[Cite as *Suttle v. DeCesare*, 2003-Ohio-2866.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 81441

ALAN SUTTLE, ET AL.,	:	
	:	
Plaintiffs-Appellants	:	JOURNAL ENTRY
	:	and
vs.	:	OPINION
	:	
MICHAEL A. DECESARE, ET AL.,	:	
	:	
Defendants-Appellees	:	

DATE OF ANNOUNCEMENT OF DECISION	:	JUNE 5, 2003
CHARACTER OF PROCEEDING:	:	Civil appeal from
	:	Common Pleas Court
	:	Case No. 332761
JUDGMENT	:	AFFIRMED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

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JOSEPH J. NAHRA, J.:

{¶1} Plaintiffs-appellants, Alan and Nancy Suttle, appeal from the trial court's granting a directed verdict in favor of defendant-appellee, Michael A. DeCesare, at the close of defendant's case in chief. For the reasons adduced below, we affirm.

{¶2} A review of the record on appeal indicates that appellants, after filing suit in common pleas court, had recovered an arbitration award in the amount of $64,412.42 against N.T.M., Inc. dba Arlington Homes of Westlake, stemming from a residential home construction dispute. See *Suttle v. DeCesare* (July 5, 2001), Cuyahoga App. No. 77753. The arbitration award also determined that DeCesare was not personally liable for the award, thereby leaving NTM solely liable for the award.

{¶3} The Suttles filed a motion to modify the arbitration award with the trial court arguing, in part, that NTM was insolvent and that, by piercing the corporate veil, DeCesare should be held personally liable for the arbitration award because DeCesare holds the assets of NTM. The trial court denied this motion to modify the award.

{¶4} Ultimately, the arbitration award and the trial court's action on it were appealed to this court. This court (1) affirmed the arbitration award, (2) reversed the judgment, award, and findings as to President DeCesare, personally, and (3) reversed the award of prejudgment interest.

{¶5} On remand, the trial court commenced a jury trial on April 9, 2002 on the issue of DeCesare's personal liability on the following claims: (1) fraud; (2) piercing the corporate veil; and, (3) violations of the Ohio Consumer Sales Practices Act ("OCSPA" or "CSPA"). At the conclusion of the Suttles' case, DeCesare moved for a directed verdict. The court reserved its ruling pending the presentation of DeCesare's case in chief. At the close of DeCesare's case, the court, finding that "the evidence does not support a finding

in fraud or a violation of the CSPA to support piercing the corporate veil," granted a directed verdict in favor of DeCesare and dismissed the jury.

{¶6} The Suttles, appealing from this adverse trial action, present four assignments of error for review.

I

{¶7} The first assignment of error states: "THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION IN LIMINE, WHICH PRECLUDED PLAINTIFFS FROM CALLING 15 FORMER CUSTOMERS OF DEFENDANT AS WITNESSES AT TRIAL WHO WOULD HAVE ESTABLISHED DEFENDANT'S PATTERN OF CONDUCT AND FRAUDULENT SCHEME."

{¶8} The record indicates that DeCesare filed a motion in limine on January 28, 2002, approximately two-and-one-half months prior to the jury trial, seeking to preclude testimony from other customers of NTM based on a lack of relevance and a danger of unfair prejudice pursuant to Evid.R. 401-403. The Suttles attached affidavits from six of these former customers (specifically, the affidavits of Linda Curtis, John Taylor, Steve Wimmer, Kathleen Bacha, John Kazlauskas and David Candelaria, which averred instances of poor workmanship and quality in the construction of their NTM homes) to their "witness and exhibit list," which was filed with the court on January 22, 2002 in preparation for trial. Despite this filing, the Suttles filed no brief in opposition to the motion in limine. The court's journal contains no ruling on this motion in limine.[1] Furthermore, the record

[1]It is a bedrock principle of law that a court speaks through its journal. *State v. King* (1994), 70 Ohio St.3d 158, 162-163, citing *State ex rel. Worcester v. Donnellon* (1990), 49 Ohio St.3d 117, 118.

contains no indication that "other customer" evidence was introduced or proffered during the trial.

{¶9} Simply put, the record fails to demonstrate the claimed error; to-wit, that the trial court *granted* the motion in limine. See App.R. 16(A)(3), (6)-(7). Absent such a ruling, the Suttles were free to attempt to offer this evidence at trial, but failed to do so. Assuming, for the sake of argument, that the court had ruled on the motion and granted it, appeal of the issue was not preserved by the appellants due to the failure to seek introduction of the contested evidence by a formal proffer or otherwise seek the introduction of the testimony at trial. See *State v. Grubb* (1986), 28 Ohio St.3d 199, syllabus; *McConnell v. Hunt Sports Ent.* (1999), 132 Ohio App.3d 657, 686; *Santora v. Pulte Homes of Ohio Corp.* (July 26, 2001), Cuyahoga App. No. 77825. Furthermore, even if the court had granted the motion in limine and plaintiffs had preserved the error for review by offering that evidence at trial, the court properly excluded the "other customer" evidence since it was irrelevant to proving DeCesare's personal liability involving this problematic home construction transaction, and its probative value would be substantially outweighed by the danger of unfair prejudice. See Evid.R. 403.

{¶10} The first assignment of error is overruled.

{¶11} The remaining assignments of error each involve the ruling on the directed verdict. We note that the following was recently stated by this court in connection with the review of a directed verdict ruling:

{¶12} "Civ.R. 50(A)(4) sets forth the standard for ruling on a motion for a directed verdict. It states:

{¶13} "'When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.'

{¶14} "A directed verdict is appropriate where the party opposing it has failed to adduce any evidence on the essential elements of his or her claim. *Glover v. Boehm Pressed Steel Co.* (1997), 122 Ohio App.3d 702, 702 N.E.2d 929. A motion for a directed verdict tests the legal sufficiency of the evidence to take the case to the jury and, therefore, presents a question of law, not one of fact. *Wagner v. Midwestern Indemn. Co.*, 83 Ohio St.3d 287, 294, 1998-Ohio-111, 699 N.E.2d 507." *Sullins v. Univ. Hospitals of Cleveland*, Cuyahoga App. No. 80444, 2003-Ohio-398, at ¶38-40.

II

{¶15} The second assignment of error states: "THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR A DIRECTED VERDICT ON THE ISSUE OF FRAUD."

{¶16} In order to prevail on a claim for common law fraud, a plaintiff must prove the following elements:

{¶17} "(a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e)

justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance." *Russ v. TRW, Inc.* (1991), 59 Ohio St.3d 42, 49, 570 N.E.2d 1076, citing *Burr v. Stark Cty. Bd. of Commrs.* (1986), 23 Ohio St.3d 69, 23 OBR 200, 491 N.E.2d 1101, paragraph two of the syllabus, and *Cohen v. Lamko, Inc.* (1984), 10 Ohio St.3d 167, 169, 10 OBR 500, 502, 462 N.E.2d 407, 409; see, also, *Integrity Tech. Servs. v. Holland Mgmt.*, Medina App. No. 02CA0009-M, 2002-Ohio-5258, at ¶43-44.

{¶18} Appellants' fraud claim is based on a number of theories. First, they claim that they were not afforded a warranty on the workmanship in the construction of their new home, despite the purchase agreement representation, at Item 10 therein, that "Seller will furnish the Buyer at closing with a Limited Warranty Agreement in accordance with the Building Industry Association of Cleveland ("BIA")." Second, they claim that DeCesare made various statements in connection with proposed changes to the original design of the home which misrepresented his ability to affect those design modifications in a workmanlike manner.

{¶19} With regard to the limited warranty claim, the record reflects that the Suttles made a claim under the warranty to the BIA of Lorain County and that NTM attempted to resolve some of the complaints by working through the BIA's Professional Standards Committee's recommendations on that claim. DeCesare testified that the BIA warranty provisions are virtually unchanged from county to county, and that he belonged to the Cleveland affiliate. In any event, DeCesare provided the Suttles with a limited warranty which, although worked through the Lorain affiliate, complied with the BIA standards of Cleveland. Contrary to appellant's assertion, and as the court found, this does not demonstrate fraud.

{¶20} With regard to alleged untruthful statements, Mr. Suttle was confronted by his earlier deposition testimony during cross-examination by the defense. During that deposition, defense counsel asked Mr. Suttle, "Are there particular things that Mr. DeCesare said to you, either before you signed the contract in February or during the construction period that you now believe to be untrue?" Mr. Suttle answered in his deposition, "Well no. The only thing during those construction periods, negotiation periods, I guess no." When next asked at trial whether this "no" answer was truthful when it was made, Mr. Suttle answered, "Yes, I am sure." This colloquy destroys the fraud claim premised on alleged false statements.

{¶21} The second assignment of error is overruled.

{¶22} At this point the remaining assignments will be addressed together since they are interrelated.

III

{¶23} The third assignment of error states: "THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR A DIRECTED VERDICT ON THE ISSUE OF PIERCING THE CORPORATE VEIL."

{¶24} The fourth assignment of error states: "THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR A DIRECTED VERDICT ON THE ISSUE OF CONSUMER SALES PRACTICES ACT VIOLATIONS SINCE DEFENDANT WAS DIRECTLY INVOLVED IN NUMEROUS VIOLATIONS OF THE ACT."

{¶25} Piercing the corporate veil so as to hold an individual shareholder, such as DeCesare, liable mandates the following consideration:

{¶26} "*** the corporate form may be disregarded and individual shareholders held liable for corporate misdeeds when (1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own, (2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and (3) injury or unjust loss resulted to the plaintiff from such control and wrong." *Belvedere Condominium Unit Owners' Ass'n. v. R.E. Roark Cos.*, 67 Ohio St.3d 274, 289, 1993-Ohio-119; see, also, *Grayson v. Cadillac Builders, Inc.* (Sept. 14, 1995), Cuyahoga App. No. 68551.

{¶27} Ohio's Consumer Sales Practices Act is codified in R.C. 1345.01 et seq. The OCSPA prohibits false and deceptive practices in consumer transactions.

{¶28} The OCSPA applies to new home construction:

{¶29} "The OCSPA *** prohibits suppliers from committing unfair, deceptive or unconscionable acts or practices in consumer transactions. R.C. 1345.02; R.C. 1345.03. A consumer transaction includes a 'service.' R.C. 1345.01(A). A 'service' includes 'the construction of a single-family dwelling unit by a supplier on the real property of a consumer.' Ohio Adm. Code 109:4-4-01 (adopted pursuant to R.C. 1345.05 to define practices which violate R.C. 1345.02 or R.C. 1345.03). Thus, the OCSPA applies to transactions that include a contract to construct a residence. *Keiber v. Spicer Const. Co.* (1993), 85 Ohio App.3d 391, 392, 619 N.E.2d 1105; *Fesman v. Berger*, 1995 Ohio App. LEXIS 5327 (Dec. 6, 1995), Hamilton App. No. C-940400, unreported." (Footnote omitted.) *Byers v. Coppel*, Ross App. No. 01CA2586, 2001-Ohio-2392; see, also, *Saraf v. Maronda Homes, Inc.*, Franklin App. No. 02AP-461, 2002-Ohio-6741, at ¶41.

{¶30} R.C. 1345.02 addresses unfair or deceptive practices and states, in pertinent part:

{¶31} "(A) No supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction. Such an unfair or deceptive act or practice by a supplier violates this section whether it occurs before, during, or after the transaction.

{¶32} "(B) Without limiting the scope of division (A) of this section, the act or practice of a supplier in representing any of the following is deceptive:

{¶33} "(1) That the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits that it does not have;

{¶34} "(2) That the subject of a consumer transaction is of a particular standard, quality, grade, style, prescription, or model, if it is not;

{¶35} "(3) That the subject of a consumer transaction is new, or unused, if it is not;

{¶36} "(4) That the subject of a consumer transaction is available to the consumer for a reason that does not exist;

{¶37} "(5) That the subject of a consumer transaction has been supplied in accordance with a previous representation, if it has not, except that the act of a supplier in furnishing similar merchandise of equal or greater value as a good faith substitute does not violate this section;

{¶38} "(6) That the subject of a consumer transaction will be supplied in greater quantity than the supplier intends;

{¶39} "(7) That replacement or repair is needed, if it is not;

{¶40} "(8) That a specific price advantage exists, if it does not;

{¶41} "(9) That the supplier has a sponsorship, approval, or affiliation that the supplier does not have;

{¶42} "(10) That a consumer transaction involves or does not involve a warranty, a disclaimer of warranties or other rights, remedies, or obligations if the representation is false."

{¶43} R.C. 1345.03 addresses unconscionable consumer sales practices and states, in pertinent part:

{¶44} "(A) No supplier shall commit an unconscionable act or practice in connection with a consumer transaction. Such an unconscionable act or practice by a supplier violates this section whether it occurs before, during, or after the transaction.

{¶45} "(B) In determining whether an act or practice is unconscionable, the following circumstances shall be taken into consideration:

{¶46} "(1) Whether the supplier has knowingly taken advantage of the inability of the consumer reasonably to protect his interests because of his physical or mental infirmities, ignorance, illiteracy, or inability to understand the language of an agreement;

{¶47} "(2) Whether the supplier knew at the time the consumer transaction was entered into that the price was substantially in excess of the price at which similar property or services were readily obtainable in similar consumer transactions by like consumers;

{¶48} "(3) Whether the supplier knew at the time the consumer transaction was entered into of the inability of the consumer to receive a substantial benefit from the subject of the consumer transaction;

{¶49} "(4) Whether the supplier knew at the time the consumer transaction was entered into that there was no reasonable probability of payment of the obligation in full by the consumer;

{¶50} "(5) Whether the supplier required the consumer to enter into a consumer transaction on terms the supplier knew were substantially one-sided in favor of the supplier;

{¶51} "(6) Whether the supplier knowingly made a misleading statement of opinion on which the consumer was likely to rely to his detriment;

{¶52} "(7) Whether the supplier has, without justification, refused to make a refund in cash or by check for a returned item that was purchased with cash or by check, unless the supplier had conspicuously posted in the establishment at the time of the sale a sign stating the supplier's refund policy."

{¶53} In order to recover under R.C. 1345.03, a consumer must show that a supplier acted unconscionably and knowingly. *Karst v. Goldberg* (1993), 88 Ohio App.3d 413, 418, 623 N.E.2d 1348. While proof of intent is not required to prove deception under R.C. 1345.02, proof of knowledge is a requirement to prove an unconscionable act under R.C. 1345.03. Id. "Knowledge," under R.C. 1345.01(E), "means actual awareness, but such actual awareness may be inferred where objective manifestations indicate that the individual involved acted with such awareness."

{¶54} Appellants generally argue that DeCesare committed unfair or deceptive practices in violation of R.C. 1345.02 in: (1) failing to honor the express limited BIA warranty contained in the purchase agreement or representing that the agreement contained a BIA limited warranty when it, allegedly, did not, see R.C. 1345.02(B)(10); and,

(2) avoiding his legal obligations toward the Suttles in not constructing the home in a workmanlike manner and not repairing the defects in the home, as mandated by the BIA limited warranty, see R.C. 1345.02(A) and (B)(10). As previously addressed in the second assignment herein, the Suttles failed to demonstrate that they were not afforded the benefits of the BIA limited warranty. Accordingly, the court did not err in failing to pierce the corporate veil.

{¶55} Appellants generally argue that DeCesare committed an unconscionable act in violation of R.C. 1345.03(A) by evading his legal obligations to the Suttles. The Suttles have failed to produce evidence that DeCesare, who as general contractor gave work on the home construction to subcontractors, which work product was successfully passed inspection by the city of Fairview Park's building department, acted with knowledge of the shoddy work. Therefore, he should not be held personally liable for the alleged unconscionable consumer sales practices.

{¶56} The third and fourth assignments of error are overruled.

Judgment affirmed.

JOSEPH J. NAHRA*
JUDGE

COLLEEN CONWAY COONEY, J., CONCURS IN JUDGMENT ONLY.

PATRICIA A. BLACKMON, P.J., DISSENTS WITH SEPARATE OPINION.

(*SITTING BY ASSIGNMENT: Judge Joseph J. Nahra, Retired, of the Eighth District Court of Appeals).

PATRICIA ANN BLACKMON, P.J.:

{¶57} I respectfully dissent from the majority opinion. The majority opinion affirms the trial court's directed verdict for DeCesare who the Suttles sued personally for fraud, gross negligence, and unfair and deceptive trade practices in the construction of their home. The Suttles describe the condition of their house as literally sinking into their basement. Moreover, they described his construction of their house as a disaster.

{¶58} At the outset, I must point out that this court, in deciding *Suttles v. DeCesare* (July 5, 2001), Cuyahoga App. No. 77753, made no conclusions regarding DeCesare's personal liability in the construction of the Suttles' home. The majority in that opinion merely concluded that the arbitrator's decision absolving Decesare of personal liability was in error because DeCesare was never a party individually to the arbitration clause in the construction agreement. Consequently, the lawsuit against DeCesare was alive and open to resolution.

{¶59} This majority opinion concludes insufficient evidence existed to pierce the corporate veil and concludes DeCesare did not commit fraud, gross negligence, or unfair and deceptive trade practices. In substance, it agrees with the trial court that at best the Suttles proved a breach of contract claim against the corporation N.T.M., Inc., and nothing more.

{¶60} This conclusion ignores the fact that reasonable minds could differ as to whether DeCesare exercised control over his one-man company in a manner as to commit fraud or an illegal

act. In *Belvedere Condominion Units Owners' Ass'n v. R.E. Roark Cos.* (1993), 67 Ohio St.3d 274, Justice Wright pointed out that the evidence missing in *Belvedere* was that the control over the company by Roark proximately caused the injury to the Condominium owners. Here, the Suttles' expert testified the support structure was simply inadequate. Additionally, the Suttles testified DeCesare stated to them that the structure could be expanded by 3 feet. This expansion included the bathroom, which was expanded 2 feet to accommodate the hot tub. The night the Suttles first attempted to use the hot tub, Mr. Suttle testified after filling it half full, the tub separated from the wall and the floors cracked. No evidence existed in the record to dispute the fact that DeCesare represented to the Suttles that the additional 3 feet expansion was workable. I note that it was DeCesare who made the representations, not his contractors, which was the case in *Grayson*.

{¶61} This court in *Grayson v. Cadillac Builders, Inc.* (Sept. 14, 1995), Cuyahoga App. 68551, pointed out the Graysons had failed to state or prove any misrepresentations by their builder; consequently, they could not pierce the corporate veil. In *Belvedere*, the Ohio Supreme Court made it clear that the builder has to represent the company in a way to defraud the plaintiffs to pierce the corporate veil. Here, the evidence showed a misrepresentation as to the expansion; thus, reasonable minds could

differ as to whether N.T.M., Inc. was a corporate fiction used to manifest a fraud on the Suttles.

{¶62} I believe the majority would agree that evidence existed that DeCesare and N.T.M., Inc. were fundamentally indistinguishable. The Suttles testified on one occasion they paid $6,300 to DeCesare's personal bank account further evidencing the corporate fiction.

{¶63} I also note that in interpreting *Belvedere's* second prong, this court, in *Alside Supply Co. v. Wager* (1993), 89 Ohio App.3d 539, pointed out this prong does not require ongoing fraud, but only that the fraud result from maintaining the corporate fiction. In *Grayson*, the sub-contractors working for the corporation made the representations and the corporation failed to oversee or control their work. Here, DeCesare made the fraudulent representations to the Suttles, not the subcontractors.

{¶64} Finally, in this case, the Suttles argue DeCesare was incompetent to build this house. He agreed to things that no expert in the field would have agreed to especially the expansion. Suttles testified he represented himself as a member of Cleveland Building Industry Association (CBIA) and that he was giving them a B.I.A. Warranty for the work, which doesn't exist. Additionally, DeCesare was not a CBIA member. The Suttles testified this was their first home and these representations among others induced them to contract with DeCesare; a person they later learned was nothing more than a liquor salesman pretending to be a builder.

{¶65} The Suttles are consumers and are entitled to protection from unfair and deceptive trade practices.

{¶66} In *Grayson,* we said:

{¶67} "[A] corporate officer may be held individually liable for his acts which violate the Consumer Sales Practices Act. *Gayer v. Ohio Business Trading Association* (July 7, 1988), Cuyahoga App. No. 54897, unreported (where corporate officer held personally misrepresented to the plaintiffs that their home would be sided with aluminum siding). See, also, *State ex rel. Fisher v. Warren Star Theater* (1992), 84 Ohio App.3d 435, 616 N.E.2d 1192 (where corporate officer of non-profit corporation held personally liable for selling tickets after show was cancelled); *State ex rel. Fisher v. Harper* (1993), 83 Ohio App.3d 754, 615 N.E.2d 733 (where corporate officer held personally liable for pyramid sales scheme which he promoted and from which he benefitted). In order to hold a corporation officer personally liable for his actions in violation of the Consumer Sales Practices Act, the evidence must show the officer took part in the commission of the act, specifically directed the particular act to be done, or participated or cooperated therein. *State ex rel. Fisher v. American Courts, Inc.* (July 21, 1994), Cuyahoga App. No. 65939, unreported."

{¶68} We further explained:

{¶69} "The Consumer Sales Practices Act does not change the existing common law of tort, nor does it change the common law rule with respect to piercing the corporate veil. A corporate officer may not be held liable merely by virtue of his status as a corporate officer. It does, however, create a tort which imposes personal liability upon corporate officers for violations of the act performed by them in their corporate capacities. See, also, Roberts and Martz, Consumerism Comes of Age: Treble Damages and Attorney Fees in Consumer Transactions-The Ohio Consumer Sales Practices Act (1981), 42 Ohio St.L.J. 927, 932-933. *Grayson*, supra, fn.1."

{¶70} This matter should have gone to the jury for a final resolution; consequently, I would reverse the trial court and order a new trial.