[15] Corporations and Business Organizations
Participation in unauthorized or wrongful acts of corporation

Though parent corporations are free to craft overall business and budgetary strategies for their subsidiaries, in order to avoid liability under the direct participant liability theory for the negligent acts of their subsidiaries parent corporations simply must not interfere directly in the manner their subsidiaries undertake certain activities such that the subsidiaries are no longer free to utilize their own expertise.

5 Cases that cite this headnote

[16] Corporations and Business Organizations
Participation in unauthorized or wrongful acts of corporation

If parent corporations do interfere directly in the manner their subsidiaries undertake certain activities, they must do so with reasonable care in order to avoid liability for a subsidiary's negligent acts under the direct participant theory of liability.

3 Cases that cite this headnote

[17] Corporations and Business Organizations
Parent and subsidiary corporations

Parent corporations are generally not liable for the acts of their subsidiaries.

5 Cases that cite this headnote

[18] Negligence
Necessity and Existence of Duty

Negligence
Foreseeability

Negligence
Ordinary care

Every person owes to all others a duty to exercise ordinary care to guard against injury which naturally flows as a reasonably probable and foreseeable consequence of his act.

3 Cases that cite this headnote

[19] Corporations and Business Organizations
Participation in unauthorized or wrongful acts of corporation

To establish the liability of a parent corporation for the negligent acts of a subsidiary under the direct participant liability theory, plaintiffs must establish more than the fact that an officer of the parent made policy decisions for the subsidiary and supervised subsidiary activities; instead, plaintiffs must show that the conduct complained of occurred while such officer was acting in his capacity as an officer of the parent, rather than as an officer of the subsidiary.

3 Cases that cite this headnote

[20] Judgment
Stock and stockholders, cases involving

Judgment
Tort cases in general

Genuine issue of material fact as to whether president of subsidiary's parent corporation, who was also chief executive officer (CEO) of subsidiary, was acting on behalf of the parent rather than the subsidiary when he directed that subsidiary reduce capital spending to minimum sustainable levels, which allegedly led to severe cuts in training and safety spending at refinery owned by subsidiary, precluded summary judgment for parent on direct participant liability claim asserted in negligence action brought by estates of workers killed by fire at the refinery.

4 Cases that cite this headnote

[21] Workers' Compensation

What Persons Liable as Third Persons

Exclusive remedy provision of Workers' Compensation Act did not render parent corporation immune from direct participant negligence claim asserted against parent by estates of workers killed in fire at refinery owned by subsidiary, as the estates' direct participant claim did not rest on piercing the corporate veil but rather asserted that the parent directly participated in creating condition at the refinery that led to the fire, subsidiary had employed the workers and paid workers' compensation benefits to workers' families, and parent would not be allowed to pierce its own corporate veil in order to avoid liability. S.H.A. 820 ILCS 305/5(a).

8 Cases that cite this headnote

[22] Corporations and Business Organizations

Parent and subsidiary corporations in general

Corporations and Business Organizations

Participation in unauthorized or wrongful acts of corporation

Direct participant liability against a parent corporation does not rest on piercing the corporate veil such that the liability of the subsidiary is the liability of the parent; on the contrary, this form of liability is asserted, as its name suggests, for a parent's direct participation, superseding the discretion and interest of the subsidiary, and creating conditions leading to the activity complained of.

14 Cases that cite this headnote

[23] Workers' Compensation

What Persons Liable as Third Persons

A parent corporation can be held liable if, for its own benefit, it directs or authorizes the manner in which its subsidiary's budget is implemented, disregarding the discretion and interests of the subsidiary, and thereby creating dangerous conditions, and in such situations parent-defendants will not be protected by the exclusive remedy provision of the Workers' Compensation Act. S.H.A. 820 ILCS 305/5(a).

2 Cases that cite this headnote

Attorneys and Law Firms

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Francis K. Tennant, of Wolf & Tennant, Chicago, for amicus curiae Illinois Trial Lawyers Association.

Opinion

Justice GARMAN delivered the judgment of the court, with opinion:

***277** *****364** On March 13, 1995, Michael F. Forsythe and Gary Szabla, mechanics at a refinery owned and operated by Clark Refining and Marketing (Clark Refining), were killed. The estate of each decedent received payment from Clark Refining pursuant to the Workers' Compensation Act (820 ILCS 305/1 *et seq.* (West 2002)). In 1996 and 1997, plaintiffs Marguerite Forsythe and Elizabeth Szabla, as special administrators of the estates of their late husbands, filed suits against Clark Refining and other defendants. Subsequently, plaintiffs added Clark Refining's parent company, Clark USA, as a defendant.

Clark USA is the only defendant involved in this appeal. At the close of discovery, the trial court granted Clark USA's motion for summary judgment pursuant to section 2–1005 of the Code of Civil Procedure (735 ILCS 5/2–1005 (West 2002)). The trial court did not state its reasoning. Plaintiffs appealed, and the appellate court reversed and remanded. 361 Ill.App.3d 642, 297 Ill.Dec. 119, 836 N.E.2d 850. Following that decision, defendant petitioned this court for leave to appeal pursuant to Supreme Court Rule 315 (177 Ill.2d R. 315).

We granted defendant's petition to consider two issues: first, whether a parent company can be held liable ***278** under a theory of direct participant liability for controlling

its subsidiary's budget in a way that led to a workplace accident; second, if such a theory is recognized, whether the exclusive-remedy provision of the Workers' ***365 **231 Compensation Act (820 ILCS 305/5 (West 2002)) immunizes a parent company from liability.

BACKGROUND

Clark Refining operated an oil refinery in Blue Island, Illinois. Defendant is Clark Refining's parent company and sole shareholder. On March 13, 1995, decedents were on their lunch break when a fire broke out at the refinery, killing them both. The fire was apparently caused when other Clark Refining employees attempted to replace a valve on a pipe without ensuring that flammable materials within the pipe had been depressurized. Plaintiffs claim that those employees were not maintenance mechanics and were not trained or qualified to perform the work they were attempting.

Plaintiffs' allegations of liability center around defendant's overall budgetary strategy. Specifically, plaintiffs allege that defendant breached a duty to use reasonable care in imposing its business strategy on Clark Refining by (1) "requiring [Clark Refining] to minimize operating costs including costs for training, maintenance, supervision and safety," (2) "requiring [Clark Refining] to limit capital investments to those which would generate cash for the refinery thereby preventing [Clark Refining] from adequately reinforcing the walls of the lunchroom or relocating the lunchroom to a safe position within the refinery," and (3) "failing to adequately evaluate the safety and training procedures in place at the Blue Island Refinery." Moreover, plaintiffs allege that defendant's strategy of capital cutbacks forced Clark Refining to have unqualified employees act as maintenance mechanics which, in turn, led to the fire that killed the decedents. This, plaintiffs argue, constitutes proximate cause.

*279 In support of its motion for summary judgment, defendant contended that it owed no duty to either decedent by virtue of its status as a mere holding company, which was connected to Clark Refining only as a shareholder. Defendant submitted evidence to prove that Clark Refining owned and operated the refinery while defendant itself had no control over the day-to-day operations. Plaintiffs countered that defendant was directly responsible for creating conditions that precipitated the accident.

In support of their argument, plaintiffs cited evidence that defendant's directors created and approved Clark Refining's budget, striving to "position itself as a low cost refiner and marketer" with the goal of replenishing defendant's cash reserve by "decreas[ing] capital spending * * * to minimum sustainable levels" through the institution of a "survival mode" business plan. Plaintiffs also produced evidence that the boards of directors of Clark Refining and defendant met simultaneously. Moreover, plaintiffs relied upon evidence that the belt-tightening budget created by Clark Refining was overseen by Paul Melnuk, who served as defendant's president as well as chief executive officer of Clark Refining.

The trial court granted summary judgment without explanation. Subsequently, plaintiffs appealed and the appellate court reversed and remanded, rejecting a claim by defendant that it was entitled to immunity under the Workers' Compensation Act. The appellate court held that "plaintiffs presented sufficient evidence to raise an issue of material fact as to whether defendant directly participated in creating conditions within the refinery which led to the deadly fire." 361 Ill.App.3d at 655, 297 Ill.Dec. 119, 836 N.E.2d 850. One justice dissented, finding that plaintiffs presented no evidence of separate acts, attributable ***366 **232 solely to defendant, by which defendant directly caused the injuries in this case. 361 Ill.App.3d at 658, 297 Ill.Dec. 119, 836 N.E.2d 850 (McNulty, J., dissenting).

*280 ANALYSIS

[1] [2] [3] [4] [5] Section 2–1005 of the Code of Civil Procedure provides for summary judgment when the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact such that the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2–1005 (West 2002). The purpose of summary judgment is not to try a question of fact but simply to determine if one exists. *Robidoux v. Oliphant*, 201 Ill.2d 324, 335, 266 Ill.Dec. 915, 775 N.E.2d 987 (2002). In reviewing a summary judgment disposition, this court will construe the record strictly against the movant and liberally in favor of the nonmoving party. *Jackson v. TLC Associates, Inc.*, 185 Ill.2d 418, 423–24, 235 Ill.Dec. 905, 706 N.E.2d 460 (1998). Moreover, it must be noted that summary judgment dispositions "should not be allowed unless the moving party's right to judgment is clear and free from doubt." *Jackson*, 185 Ill.2d at 424, 235 Ill.Dec. 905, 706 N.E.2d 460. If the undisputed material facts could lead

reasonable observers to divergent inferences, or where there is a dispute as to a material fact, summary judgment should be denied and the issue decided by the trier of fact. *Jackson,* 185 Ill.2d at 424, 235 Ill.Dec. 905, 706 N.E.2d 460. This court reviews a grant of summary judgment *de novo. Roth v. Opiela,* 211 Ill.2d 536, 542, 286 Ill.Dec. 57, 813 N.E.2d 114 (2004).

I. Direct Participant Liability

[6] [7] [8] [9] To state a cause of action for negligence, plaintiffs must show that defendant owed and breached a duty of care, proximately causing the plaintiffs injury. *Espinoza v. Elgin, Joliet & Eastern Ry. Co.,* 165 Ill.2d 107, 114, 208 Ill.Dec. 662, 649 N.E.2d 1323 (1995). The threshold issue in this case is the existence of a duty, which is a question of law for the court to decide. *Chandler v. Illinois Central R.R. Co.,* 207 Ill.2d 331, 340, 278 Ill.Dec. 340, 798 N.E.2d 724 (2003). As we have recently stated, the "touchstone of this court's duty analysis is to ask whether a plaintiff and a defendant stood in such a relationship to one another that the law imposed upon the defendant an ***281** obligation of reasonable conduct for the benefit of the plaintiff." *Marshall v. Burger King Corp.,* 222 Ill.2d 422, 436, 305 Ill.Dec. 897, 856 N.E.2d 1048 (2006), citing *Happel v. Wal–Mart Stores, Inc.,* 199 Ill.2d 179, 186, 262 Ill.Dec. 815, 766 N.E.2d 1118 (2002). Four factors inform this inquiry: (1) the reasonable foreseeability of injury, (2) the likelihood of injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing the burden upon the defendant. *Marshall,* 222 Ill.2d at 436–37, 305 Ill.Dec. 897, 856 N.E.2d 1048.

Before undertaking our analysis, we note, as did the parties and the appellate court, that the theory of direct participant liability presented here has not previously been addressed in Illinois. It has been addressed in other states and throughout the federal courts, however. We will consider this authority where appropriate in our analysis.

Plaintiffs argue that defendant demanded Clark Refining operate its refinery pursuant to an overall business strategy that it knew would adversely affect safety by forcing reductions in training and maintenance. Indeed, plaintiffs contend that defendant actively and directly mandated unreasonable cuts in Clark Refining's budget in order to carry out its strategy. This *****367 **233** strategy was outlined in Clark USA business records calling for a "survival mode" business philosophy accomplished through "reduced capital spending," "reduced working capital investment," and "reduced operating expense level." Plaintiffs allege that this "survival mode" strategy was mandated, despite the fact that defendant knew or should have known that the only feasible budget cuts would come from safety, maintenance, and training expenses. This, plaintiffs' conclude, constitutes direct participation by defendant in the harm caused. As such, plaintiffs contend the appellate court correctly found that defendant owed them a duty based on the direct participant theory and not on the legal relationship of defendant to its subsidiary.

***282** Defendant contends that unless the standards for piercing the corporate veil are met, a parent company cannot be held liable for the negligence of its subsidiary. Attendant to that rule is the principle that a parent company does not owe a duty to third parties to supervise or control the conduct of its subsidiary to ensure that the subsidiary acts with reasonable care. Clark Refining owed a nondelegable duty to its employees to provide them with a safe workplace while defendant, as a parent, owed no duty whatsoever to ensure that Clark Refining met its obligations.

Additionally, even if direct liability is a recognized theory of recovery, defendant argues that the simple task of setting financial goals and employing an overall strategy to meet those goals is not improper but, instead, is "consistent with the parent's investor status" and thus "should not give rise to direct liability." *United States v. Bestfoods,* 524 U.S. 51, 69, 118 S.Ct. 1876, 1889, 141 L.Ed.2d 43, 62 (1998). Because its conduct was always consistent with its investor status, defendant claims, there is no basis to treat it as a direct participant in the negligence alleged herein.

While the Supreme Court has held that "[i]t is a general principle * * * deeply 'ingrained in our economic and legal systems' that a parent corporation * * * is not liable for the acts of its subsidiaries" (*Bestfoods,* 524 U.S. at 61, 118 S.Ct. at 1884, 141 L.Ed.2d at 55–56, quoting W.O. Douglas & C. Shanks, *Insulation from Liability Through Subsidiary Corporations,* 39 Yale L.J. 193 (1929)), a significant body of case law supports the direct participant theory of liability urged by the plaintiffs. Some of that authority relies on the 1929 article quoted above and written, in relevant part, by then-Professor William O. Douglas.

Douglas noted that liability has been imposed in "instances where the parent is directly a participant in ***283** the wrong

complained of." 39 Yale L.J. at 208. In such instances, "the use of the latent power incident to stock ownership to accomplish a specific result made the parent a participator in or doer of the act," specifically evident where "there was interference in the internal management of the subsidiary; an overriding of the discretion of the managers of the subsidiary." 39 Yale L.J. at 209. Douglas stated further that "direct intervention or intermeddling by the parent in the affairs of the subsidiary and more particularly in the transaction involved, to the disregard of the normal and orderly procedure of corporate control carried out through the election of the desired directors and officers of the subsidiary and the handling by them of the direction of its affairs, seems to have been determinative in some cases to holding the parent liable." 39 Yale L.J. at 218.

The United States Supreme Court quoted the Douglas & Shanks article approvingly in *Bestfoods*, 524 U.S. at 64–65, 118 S.Ct. at 1886, 141 L.Ed.2d at 58 ("As Justice *****368** ****234** (then-Professor) Douglas noted almost 70 years ago, derivative liability cases are to be distinguished from those in which 'the alleged wrong can seemingly be traced to the parent through the conduit of its own personnel and management' and 'the parent is directly a participant in the wrong complained of.' [Citation.] In such instances, the parent is directly liable for its own actions"). The Court noted that the simple fact that directors of a parent corporation serve as directors of its subsidiary does not, standing alone, expose the parent corporation to liability for its subsidiary's acts. *Bestfoods*, 524 U.S. at 69–70, 118 S.Ct. at 1888, 141 L.Ed.2d at 60–61. The Court went on to state, however, that "the acts of direct operation that give rise to parental liability must necessarily be distinguished from the interference that stems from the normal relationship between parent and subsidiary," and "[t]he critical question is whether, ***284** in degree and detail, actions directed to the facility by an agent of the parent alone are eccentric under accepted norms of parental oversight of a subsidiary's facility." *Bestfoods*, 524 U.S. at 71–72, 118 S.Ct. at 1889, 141 L.Ed.2d at 62.

Similarly, in *Esmark, Inc. v. National Labor Relations Board*, 887 F.2d 739 (7th Cir.1989), the Seventh Circuit, in a case dealing with a potential violation of the National Labor Relations Act, cited Douglas & Shanks' article extensively and noted that Judge Learned Hand also recognized that a parent corporation could be held liable for the actions of its subsidiaries if the parent directly supervised the conduct of a specific transaction. In *Kingston Dry Dock Co. v. Lake Champlain Transportation Co.*, 31 F.2d 265, 267 (2d Cir.1929), Judge Hand wrote that such liability "normally must depend upon the parent's direct intervention in the transaction, ignoring the subsidiary's paraphernalia of incorporation, directors and officers." Relying on that authority, the Seventh Circuit held that "a parent corporation may be held liable for the wrongdoing of a subsidiary where the parent directly participated in the subsidiary's unlawful actions." *Esmark*, 887 F.2d at 756.

Moreover, the court held that "[w]here the parent specifically directs the actions of its subsidiary, using its ownership interest to command rather than merely cajole," the possibility of direct liability is present and will be imposed "where a parent disregards the separate legal personality of its subsidiary (and the subsidiary's own decisionmaking 'paraphernalia'), and exercises direct control over a specific transaction." *Esmark*, 887 F.2d at 757. The court described this as a "transaction-specific" theory of direct participation, citing numerous cases where parent companies have been held liable for misconduct by their subsidiaries. *Esmark*, 887 F.2d at 756 (collecting cases); see, *e.g.*, *L.B. Industries, Inc. v.* ***285** *Smith*, 817 F.2d 69, 71 (9th Cir.1987) (*per curiam*); *United States v. Sutton*, 795 F.2d 1040, 1060 (Temp.Emer.Ct.App.1986) ("A shareholder may be liable if he is a 'central figure' in a corporation's tortious conduct"); *Cher v. Forum International, Ltd.*, 692 F.2d 634, 640 (9th Cir.1982); *D.L. Auld Co. v. Park Electrochemical Corp.*, 553 F.Supp. 804, 808 (E.D.N.Y.1982) (denying summary judgment in favor of the defendant where the plaintiff presented a claim that the defendant participated in the patent infringement perpetrated by its subsidiary); *International Union, United Auto Workers v. Cardwell Manufacturing Co.*, 416 F.Supp. 1267, 1283–84, 1287–89 (D.Kan.1976) (court found a parent liable for breach of bargaining agreement by subsidiary where parent specifically directed the subsidiary to disregard obligations under the NLRA); *****369** ****235** *State v. Ole Olsen, Ltd.*, 35 N.Y.2d 979, 980, 365 N.Y.S.2d 528, 528–29, 324 N.E.2d 886, 886 (1975) (holding a corporate officer liable not on account of his being an officer of the corporate defendant but as an active individual participant in the wrongdoing); *Cooper v. Cordova Sand & Gravel Co.*, 485 S.W.2d 261, 271–72 (Tenn.App.1971); *My Bread Baking Co. v. Cumberland Farms, Inc.*, 353 Mass. 614, 619, 233 N.E.2d 748, 752 (1968) (holding that while common ownership and management will not ordinarily give rise to liability, liability may be imposed where there is active and direct participation by one corporation in the affairs of another or where there is "confused intermingling" of the activities of the two corporations); *Crescent Manufacturing*

Co. v. Hansen, 174 Wash. 193, 198, 24 P.2d 604, 606 (1933). Under this "transaction-specific" theory, shareholders or parent corporations are not held directly liable for their own independently wrongful acts but, instead, for their actions against third-party interests through the agency of subsidiaries. *Esmark*, 887 F.2d at 756. Accordingly, the court held that a parent corporation can be liable for ***286** interposing a guiding hand in the transactions of its subsidiary. *Esmark*, 887 F.2d at 756.

Plaintiffs also cite other cases approving of direct liability. In *Papa v. Katy Industries, Inc.*, 166 F.3d 937, 941 (7th Cir.1999), the Seventh Circuit, again interpreting the National Labor Relations Act, evinced its continuing support for direct participant liability when it cited *Esmark*, *Bestfoods*, and *Kingston Dry Dock* to state "that limited liability does not protect a parent corporation when the parent is sought to be held liable for its own act, rather than merely as the owner of the subsidiary that acted." Similarly, in *Pearson v. Component Technology Corp.*, the Third Circuit, interpreting federal law, stated that "[a]lthough not often employed * * * it has long been acknowledged that parents may be 'directly' liable for their subsidiaries' actions when the 'alleged wrong can seemingly be traced to the parent through the conduit of its own personnel and management,' and the parent has interfered with the subsidiary's operations in a way that surpasses the control exercised by a parent as an incident of ownership." *Pearson*, 247 F.3d 471, 486–87 (3d Cir.2001), citing *Bestfoods*, 524 U.S. at 64, 118 S.Ct. at 1886, 141 L.Ed.2d at 58, quoting 39 Yale L.J. at 207. Likewise, in *Boggs v. Blue Diamond Coal Co.*, 590 F.2d 655, 663 (6th Cir.1979), the Sixth Circuit, interpreting Kentucky law, implicitly indicated its recognition of direct liability when it stated that "a parent is not immune from tort liability to its subsidiary employees for its own, independent acts of negligence."

The Indiana Supreme Court, in *Commissioner of Department of Environmental Management v. RLG, Inc.*, 755 N.E.2d 556, 559, 563 (Ind.2001), also accepted direct participant liability when it held a defendant's sole officer and shareholder liable for violations of Indiana environmental laws and stated that "an individual, though acting in a corporate capacity * * * may be ***287** individually liable * * * as a direct participant under general legal principles." Additionally, the Iowa Supreme Court accepted a direct participant theory of liability when it held that a member of a limited liability corporation could be sued because it had undertaken to perform management services for the corporation and allegedly performed those services negligently. *Estate of Countryman v. Farmers Cooperative Ass'n*, 679 N.W.2d 598, 605 (Iowa 2004). Other courts have also accepted the theory of direct participant liability. See, *e.g.*, *United States v. TIC Investment Corp.*, 68 F.3d 1082, 1091 n. 9 (8th Cir.1995) (interpreting the Comprehensive Environmental Response, Compensation, and Liability Act, the court *****370 **236** held that "a parent corporation may be directly liable for activities carried out ostensibly by its subsidiary if the parent corporation, in effect, actually operated the subsidiary's facility by having the authority to control and actually or substantially controlling the facility"); *United States v. Kayser–Roth Corp.*, 910 F.2d 24, 27 (1st Cir.1990) (parent corporation can be held directly liable if actively involved in the affairs of its subsidiary); *Dassault Falcon Jet Corp. v. Oberflex, Inc.*, 909 F.Supp. 345, 347, 354 (M.D.N.C.1995) (direct participant liability could be maintained against a parent company for breach of warranty). Taken together, these cases make evident the substantial weight of authority supporting recognition of this theory of liability.

In opposition to plaintiffs' theory, defendant contends that a parent corporation owes no duty to supervise its subsidiary's conduct for the benefit of third parties. Defendant cites *Young v. Bryco Arms*, 213 Ill.2d 433, 452, 290 Ill.Dec. 504, 821 N.E.2d 1078 (2004), where this court noted its recognition of the general rule that "one has no duty to control the conduct of another to prevent him from causing harm to a third party, absent a special relationship with either the person causing the harm or the injured party." Building on that ***288** point, defendant argues that courts have uniformly rejected the argument that the parent-subsidiary relationship qualifies as the kind of "special relationship" necessary to give rise to a duty to supervise or control the conduct of the subsidiary. *In re Birmingham Asbestos Litigation*, 619 So.2d 1360 (Ala.1993). Supporting this contention, defendant cites *Joiner v. Ryder System Inc.*, 966 F.Supp. 1478 (C.D.Ill.1996), where the district court applied Illinois law and concluded that a duty could not be predicated either on the parent's ability to control its subsidiary or on its actual exercise of control:

> "RSI—as every parent corporation does—obviously has the power to control its subsidiaries. In fact, RSI owns them and RSI can 'force' them to do anything it wants. That power, by itself, however, does not impose a duty upon RSI. Only if RSI abused the power—by exerting too much control—could it be held liable for the conduct of its subsidiaries as an alter ego." *Joiner*, 966 F.Supp. at 1490.

Additionally, defendant contends that direct participant claims virtually identical to those raised here were rejected by two state appellate decisions, one from Texas and one from California. In *Coastal Corp. v. Torres,* 133 S.W.3d 776 (Tex.App.2004), refinery employees injured in an explosion brought a negligence action against the refinery's parent company. The employees alleged that " 'through central budgetary authority exercised by Coastal's corporate officers * * * Coastal * * * assumed control over maintenance, turnaround, and inspection matters at the plant,' " limited expenditures, and "controlled and influenced its subsidiary in a way that directly resulted in appellees' injuries." *Coastal Corp.,* 133 S.W.3d at 777, 779. The *Coastal Corp.* court noted that the plaintiffs in that case alleged "negligent control of the budget, not negligent control over details of specific operational activities," and eventually found that the parent company had no duty as a matter of Texas law to "approve budgets for its subsidiaries in order to assure ***289** that the subsidiaries repair defects on their premises." *Coastal Corp.,* 133 S.W.3d at 779, 782.

Similarly, in *Waste Management Inc. v. Superior Court of San Diego,* 119 Cal.App.4th 105, 13 Cal.Rptr.3d 910, 69 Cal. Comp. Cas. 759 (2004), plaintiffs brought an action against a parent company for negligently controlling its subsidiary's budget *****371** ****237** such that the subsidiary was prevented from replacing and repairing trash trucks. The court recognized direct participant liability and stated that "the parent may owe a duty arising out of obligations independent of the parent subsidiary relationship." *Waste Management,* 119 Cal.App.4th 105, 13 Cal.Rptr.3d 910, 69 Cal. Comp. Cas. at 762. The court went on to hold, however, that "[n]egligently controlling or intentionally mismanaging a subsidiary's budget does not create a duty on the part of the parent corporation to ensure safety or prevent injuries to the subsidiary's employees." *Waste Management,* 119 Cal.App.4th 105, 13 Cal.Rptr.3d 910, 69 Cal. Comp. Cas. at 763.

[10] As defendant points out, *Coastal Corp.* and *Waste Management* stand for the proposition that mere budgetary mismanagement is not enough to support direct participant liability. Additionally, however, the *Coastal Corp.* court noted that "it is apparent that liability is imposed when there is specific control over the activity that caused the accident." *Coastal Corp.,* 133 S.W.3d at 779. Similarly, the *Waste Management* court stated that the plaintiffs' case failed because they could not show that the parent company "directed and authorized the *manner* in which the subsidiary conducted its business." (Emphasis in original.) *Waste Management,* 119 Cal.App.4th 105, 13 Cal.Rptr.3d 910, 69 Cal. Comp. Cas. at 763. In other words, these courts found that a viable claim of liability under the direct participant theory cannot rest solely upon budgetary mismanagement, but budgetary mismanagement can make up one part of a viable claim, in conjunction with the direction or authorization of the manner in which an activity is undertaken. The *Joiner* decision echoes this sentiment. ***290** There, the court granted summary judgment in favor of the parent/defendant, noting significantly that the parent/defendant did "not get involved in the day-to-day activities or management of the subsidiaries." *Joiner,* 966 F.Supp. at 1490. Based upon this analysis, we conclude that budgetary mismanagement, accompanied by the parent's negligent direction or authorization of the manner in which the subsidiary accomplishes that budget, can lead to a valid cause of action under the direct participant theory of liability.

[11] **[12]** **[13]** **[14]** Considering the above, we hold that direct participant liability is a valid theory of recovery under Illinois law. Where there is evidence sufficient to prove that a parent company mandated an overall business and budgetary strategy *and* carried that strategy out by its own specific direction or authorization, surpassing the control exercised as a normal incident of ownership in disregard for the interests of the subsidiary, that parent company could face liability. The key elements to the application of direct participant liability, then, are a parent's specific direction or authorization of the manner in which an activity is undertaken and foreseeability. If a parent company specifically directs an activity, where injury is foreseeable, that parent could be held liable. Similarly, if a parent company mandates an overall course of action and then authorizes the manner in which specific activities contributing to that course of action are undertaken, it can be liable for foreseeable injuries. We again stress, though, that allegations of mere budgetary mismanagement alone do not give rise to the application of direct participant liability.

[15] **[16]** **[17]** Our finding is supported by the policy-based factors courts use to determine whether a duty exists. *Marshall v. Burger King Corp.,* 222 Ill.2d at 436–37, 305 Ill.Dec. 897, 856 N.E.2d 1048 (the factors are (1) the reasonable foreseeability of injury, (2) the likelihood of injury, (3) the *****372** ****238** magnitude of the burden of ***291** guarding against the injury, and (4) the consequences of placing the burden upon the defendant). Certain heavy industries, like refining, inherently involve a great amount

of danger. It is conceivable that severe cutbacks in staffing, safety, maintenance, and training in such industries could lead, with reasonable foreseeability, to the injury of others. The likelihood of injury in those circumstances would not be remote and could be deadly. Additionally, the magnitude of the burden of guarding against such injury would not be great. Parent companies are free to craft overall business and budgetary strategies; such companies simply must not interfere directly in the manner their subsidiaries undertake certain activities such that the subsidiaries are no longer free to utilize their own expertise. Alternatively, if parent companies do interfere directly in the manner their subsidiaries undertake certain activities, they must do so with reasonable care. Finally, it is not an undue burden to require that parent corporations engage in the considered exercise of due care in an already limited role. As we have already acknowledged, parent corporations are generally not liable for the acts of their subsidiaries. *Bestfoods,* 524 U.S. at 61, 118 S.Ct. at 1884, 141 L.Ed.2d at 55–56, quoting 39 Yale L.J. 193. Moreover, the mere fact of a parent-subsidiary relationship, without a great deal more, does not give rise to liability. *Bestfoods,* 524 U.S. at 61, 118 S.Ct. at 1884, 141 L.Ed.2d at 56, quoting 1 W. Fletcher, Cyclopedia of Law of Private Corporations § 33, at 568 (rev.ed.1990).

[18] This court has repeatedly and consistently highlighted the point that it is "axiomatic that every person owes to all others a duty to exercise ordinary care to guard against injury which naturally flows as a reasonably probable and foreseeable consequence of his act." *Frye v. Medicare–Glaser Corp.,* 153 Ill.2d 26, 32, 178 Ill.Dec. 763, 605 N.E.2d 557 (1992), quoting ***292** *Nelson v. Union Wire Rope Corp.,* 31 Ill.2d 69, 86, 199 N.E.2d 769 (1964); see also *Mt. Zion State Bank & Trust v. Consolidated Communications, Inc.,* 169 Ill.2d 110, 124, 214 Ill.Dec. 156, 660 N.E.2d 863 (1995); *Widlowski v. Durkee,* 138 Ill.2d 369, 373, 150 Ill.Dec. 164, 562 N.E.2d 967 (1990); *Feldscher v. E & B, Inc.,* 95 Ill.2d 360, 368–69, 69 Ill.Dec. 644, 447 N.E.2d 1331 (1983). Recognizing that a parent company may have a duty based upon direct participant liability does not end the analysis though. Certain facts must still be present to give rise to its application.

II. Direct Participant Liability Applied

Returning to the specific issue in this case, we must resolve whether there exists a question of material fact such that the evidence presented could lead a reasonable observer to believe that defendant's overall business and budgetary strategy involved the negligent direction or authorization of the manner in which Clark Refining conducted its business. If so, the trial court's grant of summary judgment was inappropriate.

Defendant's overall business strategy at the time of the tragic accident involved here mandated increased productivity driven, at least in part, by budgetary cuts. The question remains, though, whether those cuts were negligently directed by or conducted in a manner authorized by defendant at the expense of Clark Refining. Answering this question requires a close look at the role of defendant's president, Paul Melnuk, who also served as chief executive officer of Clark Refining.

In *Bestfoods,* the Supreme Court pointed out that lower courts must "recognize that 'it is entirely appropriate for directors of a parent corporation to serve as directors *****373** ****239** of its subsidiary, and that fact alone may not serve to expose the parent corporation to liability for its subsidiary's acts.' " *Bestfoods,* 524 U.S. at 69, 118 S.Ct. at 1888, 141 L.Ed.2d at 60, citing *American Protein Corp. v. AB Volvo,* 844 F.2d 56, 57 (2d Cir.1988). The Court acknowledged the " 'well established principle [of corporate law] that directors and officers holding positions ***293** with a parent and its subsidiary can and do "change hats" to represent the two corporations separately, despite their common ownership.' " *Bestfoods,* 524 U.S. at 69, 118 S.Ct. at 1888, 141 L.Ed.2d at 61, citing *Lusk v. Foxmeyer Health Corp.,* 129 F.3d 773, 779 (5th Cir.1997). Further, the Court noted that it should be presumed that directors are wearing their "subsidiary hats," rather than their "parent hats," when acting for the subsidiary. *Bestfoods,* 524 U.S. at 69, 118 S.Ct. at 1888, 141 L.Ed.2d at 61.

[19] Accordingly, to establish liability, plaintiffs must establish more than the fact that Paul Melnuk made policy decisions and supervised subsidiary activities. *Bestfoods,* 524 U.S. at 69, 118 S.Ct. at 1888, 141 L.Ed.2d at 61. Instead, plaintiffs must show that the conduct complained of occurred while Paul Melnuk was acting in his capacity as an officer of Clark USA, rather than as an officer of Clark Refining. *Bestfoods,* 524 U.S. at 69, 118 S.Ct. at 1888, 141 L.Ed.2d at 61. In attempting to do so, plaintiffs point to additional language from *Bestfoods,* where the Court stated that "the presumption that an act is taken on behalf of the corporation for whom the officer claims to act is strongest when the act is perfectly consistent with the norms of corporate behavior, but wanes as the distance from those accepted norms approaches

the point of action by a dual officer plainly contrary to the interests of the subsidiary yet nonetheless advantageous to the parent." *Bestfoods*, 524 U.S. at 70 n. 13, 118 S.Ct. at 1888 n. 13, 141 L.Ed.2d at 61 n. 13.

[20] Seizing upon that language, plaintiffs point to the April 1995 "Memorandum to the Executive Committee," prepared by Paul Melnuk, completed on Clark USA letterhead, and including a document entitled "1995 Economic Imperatives." Moreover, plaintiffs point to another Clark USA business record, the agenda for the February 15, 1995, board of directors meeting, which ***294** includes a section entitled "Clark USA Liquidity Overview." That document lays out a "survival mode" business philosophy marked by "reduced capital spending," "reduced working capital investment," and "reduced operating expense level." The document further states that the "goal is to replenish [defendant's] strategic cash reserve to $200 million." Defendant's continued emphasis on this goal is supported by the "1995 Economic Imperatives," one of which was to "[r]eplenish cash balance to 200 million" by reducing capital spending to "minimum sustainable levels." Relying on this, plaintiffs contend that the business and budgetary strategy defendant mandated in this case was carried out for its own benefit at the foreseeable expense of safety and spending at Clark Refining and at the direction of Paul Melnuk. As such, the only benefit of the business and budgetary strategy involved in this case ran to defendant and not Clark Refining. This, plaintiffs argue, proves that Paul Melnuk was acting not on behalf of Clark Refining but, instead, on behalf of Clark USA.

In opposition, defendant cites the testimony of Paul Melnuk himself where he claims that the 1995 Imperatives, though completed on defendant's letterhead, were actually carried out for Clark Refining. Additionally, defendant notes that the 1995 Imperatives include discussion of the continuing need to spend on necessary health *****374** ****240** and safety as well as ensure that all existing environmental, health, and safety needs are fully supported.

At the very least, there is a genuine issue of material fact as to whose "hat" Melnuk was wearing when he completed the 1995 memorandum. If the fact finder concludes that Melnuk was acting on behalf of defendant and thus wearing his Clark USA "hat," there is some evidence that he was directing or authorizing the manner in which Clark Refining's budget was implemented ***295** such that he had a duty, under the direct participant theory of liability, to do so with reasonable care. The additional evidence produced by plaintiffs indicating that Melnuk knew both that the budgetary reductions involved here had to come in large part from controllable costs such as education, training, repairs, and equipment maintenance, and that these reductions were compromising safety at the refinery raises an issue of material fact as to whether or not defendant breached that duty. The trial court's grant of summary judgment was therefore inappropriate.

If Paul Melnuk, acting on behalf of defendant, directed or authorized the manner in which the budget cuts in this case were taken, he had a duty to do so in a nonnegligent way. If Melnuk directed or authorized the manner in which the budget cuts at issue were taken, knowing that safety at the Blue Island refinery would be compromised, and did so superseding the discretion and interest of Clark Refining, direct participant liability could attach. Determining whether this duty applies to the facts of this case, and whether defendant is liable, involves factual inquiry. See, *e.g.*, *O'Hara v. Holy Cross Hospital*, 137 Ill.2d 332, 342–44, 148 Ill.Dec. 712, 561 N.E.2d 18 (1990) (this court held that whether or not a hospital had a duty to protect a nonpatient invited into an emergency room involved a factual inquiry into whether the nonpatient was invited to participate in the care and treatment of the patient and thus summary judgment in favor of hospital was inappropriate). This inquiry is not suitable for this court on review and not appropriate for disposition at summary judgment, especially considering that this court must interpret the record strictly against the moving party and liberally in favor of the nonmoving party. *Jackson*, 185 Ill.2d at 423–24, 235 Ill.Dec. 905, 706 N.E.2d 460.

III. Immunity Under the Illinois Workers' Compensation Act

Having found that direct participant liability is a ***296** potentially valid theory of recovery in this case, and that a genuine issue of material fact exists as to its application, we still must analyze the exclusive remedy provision of the Workers' Compensation Act (820 ILCS 305/ 5(a) (West 2002)). Defendant claims that, even if it were found liable under the direct participant theory, the exclusivity provision renders it immune. The provision, found in section 5(a) of the Act, provides:

> "No common law or statutory right to recover damages from the employer * * * for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is

> available to any employee who is covered by the provisions of this Act * * *." 820 ILCS 305/5(a) (West 2002).

This provision serves a balancing function. On the one hand, the Act establishes a new "system of liability without fault, designed to distribute the cost of industrial injuries without regard to common-law doctrines of negligence, contributory negligence, assumption of risk, and the like." *Gannon v. Chicago, Milwaukee, St. Paul & Pacific Ry. Co.*, 13 Ill.2d 460, 463, 150 N.E.2d 141 (1958). On the other hand, the Act imposes "statutory limitations upon the amount *****375 **241** of the employee's recovery, depending upon the character and the extent of the injury" and provides "that the statutory remedies under it shall serve as the employee's exclusive remedy if he sustains a compensable injury." *McCormick v. Caterpillar Tractor Co.*, 85 Ill.2d 352, 356, 53 Ill.Dec. 207, 423 N.E.2d 876 (1981).

[21] Defendant asserts that plaintiffs' theory of liability in this case should be treated no differently than a conventional veil-piercing theory, contending that plaintiffs' claim has to be that the parent company interfered to such an extent in the subsidiary's business that it should be treated as if it were the subsidiary. In that situation, defendant continues, the parent company has become the subsidiary/employer and should be subject to the same burdens and entitled to the same protections a ***297** subsidiary/employer would have under the Workers' Compensation Act. See *Kotecki v. Cyclops Welding Corp.*, 146 Ill.2d 155, 166 Ill.Dec. 1, 585 N.E.2d 1023 (1991) (holding that a third party sued by an employee injured in a workplace accident can bring a contribution claim against the employer, but that the employer's liability is limited to the amount it would be required to pay under the Workers' Compensation Act).

[22] We reject this argument. Direct participant liability, as we now recognize it, does not rest on piercing the corporate veil such that the liability of the subsidiary is the liability of the parent. On the contrary, this form of liability is asserted, as its name suggests, for a parent's direct participation, superseding the discretion and interest of the subsidiary, and creating conditions leading to the activity complained of. Here, plaintiffs claim that defendant directly participated in creating conditions within the Blue Island refinery that led to the fire by directing or authorizing the manner in which Clark Refining's cost-cutting budget was instituted with no regard for the discretion and interest of Clark Refining itself.

In essence, defendant is requesting that it be allowed to pierce its own corporate veil in order to avoid liability. Illinois courts have consistently expressed reluctance for allowing such a practice. See *In re Rehabilitation of Centaur Insurance Co.*, 158 Ill.2d 166, 173–74, 198 Ill.Dec. 404, 632 N.E.2d 1015 (1994) (citing with approval the principle that the general law mandates that piercing must never be made in favor of a corporation or its shareholders); *Main Bank of Chicago v. Baker*, 86 Ill.2d 188, 206, 56 Ill.Dec. 14, 427 N.E.2d 94 (1981) (stating that a party "cannot assert the equitable doctrine of piercing the corporate veil to disregard the separate corporate existence of a corporation he himself created to gain an advantage which would be lost under his present contention"); see *Hughey v. Hoffman Rosner Corp.*, 109 Ill.App.3d 633, 636, 65 Ill.Dec. 194, 440 N.E.2d 1049 (1982); ***298** *Schmidt v. Milburn Brothers, Inc.*, 296 Ill.App.3d 260, 267, 230 Ill.Dec. 655, 694 N.E.2d 624 (1998). The appellate court in this case recognized this point when it rejected defendant's attempt "to have its cake and eat it too: asserting, on the one hand, that it was merely a shareholder in arguing that it owed no duty to the decedents, while, at the same time, attempting to invoke the Act's grant of immunity by characterizing itself as the decedents' employer." 361 Ill.App.3d at 651–52, 297 Ill.Dec. 119, 836 N.E.2d 850.

In *Schmidt,* this point was made particularly clear. That case involved a plaintiff injured in a collision with a driver who worked for a company loosely affiliated with the defendant, plaintiff's own employer. The defendant in the case asserted the protection of the exclusive remedy provision *****376 **242** of the Workers' Compensation Act. The court was not persuaded, stating that:

> "[I]f defendants are right, [defendant] pays nothing for the negligence of its driver—no workers' compensation premiums, no workers' compensation benefits, no tort liability. That would turn the exclusive remedy provision of the [Workers' Compensation Act] into a sword, instead of a shield. No useful societal purpose would be served. [Defendant] would receive all the benefits the law provides to a separate and distinct corporate body with none of the usual detriments * * *." *Schmidt*, 296 Ill.App.3d at 269, 230 Ill.Dec. 655, 694 N.E.2d 624.

We agree with this analysis. It was Clark Refining, not defendant, who paid workers' compensation benefits to the decedents' families. It was Clark Refining, not defendant, who actually employed the decedents. As such it is Clark Refining, not Clark USA, that should enjoy the exclusive remedy provision of the Workers' Compensation Act. We decline to allow Clark USA to pierce its own corporate

veil. Accordingly, the Workers' Compensation Act does not immunize defendant from liability.

CONCLUSION

Drawing no ultimate conclusions on the merits of plaintiffs' case and mindful that summary judgment is an extraordinary remedy, summary judgment was inappropriate ***299** in this matter. We recognize the direct participant theory of liability. We note, however, that this theory of liability gives rise to a duty only in limited circumstances. Budgetary oversight alone is insufficient, as is a parent company's commission of acts consistent with its investor status.

[23] If there is sufficient evidence to show that a parent corporation directed or authorized the manner in which an activity is undertaken, however, a duty arises. Specifically, the duty to utilize reasonable care in directing or authorizing the manner in which that activity is undertaken. Accordingly, a parent corporation can be held liable if, for its own benefit, it directs or authorizes the manner in which its subsidiary's budget is implemented, disregarding the discretion and interests of the subsidiary, and thereby creating dangerous conditions. In such situations, parent-defendants will not be protected by the exclusive remedy provision of the Workers' Compensation Act.

For these reasons, we affirm the appellate court's reversal of the trial court's grant of summary judgment and its remand of the cause to the circuit court for further proceedings.

Affirmed.

Justices FITZGERALD and KARMEIER concurred in the judgment and opinion.

Chief Justice THOMAS and Justice KILBRIDE took no part in the consideration or decision of this case.

Justice FREEMAN specially concurred, with opinion, joined by Justice BURKE.

Justice FREEMAN, specially concurring:

Our ruling today, for the first time, recognizes that direct participant liability is a valid theory of recovery under Illinois law. We also find that, on the specific record presented in this case, the trial court erred in granting defendant, Clark USA, Inc., summary judgment on plaintiffs' direct participant liability claims. I am in agreement with the ultimate result reached by the majority ***300** opinion. I write separately, however, to offer additional reasons in support *****377** ****243** of the reversal of summary judgment in this matter.

In March 1995, plaintiffs' decedents were killed in a fire which followed an explosion occurring at their workplace, a refinery located in Blue Island. The refinery is owned and operated by decedents' employer, Clark Refining & Marketing, Inc. (Clark Refining). Defendant, Clark USA, Inc., owns 100% of the stock of Clark Refining. Plaintiffs allege that the fatal fire started when untrained operators, who were not maintenance mechanics, performed maintenance tasks and disassembled a valve which, instead of being drained of flammable materials, was still pressurized. As a result, these materials escaped and burst into flames. Decedents were eating in a lunchroom located in the maintenance building at the refinery across an access road from the maintenance work, and the explosion and subsequent fire trapped and killed them before they could escape the building.

Subsequent to the accident, plaintiffs filed suit, naming Clark Refining's parent company, Clark USA, Inc., as a defendant based upon the theory of direct participant liability for controlling the budget of its subsidiary in such a way that directly led to the workplace accident and, ultimately, to the death of decedents. Plaintiffs alleged that defendant negligently imposed an "overall business strategy" directing the subsidiary to minimize costs and capital investments, which allegedly caused the subsidiary to engage in the dangerous practice of reducing training and maintenance. According to plaintiffs, as a result of this direct interference by the parent company, untrained operators were assigned to perform dangerous maintenance tasks at the plant. This occurred, plaintiffs contend, because there was a large maintenance backlog caused by economic cutbacks specifically dictated and directed by defendant in order to increase its own profits.

***301** During the course of this lengthy litigation, the parties have engaged in an extensive amount of discovery, including the exchange of countless business records as well as the taking of depositions of numerous individuals with knowledge of the events that occurred prior, during and after the time of the accident. Indeed, the appellate record in the instant matter exceeds 60 volumes and reaches nearly 15,000 pages. Two weeks before this cause was set for jury trial,

the circuit court of Cook County granted defendant summary judgment pursuant to section 2–1005 of the Code of Civil Procedure (735 ILCS 5/2–1005 (West 2002)). The trial court's order granting summary judgment, however, stated only that defendant's motion was granted and contained no specific findings by the trial court to indicate the basis for its ruling.

It is in this procedural posture that the instant cause comes to us on appeal. We must, therefore, review the ruling of the circuit court to determine whether, under the specific facts and circumstances of this case, the circuit court erred in granting defendant summary judgment. The standards used to determine the propriety of a grant of summary judgment are familiar and well settled. The purpose of summary judgment is not to try a question of fact but, rather, to determine whether a genuine issue of material fact exists. *Adams v. Northern Illinois Gas Co.*, 211 Ill.2d 32, 42–43, 284 Ill.Dec. 302, 809 N.E.2d 1248 (2004). The entry of summary judgement is appropriate only where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2–1005(c) (West 2004).

****244** *****378** In determining whether a genuine issue of material fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent. *Bagent v.* ***302** *Blessing Care Corp.*, 224 Ill.2d 154, 162–63, 308 Ill.Dec. 782, 862 N.E.2d 985 (2007). A triable issue precluding the entry of summary judgment exists where the material facts are disputed or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts. *Bagent*, 224 Ill.2d at 162–63, 308 Ill.Dec. 782, 862 N.E.2d 985. Although summary judgment can aid in the expeditious disposition of a lawsuit, it is nevertheless a drastic means of disposing of litigation and, therefore, should be allowed only where the right of the moving party is clear and free from doubt. *Adams*, 211 Ill.2d at 43, 284 Ill.Dec. 302, 809 N.E.2d 1248 (and cases cited therein).

It is with these standards in mind that we hold today that the trial court improvidently granted defendant summary judgment. We have carefully reviewed the vast amount of evidence adduced by plaintiffs in opposition to defendant's motion for summary judgment. Various business documents generated by defendant and/or its subsidiary, coupled with the deposition testimony of several individuals familiar with events transpiring prior, during and subsequent to the accident, raise numerous genuine issues of material fact as to whether defendant, through its direct control of Clark Refining, negligently caused the maintenance and training of employees at the Blue Island facility to degrade to such a level that safe operation of the plant became impossible, ultimately leading to the fatal accident in this case.

At this juncture, I underscore that our opinion today does not alter the bedrock principle of limited liability for corporate shareholders, [1] and that direct participant liability is a very narrow exception to this general ***303** principle. Today's decision stands for the proposition that if a parent company merely articulates general policies and supervises a subsidiary's budgeting decisions, such conduct alone is not enough to give rise to direct liability on the part of the parent. In other words, conduct that is entirely "consistent with the parent's investor status" does not pose a problem. *United States v. Bestfoods*, 524 U.S. 51, 69, 118 S.Ct. 1876, 1889, 141 L.Ed.2d 43, 62 (1998). Thus, activities by the parent company that involve the subsidiary, such as "monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures," will, generally, not give rise to direct liability. *Bestfoods*, 524 U.S. at 72, 118 S.Ct. at 1889, 141 L.Ed.2d at 62. The "critical question" in deciding whether the parent company can be held liable under a theory of direct participant liability is "whether, in degree and detail, actions directed to the [subsidiary] by an agent of the parent alone are eccentric under accepted norms of parental oversight of a subsidiary's facility." *Bestfoods*, 524 U.S. at 72, 61–62, 118 S.Ct. at 1889, 141 L.Ed.2d at 62. Throughout these proceedings, defendant has voiced the valid concern that the direct participation liability theory of recovery must not be stretched *****379** ****245** to such an extent that it encompasses routine and proper exercises of shareholder control, lest the exception swallows the general rule and serves to spawn a flood of lawsuits against parent companies. I agree with defendant on this point, and our opinion today preserves the proper balance between the general rule and this narrow exception.

In addition, defendant has voiced concern that it could be held liable under the direct participant theory simply because it shares its officers and directors with its subsidiary. Our opinion today guards against such a result, as it recognizes the principle that "it cannot be ***304** enough to establish liability [under a direct participation theory] that dual officers and directors made policy decisions and supervised activities

at the facility." *Bestfoods*, 524 U.S. at 69–70, 118 S.Ct. at 1888, 141 L.Ed.2d at 61. This is true because when an individual wears two "hats"—*i.e.*, as an officer and/or director of both the parent and the subsidiary companies—a court will "generally presume 'that the directors are wearing their "subsidiary hats" and not their "parent hats" when acting for the subsidiary.' " *Bestfoods*, 524 U.S. at 69, 118 S.Ct. at 1888, 141 L.Ed.2d at 61, quoting P. Blumberg, Law of Corporate Groups: Procedural Problems in the Law of Parent & Subsidiary Corporations § 1.02.1, at 12 (1983). In other words, a parent company will generally not be found liable for decisions made by a subsidiary's board and/or officers simply because these individuals are also officers or directors of the parent company. Rather, liability will result only in instances where the conduct complained of occurred while the officers/directors were acting in their capacity as officers/directors of the *parent*, rather than of the subsidiary. As the Court in *Bestfoods* explained: "the presumption that an act is taken on behalf of the corporation for whom the officer claims to act is strongest when the act is perfectly consistent with the norms of corporate behavior, but wanes as the distance from those accepted norms approaches the point of action by a dual officer plainly contrary to the interests of the subsidiary yet nonetheless advantageous to the parent." *Bestfoods*, 524 U.S. at 70 n. 13, 118 S.Ct. at 1888 n. 13, 141 L.Ed.2d at 61 n. 13.

It should be emphasized that rarely will a parent company that generally observes corporate formalities step outside the proper role of a parent to so pervasively interfere with the operations of the subsidiary that it can be viewed as directly inflicting harm on the subsidiary's employees or third parties doing business with the ***305** subsidiary. In the matter before us, however, plaintiffs have presented sufficient evidence of conduct by defendant to create a genuine issue of material fact as to whether that conduct could not only be deemed "eccentric under accepted norms of parental oversight" of a subsidiary's business (*Bestfoods*, 524 U.S. at 72, 118 S.Ct. at 1889, 141 L.Ed.2d at 62), but also "plainly contrary to the interests of the subsidiary yet nonetheless advantageous to the parent" (*Bestfoods*, 524 U.S. at 70 n. 13, 118 S.Ct. at 1888 n. 13, 141 L.Ed.2d at 61 n. 13), to the extent that it could serve as a predicate for direct participant liability on the part of defendant.

First, the record contains several business documents which raise a genuine issue of material fact with respect to the nature and extent of direct involvement by defendant in the affairs of its subsidiary, Clark Refining. As background, I note that throughout the time period at issue in this matter, defendant and Clark Refining had largely (although not entirely) overlapping boards of directors, which often held joint meetings. In addition, the *****380 **246** president and chief executive officer of defendant, Paul Melnuk, was also the president, chief executive officer (CEO) and chief operating officer (COO) of Clark Refining. As further background information, I note that, in his deposition, Melnuk testified that he had no previous experience in the oil refining business, and that he concentrated on the financial aspects of the business. Melnuk further stated in his deposition that defendant had no operations personnel, and that its function was to simply serve as a holding company.

It is against this background that we have reviewed the following business records. For example, plaintiffs point to a business record entitled "Clark USA Liquidity Overview." This document is part of the agenda for the Clark USA, Inc., February 15, 1995, board of directors meeting, and commands that the "1995 philosophy is ***306** survival mode," and that the "goal is to replenish the strategic cash reserve to $200 million." This goal was to be accomplished through "reduced capital spending," "reduced working capital investment," and "reduced operating expense level."

Defendant's continued focus on this financial goal is reflected in a document entitled "Interoffice Memorandum," which is dated April 19, 1995, from Paul Melnuk to the "Executive Committee" regarding an "EC Meeting" to be held the following week. As part of this memo, Melnuk included as attachments documents entitled "Clark USA, Inc. 1995 Imperatives April 1995," "Clark USA, Inc. 1994 Performance Distribution Grade Level 13 and Above," and "Clark USA, Inc. Scorecard First Quarter, 1995." In the 1995 "Imperatives" document, focus was placed upon replenishing Clark USA, Inc.'s strategic cash reserve of $200 million by reducing the capital spending at the Blue Island refinery to the "minimum sustainable level." In the "Scorecard" document, "key achievements" were listed to include "cash balance" and "1995 Imperatives," whereas key disappointments were listed to include "performance management," "employee morale/lack of leadership," "short-term thinking," and "Blue Island tragedy."

These documents create, in several respects, genuine issues of material fact that preclude entry of summary judgment. First, although defendant has asserted that it is a mere holding company, the "Interoffice Memo" contains documents which, on their face, deal with Clark USA, Inc., matters, and the memo itself is directed to the "Executive Committee."

The existence of an executive committee for Clark USA, Inc., however, would run counter to defendant's argument that it is merely a holding company and has no operating personnel. During his deposition, Melnuk acknowledged the words as they are written in the memo and, specifically, in the attachment ***307** entitled " Clark USA, Inc. 1995 Imperatives." Melnuk, however, offered another, alternative reading of these words, stating: "The words on this page as you read them are the words as you read them. These are actually, in fact, the 1995 Imperatives of Clark Refining and Marketing, Inc., and in this regard *the title on this page is incorrect.*" (Emphasis added.) Similarly, with respect to the attachment to the memo entitled "Clark USA, Inc. Scorecard First Quarter, 1995," Melnuk testified in his deposition that although the title states "Clark USA," this document "is in fact a score card of the business of Clark R[efining] and M[arketing]," again contending that the title of the document was "incorrect." At a minimum, these differing interpretations of the language of these documents and their contents create a genuine issue of material fact precluding entry of summary judgment.

****247** *****381** In addition, plaintiffs assert that these documents create a genuine issue of material fact as to whether defendant's mandated budget cuts were targeted to reduce Clark Refining's capital spending on essential items such as safety training and maintenance. Plaintiffs contend that such commands are especially egregious and inappropriate in a refinery setting dealing with highly explosive materials, where an accident such as occurred here is foreseeable. According to plaintiff, the actions of defendant constitute precisely the type of conduct on the part of a parent company that may be considered "eccentric under accepted norms of parental oversight" (*Bestfoods*, 524 U.S. at 72, 118 S.Ct. at 1889, 141 L.Ed.2d at 62) and "plainly contrary to the interests of the subsidiary yet nonetheless advantageous to the parent" (*Bestfoods*, 524 U.S. at 70 n. 13, 118 S.Ct. at 1888 n. 13, 141 L.Ed.2d at 61 n. 13), to the extent that it could serve as a predicate for direct participant liability on the part of defendant.

***308** In support of this theory, plaintiffs point to evidence that they assert shows that although defendant, through Melnuk, was aware of the negative effects of the mandated cuts on the safety, training, and maintenance at the Blue Island refinery, it nevertheless continued to require Clark Refining to comply with its dictates. For example, Ronald Anderson, a former union president at the refinery, stated in his deposition testimony that the issue of the lack of preventative maintenance at the refinery—including that employees were forced to "cut[ ] corners" with respect to maintenance and safety—was sent up the corporate chain of command, all the way to Melnuk. According to Anderson, under the direction of the "corporate office," members of the refinery's safety and environmental department worked only a daytime shift, even though the plant operated on a 24–hour basis. This meant that untrained operators were left to perform these specialized jobs during the off-shifts. In his deposition, Anderson described the situation at the plant as being one of "continuous deterioration" with respect to maintenance, safety, and training, and stated that the refinery was "falling apart." According to Anderson, Melnuk would not provide authorization to remedy the situation, despite the fact that, as union president, he directly discussed these issues with Melnuk. Anderson also stated that flyers were posted around the refinery which discussed the financial status and competitiveness of the company, which asked for increases in production, and which pointed out that other refineries had entered into bankruptcy. Anderson testified that this created a "fear factor" at the plant, in that "people * * * who generally would not compromise situations, compromised their job, were placed in a position through fear to be tempted to compromise things," meaning that they "cut corners" because they believed that otherwise "the place was going to shut down and everybody was going to lose their jobs."

***309** Based upon this evidence, a genuine issue of material fact was raised as to whether defendant's extreme cost-cutting requirements—dictated to the subsidiary despite the knowledge that its measures resulted in a dangerous reduction in training and maintenance which adversely affected safety at the refinery—may be considered "eccentric under accepted norms of parental oversight" (*Bestfoods*, 524 U.S. at 72, 118 S.Ct. at 1889, 141 L.Ed.2d at 62) and "plainly contrary to the interests of the subsidiary yet nonetheless advantageous to the parent" (*Bestfoods*, 524 U.S. at 70 n. 13, 118 S.Ct. at 1888 n. 13, 141 L.Ed.2d at 61 n. 13), to the extent that it could serve as a basis for direct participant liability on the part of defendant. In addition, there is clearly a genuine issue of *****382** ****248** material fact with respect to what "hat" Melnuk was wearing during this time period when he was apprised of these safety concerns but nevertheless dictated budget cuts. I also note that, during these proceedings, defendant has not challenged plaintiffs' assertion that it knew of the potential danger at the refinery due to its business plan.

In addition, plaintiffs also rely upon the deposition testimony of Terence Quirke, an economics planning engineer at the

Blue Island refinery, to withstand defendant's summary judgment motion. Quirke testified with respect to the development and implementation of operating budgets at the Blue Island facility. According to Quirke, Melnuk—the president, CEO and COO of both defendant and its subsidiary—was personally and actively involved in creating and implementing operating budgets at the plant. According to Quirke, starting in 1993 management implemented a "zero based budget" approach that took into account the actual costs of each item and operation in detail.

According to Quirke, he and colleagues at the refinery established a working budget and assumed that it would ***310** be approved by management. Quirke testified, however, that he was informed that "Paul Melnuk had said that the budget was too much." Quirke then inquired about what items needed to be cut, and he was told that the budget had to be reduced by 25%. In response, Quirke compiled a list of items that could and could not be cut. The bulk of the expenditures at the refinery were nondiscretionary—including raw materials and utilities that were necessary to operate the plant. The remaining 20% of the costs were controllable, including employee wages, benefits, education, training, repairs, and equipment maintenance. According to Quirke, the only choice in complying with the requirement to reduce costs by 25% was to cut the controllable costs within the budget. According to Quirke's deposition testimony, this was explained to Melnuk, and, eventually, the budget with these reductions was approved. Quirke testified that, as a result of the mandated budget cuts, several troubling events occurred at the refinery, including 20 workers being replaced with 6 in one department, and new operator training and refresher training being entirely eliminated.

According to plaintiffs, when defendant ordered the budget cuts at the Blue Island refinery, it knew that safety, training, staffing, education and maintenance would all be compromised, and, accordingly, it was foreseeable that injury would occur as a result. Plaintiffs further contend that the record reflects that the subsidiary had no decision in this reduction. Finally, plaintiffs point to Clark Refining's own internal investigation of the accident, which cited a lack of training, maintenance and safety as having played a causative role.

Accordingly, in light of the evidence presented by plaintiffs, a genuine issue of material fact has been raised with respect to whether defendant merely established parameters or financial goals for its subsidiary. The evidence raises a question as to whether defendant ***311** actively mandated aggressive cuts in its subsidiary's budget knowing that these cuts could only be accomplished by dramatic reductions in maintenance, training and safety. Moreover, the evidence raises a question with respect to the foreseeability of injury, as it appears that defendant had several opportunities, after ordering drastic budget reductions and observing their negative effects, to change course but did not. This conduct raises material questions of fact as to whether defendant's actions fall within the direct participant liability doctrine.

****249** *****383** In sum, our opinion today recognizes a very narrow exception to the general rule. I underscore the procedural posture of this case: it is here on a review of a grant of defendant's motion for summary judgment. In assessing the circuit court's ruling, we construe, as we must, all evidence strictly against the movant—defendant—and liberally in favor of the opponent—plaintiffs. With our opinion today, this court only determines that plaintiff adduced sufficient evidence to withstand defendant's motion for summary judgment. The decision today should not be interpreted as indicating or telegraphing whether plaintiffs will ultimately succeed on the merits of this cause of action. That is a question for the trier of fact to decide at trial.

Justice BURKE joins in this special concurrence.

All Citations

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Footnotes

1 As the United States Supreme Court observed in *United States v. Bestfoods,* "it is hornbook law that 'the exercise of the "control" which stock ownership gives to the stockholders ... will not create liability beyond the assets of the subsidiary.' " *Bestfoods,* 524 U.S. at 61–62, 118 S.Ct. at 1884, 141 L.Ed.2d at 56, quoting W.O. Douglas & C. Shanks, *Insulation from Liability Through Subsidiary Corporations,* 39 Yale L.J. 193 (1929).

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