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NO. 70063-4-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

FORTUNE OIL COMPANY, INC., THE FORTUNE COMPANY,
INC., ALBERT D. ROSELLINI, JR., VICKI ROSELLINI, husband
and wife,

Appellants,

vs.

JOON KIM, an individual, P.D.Q. INCORPORATED,
dba P.D.Q. Deli Mart

Respondents.

APPELLANTS' REPLY BRIEF

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I. ARGUMENT

1.1 Respondents do not present a legal or factual basis for piercing the corporate veil.

Respondents attempt to defend the trial court decision to disregard the corporate form of Fortune Oil, Inc. (“Fortune Oil”) and hold Albert and Vicki Rosellini personally responsible for the company’s obligation to Respondents rests on two principal grounds.

One of Respondents’ arguments advanced at trial and accepted by the trial court was that Fortune Oil failed to maintain necessary records. On appeal Respondents reiterate that the company failed to keep “corporate forms” or to satisfy “corporate requirements.”¹ However, these alleged requirements are not specified and no authority establishing such requirements is identified by Respondents. Similarly, Respondents’ assertion that the company “had a duty to keep the financial records as required by its bylaws”² is unsupported by citation to any authority, as is the bare assertion that the QuickBooks accounting “does not qualify as the regular books of account in accordance with standard

¹ Respondents’ Brief p. 32.

² Respondents’ Brief p. 34.

accounting practices; as required by the Fortune Oil's bylaws."³ Respondents appear to argue that Fortune Oil must have failed to maintain proper records because Mr. Rosellini at his deposition was unable to explain the genesis of various entries in the tax returns. But, Mr. Rosellini also testified that he did not personally maintain the company's books or prepare the company's tax returns.⁴ No authority presented by Respondents establishes a requirement for any records other than those maintained by the company. In addition, no authority is presented that the failure to maintain records is grounds for piercing the corporate veil. No evidence established that the failure to maintain records was an intentional attempt to violate a duty to another⁵ or that the failure to maintain any records was the proximate cause of Respondents' loss.

The second principal argument advanced by Respondents is that corporate disregard is justified because of commingling. The only evidence of alleged commingling that Respondents point to is that Mr. Rosellini would withdraw funds from Fortune Oil when cash flow permitted and when the company was short of funds put funds back into the company. The evidence was that all such

³ Respondents' Brief p. 31

⁴ CP 124

⁵ See, Meisel v. M&N Hydraulic Press Co., 97 Wn.2d 403, 645 P.2d 689 (1982).

transactions were recorded in the QuickBooks accounting maintained by the bookkeeper.⁶ This Respondents maintain this is the kind of commingling that justifies piercing the corporate veil. However, again, no authority supporting this assertion is cited by Respondents and there is no evidence that any such conduct was done intentionally to evade any duty.

Respondents assert that the deposits to and withdrawals from the Fortune Oil accounts resulted in the Respondents' loss. Respondents argue that this conclusion is supported by the tax returns, the failure to account for the proceeds from sale of the supply contracts and the loss on gasoline supplied to the Ferndale Truck Stop. There was no evidence at trial interpreting Fortune Oil's tax returns or that supports Respondents' wild extrapolation of particular entries in the returns. The evidence showed that when the company began to struggle the Rosellinis put money into the company, mortgaging their home in order to do so⁷. There was no evidence that the Rosellinis took money for themselves during this period of time.

⁶ CP 123-9.

⁷ CP 74-6.

The claim that the proceeds from the sale of the supply contracts cannot be accounted for is also contrary to the evidence. As Mr. Rosellini testified, the contracts were sold to oil companies to which Fortune Oil owed large sums of money. The purchase price in each case was not received in cash, but was credited against the sum owed to the oil companies by Fortune Oil.⁸

Finally, Respondents assert that had Fortune Oil not made additional deliveries to the Ferndale Truck Stop when the Truck Stop failed to pay or had Mr. Rosellini attempted to collect the receivable from the Truck Stop, the Respondents would have been paid. However, there is no evidence of how much the Truck Stop owed Fortune Oil when it became apparent that the Truck Stop was not able to pay or what efforts to collect the receivable were made. The assertion that the Ferndale receivable was the cause of Respondents' loss is purely speculation. Moreover, to the extent the Ferndale receivable was the cause of Fortune Oil's failure, it clearly was not an intentional attempt to evade a duty. The Rosellinis not only lost the business of Fortune Oil, they were also forced to mortgage their home when the company failed. That is certainly not something they would have intended to precipitate.

⁸ CP 74, 77-78.

1.2 **Fortune Oil did not stand as a fiduciary to Respondents.**

The trial court found that Fortune Oil had a duty to make Respondents' funds available because "Fortune Oil did not own the funds"⁹ and therefore stood as a fiduciary to Respondents. To the contrary, as explained in Appellants' Opening Brief, no such relationship was created. Moreover, there is no evidence that the credit card collections received by Shell from Respondents' customers were actually ever received by Fortune Oil. When the company failed it owed large sums to the oil companies. There was no evidence that Shell continued to pay Fortune Oil after the company was declared in default or on what date this occurred. Again, it is entirely speculation to assume that Fortune Oil received payment for credit card charges made at Respondents' station before Shell stopped making payments to Fortune Oil. Thus, even if Fortune Oil stood as a fiduciary, which it did not, there is no evidence that the money owed Respondents ever reached Fortune Oil's accounts.

Respondents' final argument, that Fortune Oil was a

⁹ Finding of Fact No. 3, CP 400.

fiduciary because of “lopsided bargaining power”, invites the court to speculate with no evidentiary basis that the bargaining power was lopsided. Moreover, Respondent fails to cite any authority that lopsided bargaining power in a contract negotiation creates a fiduciary relationship.

1.3 **Albert Rosellini did not personally violate the Consumer Protection Act.**

The trial court found that Albert Rosellini was liable under the Consumer Protection Act based solely on the confession of judgment and the court’s decision to pierce the corporate veil. The trial court did not find that Mr. Rosellini personally acted in violation of the Act. On this appeal Respondent asks this court to conclude that Mr. Rosellini violated the Act by doing three things. First, they argue he made: “personal use and unlawful transfer of funds belonging to PDQ which was held in trust for PDQ.” There was no evidence that Fortune Oil actually received the Respondents’ credit card funds. There was no evidence that there was any personal use of any funds coming into Fortune Oil near the time Respondents’ credit card payments could have been received. There was no evidence that any funds were held in trust or that any

of Respondents' funds were transferred by Mr. Rosellini. Thus, the first ground argued by Respondents is entirely baseless.

The remaining two grounds asserted by Respondents for holding Mr. Rosellini personally responsible for violating the Act are related to the Ferndale Truck Stop. In addition to unspecified 'self-serving acts' related to the Truck Stop, Respondents claim it was an unfair and deceptive act for Mr. Rosellini not to repay Fortune Oil for its losses when the Truck Stop was sold. Once again, no authority is offered for this proposition. In fact, the evidence showed that the Rosellinis put far more into Fortune Oil than the \$300,000 recouped from the Truck Stop. The Rosellinis put at least \$900,000 into the company after the company's failure became apparent. There are no grounds to find that Mr. Rosellini's personal actions violated the Consumer Protection Act.

1.4 **There was no evidence of transfers to the Rosellinis in violation of RCW 19.40.051.**

Respondents argue that "the Rosellinis fraudulently transferred the assets of Fortune Oil to gorge themselves" and that such transfers "were disguised as inter-company loans, draws, line

of credits, and sale of gasoline contracts to third parties.”¹⁰

However, Respondents are unable to identify a single transfer to the Rosellini of Fortune Oil assets made while the company was insolvent. There is no evidence in the record to support Respondents’ claim that fraudulent transfers were made.

1.5 There was no evidence that the Resollinis received distributions in violation of RCW 23B.06.400.

Respondents’ argument that the Rosellinis are liable for making distributions from Fortune Oil to themselves in violation of RCW 23B.06.400 is completely without support in the facts before the trial court. Although Respondents claim that assets were distributed to the Rosellinis, not a single such distribution is identified and the amount and dates of the alleged distributions are unspecified. The reason that not a single fraudulent distribution can be identified is that the evidence shows no such distributions were made.

Alternatively, Respondents argue that Mr. Rosellini was “negligent” in allowing the Ferndale Truck Stop to run up a large bill with Fortune Oil and that this is a violation of the statute. Once

¹⁰ Respondents’ Brief p. 46.

again, however, Respondents can point to no authority supporting such a theory.

1.6 **Karl Park is not entitled to judgment.**

Respondents argue that non-party, Karl Park, is entitled to judgment in this case because he holds an assignment from the Respondents. No evidence of such an assignment was before the trial court or otherwise appears in the record.

1.7 **The trial court's award of attorney fees to Respondents was in error.**

The trial court's sole basis for awarding attorney's fees to Respondents was the Consumer Protection Act. The award was only against Albert Rosellini based on "his active participation in the actions of the corporation."¹¹ Since as described above, the evidence did not show personal conduct by Mr. Rosellini in violation of the Act, the award of attorney's fees must be reversed.

¹¹ CP 407.

II. CONCLUSION

For the reasons outlined above the decision of the trial court should be reversed and the case be remanded with directions that the claims against Appellants be dismissed.

DATED this 19th day of December, 2013.

Respectfully submitted,

A handwritten signature in black ink that reads "Randy Barnard". The signature is written in a cursive style with a horizontal line drawn through the middle of the letters.

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