[Cite as *Ball v. Octopus Constr., L.L.C.*, 2023-Ohio-2596.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Geneva L. Ball et al.,	:	
Plaintiffs-Appellants,	:	No. 22AP-780 (C.P.C. No. 22CV-380)
v.	:	(REGULAR CALENDAR)
Octopus Construction, LLC d/b/a L & M Masonry et al.,	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on July 27, 2023

On brief: *Decker Vonau & Carr LLC*, *Garrison P. Carr*, and *Christopher S. Vonau*, for appellants.

APPEAL from the Franklin County Court of Common Pleas

JAMISON, J.

{¶ 1} Plaintiffs-appellants, Geneva L. Ball and Eric M. Thompson, appeal from a judgment of the Franklin County Court of Common Pleas, awarding appellants damages against defendant-appellee, Octopus Construction, LLC ("Octopus") d/b/a L & M Masonry ("L & M"), for violations of the Consumer Sales Practices Act ("CSPA"), but refusing to impose personal liability upon defendant-appellee, Michael J. Jacobs ("Jacobs"). For the following reasons, we affirm.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On January 19, 2022, appellants filed a complaint against L & M, Octopus, Jacobs, and several other defendants, alleging violations of the CSPA. The complaint also alleged violations of the Home Sales Solicitation Act, negligence, breach of implied warranties, negligence per se, breach of contract, and personal liability under the alter ego theory. Appellants' complaint sought statutory damages, attorney fees, and costs.

{¶ 3} According to appellants' complaint, in late May 2021, Jacobs provided a job estimate to them detailing construction work to be performed on a residence located on Franklin Avenue, Columbus, Ohio. The work was to be performed in accordance with appellants' city approved architectural plans. The job estimate identified the contractor who would perform the work as "L & M Masonry & Concrete." On June 17, 2021, work began on the project.

{¶ 4} On the third day of the job, involving the egress to the property, Jacobs severed a water line on the property while operating a backhoe, resulting in water damage to appellants basement. The repair cost was $3,100 which Jacobs initially agreed to pay but later refused. After failed efforts to convince Jacobs to file a claim with his liability insurance carrier, appellants hired legal counsel and eventually submitted a claim to Octopus' insurer, and the claim was paid.

{¶ 5} Ball testified that in addition to the damage caused by the broken water line, Jacobs failed to follow the architectural plans in constructing the entrance to the basement and stairs. More particularly, Ball testified that key dimensions of the stairs and entrance failed to comply with Columbus City Code, requiring amendments to the original architectural plans, reconstruction, and reinspection. When Jacobs stopped returning telephone calls and messages, appellants filed suit.

{¶ 6} None of the named defendants filed an answer to the complaint or otherwise appeared in litigation. On March 29, 2022, appellants filed a motion for default judgment. On May 17, 2022, the trial court granted appellants' motion, in part, entered default judgment for appellants on the CSPA claim, and scheduled an evidentiary hearing on the issues of appellants' damages and the alter ego claim against Jacobs. On July 6, 2022, a magistrate of the court held an evidentiary hearing to determine appellants' damages. The only witnesses who testified at the hearing were appellants.

{¶ 7} On August 30, 2022, the magistrate issued a decision, including findings of fact and conclusions of law. The magistrate concluded that L & M violated the CSPA and recommended the court enter judgment in favor of appellants and against L & M in the total amount of $14,674, including attorney fees. The magistrate did not recommend judgment against Jacobs in his individual capacity based on an alter ego theory.

{¶ 8} Appellants filed an objection to the magistrate's decision arguing that the magistrate erred in rejecting the alter ego theory of liability and not recommending judgment against Jacobs, individually. On November 11, 2022, the trial court issued a decision and final judgment overruling appellants' objections, adopting the magistrate's decision as its own, and entering judgment for appellants.

{¶ 9} Appellants timely appealed to this court from the November 11, 2022 judgment. Appellees have not participated in the appeal.

II. ASSIGNMENTS OF ERROR

{¶ 10} Appellants assign the following two assignments of error for our review:

> [I.] The trial court erred when it found that Defendant Michael J. Jacobs was doing business under a validly registered L.L.C. that Plaintiffs were aware of at the time of contracting.
>
> [II.] In the alternative, the trial court erred when it found that the Corporate Veil was not pierced as to Defendant Michael J. Jacobs.

III. STANDARD OF REVIEW

{¶ 11} "A trial court considering objections to a magistrate's decision must undertake an independent review of the matters objected to and ascertain whether the magistrate has properly determined the factual issues and appropriately applied the law." *McCarthy v. Johnson*, 10th Dist. No. 18AP-961, 2020-Ohio-3429, ¶ 10, citing Civ.R. 53(D)(4)(d). "Therefore, a trial court applies a de novo standard in reviewing objections to a magistrate's decision." *Id.*, citing *James v. My Cute Car, L.L.C.*, 10th Dist. No. 16AP-603, 2017-Ohio-1291, ¶ 13. "The standard of review on appeal from a trial court judgment that adopts a magistrate's decision varies with the nature of the issues that were (1) preserved for review through objections before the trial court and (2) raised on appeal by assignment of error." *In re Guardianship of Schwarzbach*, 10th Dist. No. 16AP-670, 2017-Ohio-7299, ¶ 14. Generally, we review a trial court's decision to adopt, reject, or modify a magistrate's decision for abuse of discretion. *Lenoir v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 19AP-94, 2020-Ohio-387, ¶ 10. An abuse of discretion occurs when a court's decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 12} Here, we must determine whether the trial court abused its discretion in finding that the magistrate properly determined the factual issues and appropriately applied the law in concluding that appellants failed to prove an alter ego theory of liability as to Jacobs.

IV. LEGAL ANALYSIS

A. Assignments of Error

{¶ 13} Because appellants' assignments of error are inextricably interrelated, we shall consider them jointly.

{¶ 14} Appellants contend the trial court erred when it found Jacobs was doing business as a limited liability company when the contract was executed. Appellants also argue the trial court erred when it failed to find Jacobs personally liable for damages under the alter ego theory.

{¶ 15} As the Supreme Court of Ohio has explained "one purpose of incorporation is the ability to limit the liability of the individual shareholders." *Minno v. Pro-Fab, Inc.*, 121 Ohio St.3d 464, 2009-Ohio-1247, ¶ 7, citing *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc.*, 67 Ohio St.3d 274, 287 (1993), *Dombroski v. WellPoint, Inc.*, 119 Ohio St.3d 506, 2008-Ohio-4827, and Article XIII, Section 3, Ohio Constitution. In *Minno*, the court expounded that " '[t]he corporate form is useful primarily because it creates a division between shareholders and their business concerns: "[The corporate form] has been introduced for the convenience of the company in making contracts, in acquiring property for corporate purposes, in suing and being sued, and to preserve the limited liability of the stockholders, by distinguishing between the corporate debts and property of the company, and of the stockholders in their capacity as individuals." ' " *Id.* at ¶ 7, quoting *Dombroski* at ¶ 16, quoting *State v. Std. Oil Co.*, 49 Ohio St. 137, 177 (1892).

{¶ 16} In appellants' objections to the magistrate's decision, appellants argued the corporate form did not protect Jacobs from personal liability of the construction contract because Octopus was not a registered LLC at the time of contracting. Appellants claimed the evidence showed the parties' agreement was executed in May 2021, prior to the date of registration. The magistrate found the Secretary of State issued a certificate of registration to Octopus on June 9, 2021, which was before the contract was executed and before work began on the project. The trial court agreed with the magistrate on finding "[t]he evidence

establishes the contract was executed on or around June 18—after Octopus was registered with the Secretary of State." (Nov. 21, 2022 Decision & Entry at 2.) Appellants have not challenged the trial court's finding in this appeal.

{¶ 17} Appellants contend alternatively that even though Jacobs was not a party to the contract between appellants and L & M, Jacobs can be held personally liable to appellants on the contract under the alter ego theory. We disagree.

{¶ 18} Under the alter ego theory, the corporate form may be disregarded in certain circumstances, and the corporate veil pierced, to reach assets of the corporation's individual shareholders. *Minno* at ¶ 8. " 'Piercing the corporate veil' [has been defined as] '[t]he judicial act of imposing personal liability on otherwise immune corporate officers, directors, or shareholders for the corporation's wrongful acts.' " *Id.* at ¶ 8, quoting *Black's Law Dictionary* 1184 (8th Ed.2004).

{¶ 19} Under Ohio law, piercing the corporate veil is not an independent cause of action. *RCO Internatl. Corp. v. Clevenger*, 180 Ohio App.3d 211, 2008-Ohio-6823, ¶ 11 (10th Dist.). Rather, "it is a remedy encompassed within a claim. It is a doctrine wherein liability for an underlying tort may be imposed upon a particular individual." *Id.*

{¶ 20} "A trial court may apply the doctrine of piercing the corporate veil to limited liability companies." *Denny v. Breawick, L.L.C.*, 3d Dist. No. 5-18-12, 2019-Ohio-2066, ¶ 15. The Supreme Court has set forth the elements that must be present in order for a trial court to apply the doctrine of piercing the corporate veil: (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. *Id.* at ¶ 16.

{¶ 21} The three prongs of the *Belvedere* test are conjunctive in nature, which means that the proponent must satisfy all three prongs in order to pierce the corporate veil. *Dombroski* at ¶ 18. The burden of proof on the alter ego theory of liability is squarely on the proponent. *Siva v. 1138 L.L.C.*, 10th Dist. No. 06AP-959, 2007-Ohio-4667, ¶ 17, *Brunner & Brunner v. Abboud*, 10th Dist. No. 95APE07-933, 1996 Ohio App. LEXIS 796 (Feb. 27, 1996). Piercing the corporate veil in this manner remains a "rare exception," to be applied

only "in the case of fraud or certain other exceptional circumstances." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003).

{¶ 22} Here, the evidence shows the Secretary of State issued a certificate of registration to Octopus on June 9, 2021, before work on the project began and before the contract was executed by the parties. (*See* Plaintiffs' Ex. M.) Appellants, however, did not register L & M as a fictitious name for Octopus until August 16, 2021, after Jacobs left the project. (*See* Plaintiffs' Ex. N.) Appellants argued in the trial court that Jacobs' exercised control over L & M was so complete that the corporation had no separate mind, will, or existence, and that Jacobs committed fraud or an illegal act against appellants by intentionally failing to timely register L & M as a fictitious name of Octopus.[1] The magistrate and the trial court determined the evidence did not support liability under the alter ego theory. We agree.

{¶ 23} Appellants first contend the evidence supports a finding under the first prong of the *Belvedere* test that Jacobs' control over L & M was so complete that the corporation had no separate mind, will, or existence of its own. In support of this claim, appellants rely primarily on their testimony that Jacobs either performed or supervised performance of all the work on the project, he never mentioned Octopus either orally or in writing, and he was the only person appellants communicated with regarding work on the project.

{¶ 24} The Articles of Organization for Octopus, filed by Lynn Jacobs, identify her as the statutory agent of Octopus and listed Lynn and Michael Jacobs as the agents, members, or managers of Octopus. The fictitious name recognition form filed with the Secretary of State is executed by Michael Jacobs as an authorized agent of Octopus. The job estimate completed by Jacobs is on L & M stationary and is addressed to Ball.

{¶ 25} The complaint provides the following additional facts:

> 143. Defendants Mike and Lynn are members/ employees/ agents of Defendant L & M.
>
> 144. As an agent of L & M, Mike personally committed the acts and practices described herein above that damaged

[1] The relevant statutory law provides that a "Trade name" means a name used in business or trade to designate the business of the user and to which the user asserts a right to exclusive use. *See* R.C. 1329.01(A)(1). However, a "Fictitious name" means a name used in business or trade that is fictitious and that the user has not registered or is not entitled to register as a trade name. *See* R.C. 1329.01(A)(2).

> Plaintiffs, as he was physically leading his crew for all the work performed and was the one operating the excavator.
>
> 145. Mike and Lynn, as individuals, are fundamentally indistinguishable from their company, L & M, in that they use a tradename, specifically L & M Masonry & Concrete on their Job Estimate that is not registered with the Ohio Secretary of State, Mike personally answers the office phone, Mike directs all of the work, they failed to file a registered tradename that they used before actually using that tradename, specifically L & M Masonry.

(Compl. at 17.)

{¶ 26} This court has explained that "[s]ome non-exhaustive factors to be considered in determining whether this prong has been met include grossly inadequate capitalization, the failure to observe corporate formalities, the diversion of funds or other property of the company for personal use, and the absence of corporate records." *Siva* at ¶ 10, citing *Sanderson Farms, Inc. v. Gasbarro*, 10th Dist. No. 01AP-461, 2004-Ohio-1460, ¶ 6.

{¶ 27} We find it difficult to evaluate the first prong of the *Belvedre* test given the paucity of evidence as to the organizational structure and business practices of L & M and Octopus. Appellant, Eric Thompson, testified that when he contacted Jacobs after Jacobs ruptured the water line and asked him why he would not file an insurance claim, Jacobs stated "he would speak to his wife, Lynn, and his insurance agent and * * * call [him] back." (Compl. at 10.) This evidence suggests that Jacobs did not have complete control over all aspects of the business. Indeed, appellants also sued Lynn Jacobs in her individual capacity under the alter ego theory, but later abandoned the claim.

{¶ 28} The magistrate concluded that "the evidence established only that Mr. Jacobs worked for L&M; it did not establish that he controlled L&M so completely that it had no separate mind, will, or existence." (Mag.'s Decision at 8.) The trial court agreed with the magistrate.

{¶ 29} Given the relative lack of probative evidence on this issue, we cannot say the trial court abused its discretion when it adopted the magistrate's conclusion that Jacobs' control of L & M was so complete that the corporation had no separate mind, will, or

existence of its own. Accordingly, we agree with the trial court that appellants did not meet their burden under the alter ego theory.

{¶ 30} Were we to determine that the trial court abused its discretion in concluding the evidence failed to support a finding as to the first prong of the *Belevedere* test, the record reveals no such abuse of discretion as to the trial court's conclusion regarding the second prong of the test. Indeed, our review of the evidence reveals no support for appellants' claim that Jacobs exercised control over L & M in such a manner as to commit fraud or an illegal act. With respect to the second prong of the *Belevedere* test, in *Dombroski*, the court clarified that "unjust or inequitable conduct" in the absence of "fraud, an illegal act, or a[n] * * * unlawful act" is not sufficient to satisfy this prong. *Id.* at ¶ 27, 29.

{¶ 31} Appellants argue the evidence did not support a finding that appellants knew they were dealing with a construction company, not a sole proprietorship, when they contracted with L & M. Appellants posit that Jacobs' use of the fictitious company name of L & M amounted to the type of fraud or illegal act that justifies the application of the alter ego doctrine. The magistrate disagreed and made the following relevant findings:

> Octopus registered L&M Masonry as a trade name about two months after Octopus filed its articles of organization. While the trade-name filing was after plaintiffs entered into the construction contract with L&M, it was after the water-line break. Given that timing, there can be no inference that Octopus delayed filing its trade name to deceive plaintiffs in anyway.
>
> Nor did the delay render the contract as between plaintiffs and Mr. Jacobs as a sole proprietor. Plaintiffs knew they were contracting with a company. They received L&M's name and contact information from Angi, a list of vetted contractors. L&M is Octopus's trade name; they had no expectation they were dealing with a sole proprietor.

(Mag.'s Decision at 8-9.)

{¶ 32} The trial court found the evidence supported the magistrate's findings. We agree with the trial court.

{¶ 33} Appellant, Ball, testified that she and Thompson found "L & M Masonry" on a website purporting to list highly rated contractors in the area. The estimate appellants received identified the contracting party as "L & M Masonry & Concrete." Ball testified as follows:

> A. This is the written estimate that [Mr. Jacobs] brought and kind of filled out the day that he wanted to begin the work.
>
> Q. Okay. And what is the business name he put on this estimate?
>
> A. I think it's L&M Masonry & Concrete.
>
> Q. Okay. On the estimate did he represent to -- Michael Jacobs represent to you that he was a registered business under L&M Masonry & Concrete?
>
> A. Definitely, yeah.

(Tr. at 7-8.)

{¶ 34} Ball's testimony establishes she knew Jacobs was doing business on behalf of a company, not as a sole proprietor. The evidence also shows that throughout the project, appellants made all checks payable to L & M Masonry or some variations thereof. Thompson also acknowledged that he and Ball believed they had contracted with a registered LLC:

> Q. Okay. And did you know at the time you and your wife received an estimate from him -- from Michael J. Jacobs that L&M Masonry was not registered with the State of Ohio?
>
> A. No, we had no idea.

(Tr. at 36.)

{¶ 35} The testimony is clear that appellants believed they had contracted with an LLC, not a sole proprietor. Evidence that appellants did not know the true name of the LLC does not permit the inference that appellants were deceived into believing they had contracted with Jacobs as a sole proprietor.

{¶ 36} We note that appellants now claim Jacobs is personally liable on the contract with appellants because his principal was either undisclosed or partially disclosed. *See James G. Smith & Assocs., Inc. v. Everett*, 1 Ohio App.3d 118 (10th Dist.1981). The record in this case reveals, however, appellants did not make this specific argument in the trial court. Accordingly, the argument has been waived for purposes of appeal.

{¶ 37} The evidence, as set forth above, established that appellants knew they were contracting with L & M, not Jacobs. Thus, the evidence supports a finding that the agency relationship was fully disclosed at the time of contracting. The fact that L & M was an

unregistered fictitious name for Octopus does not alter the fact that the agency relationship was disclosed. *See* Restatement of the Law 2d, Agency, Section 4 (1958).

{¶ 38} Even if Jacobs caused appellants to believe that he operated L & M as a sole proprietorship, the evidence does not support a finding that Jacobs did so for the purpose of committing fraud or another illegal conduct. Ohio law does not impose personal liability on a member of an LLC, simply because the LLC does business through an unregistered fictitious name. Appellants have cited no legal authority holding that a registered LLC loses its legal status as such by doing business under an unregistered fictitious name. Nor have appellants cited any authority holding that a legally registered LLC violates the CSPA merely by doing business using an unregistered fictitious name, as " '[t]he failure to report a fictitious name to the Secretary of State is not among the violations listed in R.C. 1345.02, 1345.03, and 1345.05, or in Ohio Adm.Code Chapter 109:4-3.' " *Doff v. Lipford*, 5th Dist. No. 2019CA00017, 2019 Ohio App. LEXIS 2417 (June 10, 2019), quoting *Ganson v. Vaughn*, 135 Ohio App.3d 689, 694 (1st Dist.1999). *See also Charvat v. Farmers Ins. Columbus, Inc.*, 178 Ohio App.3d 118, 2008-Ohio-4353 (10th Dist.). "Where no other deceptive acts are alleged in connection with the use of a fictitious business name, the mere failure to register does not violate the CSPA." *Charvat* at ¶ 34, citing *Ganson* at 694. Accordingly, under Ohio law, a CSPA violation and the alleged improper use of an unregistered fictitious name, do not constitute conduct on the part of Jacobs that could conceivably be characterized as fraudulent or illegal.

{¶ 39} Appellants did not properly plead fraud in the complaint. *See* Civ.R. 9(A). Evidence of Jacobs' shoddy workmanship and failed attempts to remedy it do not permit an inference of fraud or other illegal conduct.

{¶ 40} The crux of the alter ego theory is that the individual to be held liable exercised their control of the corporation to be pierced in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity. The trial court concluded that the evidence presented by appellants at the hearing before the magistrate did not support a finding that Jacobs exercised control of L & M in such a manner as to commit fraud or an illegal act against appellants. On this record, we cannot say the trial court acted unreasonably in so concluding.

{¶ 41} Having determined the trial court did not err when it found appellants failed to satisfy the second prong of the *Belvedere* test, we need not opine as to the third prong of the test. *See Olzens v. Lapuh*, 11th Dist. No. 2007-L-119, 2008-Ohio-4303, ¶ 41. ("As the *Belvedere* test is conjunctive, we cannot conclude that the trial court's judgment regarding * * * individual liability based on piercing the corporate veil doctrine is supported by competent, credible evidence.").

{¶ 42} For the foregoing reasons, we overrule appellants' assignments of error.

V. CONCLUSION

{¶ 43} Having overruled appellants' two assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BOGGS and LELAND, JJ., concur.
