

STATE OF MICHIGAN
COURT OF APPEALS

NINOWSKI WOOD & MCCONNELL
MANUFACTURERS REPRESENTATIVES,
INC.,

UNPUBLISHED
April 26, 2002

Plaintiff-Appellant,

v

MNP CORPORATION,

No. 227850
Oakland Circuit Court
LC No. 99-013453-CB

Defendant-Appellee.

Before: Whitbeck, C.J., and Wilder and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendant. We affirm.

I. Basic Facts And Procedural History

Sombur Machine & Tool, Inc., also known as SMTC, Inc. (“Sombur”), was a tool and die maker that manufactured fasteners and cold-headed products used in the automotive industry. Defendant supplied the steel to Sombur that it needed for manufacturing. Plaintiff was Sombur’s manufacturer’s representative. During the first part of the 1990s, Sombur began having business problems and became unable to pay creditors, one of which was plaintiff. Defendant, one of Sombur’s largest creditors, later purchased all of Sombur’s personal property and name at a foreclosure sale, subject to prior secured interests. Plaintiff did not bid on Sombur’s assets at the sale, otherwise object to the sale, nor attempt to attach Sombur’s real property excluded from the foreclosure sale.

In 1994, plaintiff sued Sombur for breaching the manufacturer’s representative agreement into which both had entered. Following a trial in May 1996, plaintiff obtained a judgment against Sombur for \$165,821.06. The trial court, in this first action, entered the judgment on July 2, 1996. Plaintiff then began a garnishment proceeding to collect the amount of the judgment. Defendant was served as a garnishee, but responded that it owed nothing to Sombur given Sombur’s debt to it. Defendant and other secured creditors also intervened in the garnishment proceeding because they objected to other creditors paying plaintiff through the lower priority garnishments before they were repaid their secured debts. Essentially, defendant and a number of other Sombur creditors objected to plaintiff collecting Sombur’s accounts

receivable from the three major automotive manufacturers: General Motors, Ford, and Chrysler. Plaintiff, however, contended that defendant, secured creditor Comerica, and Sombur's majority owner, whom Sombur also owed a secured debt, were working together to make Sombur judgment proof while still operating the business.

When considering whether to dispose of the garnishment proceeding summarily, the trial court articulated the issue as whether a prior perfected security interest in collateral has priority over a subsequent named judgment creditor. The trial court decided the issue on two separate grounds. First, relying on UCC 9-301(4), MCL 440.9301(4), and case law, the trial court held that, because plaintiff did not present any evidence refuting defendant's prior perfected security interests, plaintiff's interest in the collateral as a judgment creditor was subordinate to the prior perfected secured creditors, like defendant. Second, the trial court held that

MNP stated in its disclosure that no amount was owed to Defendant Sombur. And because Plaintiff's [sic] failed to serve interrogatories or Notice a Deposition, the fact that *MNP owed no amount to Sombur must be accepted as true* pursuant to MCR 3.101(M)(2). Therefore, no genuine issue as to any material fact exists in this case, and that MNP is entitled to the same relief afforded to the garnishee defendant as was in the *Alyas [v Illinois Employers Ins of Wausau, 208 Mich App 324; 527 NW2d 548 (1995)]* case.^[1]

Thus, the trial court granted defendant's motion for summary disposition and dissolved the garnishments.

Defendant acquired Sombur's remaining asset, its real property, in 1998 through another foreclosure sale. In March 1999, in an attempt to collect the judgment entered against Sombur on July 2, 1996, plaintiff filed this third action alleging that defendant was Sombur's alter ego. Plaintiff argued that, as of January 1995, there was a complete identity between Sombur and defendant, and that defendant used its control of Sombur to "fraudulently and/or wrongfully prevent [plaintiff] to be paid." At issue was whether defendant, along with Comerica, had arranged to use a number of bank accounts and a revolving line of credit to collect money owed to Sombur, but to control which creditors Sombur paid. Needless to say, plaintiff had not received payment for its judgment and was upset that other creditors, including allegedly creditors with lower priority, were being paid with this so-called lock box arrangement. Defendant responded on April 21, 1999, denying all allegations. Defendant raised several affirmative defenses, including collateral estoppel, and demanded that plaintiff join all claims that it had against defendant in this action. Plaintiff responded on May 3, 1999, denying defendant's affirmative defenses as untrue.

Defendant subsequently filed a motion for summary disposition, arguing that no issue of disputed material fact existed because plaintiff's allegations were insufficient to support an alter ego claim² and collateral estoppel barred plaintiff from raising questions that had already been

¹ Emphasis added.

² MCR 2.116(C)(10).

determined against it in a previous proceeding.³ Further, defendant claimed, public policy concerns should bar plaintiff's claim. Plaintiff responded that it had appropriately pleaded and had sufficient evidence to maintain an alter ego claim against defendant and that collateral estoppel did not bar the action because the alter ego claim was never litigated or decided.

The trial court was scheduled to hear oral arguments on May 3, 2000, but, because plaintiff did not appear at the hearing, the trial court did not hear any argument. After a recitation of the relevant facts and the parties' arguments, the court concluded that in plaintiff's previous garnishment claim against defendant, the other trial court

determined the superiority of MNP's security interest over NWM in regards [sic] to Sombur's accounts receivable. In order to dismiss the garnishment against MNP, the court necessarily determined that MNP did not have control of any of Sombur's property, and, thus, the alter ego claim is precluded from being relitigated by collateral estoppel. It does seem that to be relitigated would do it all over again.

Therefore, the court granted defendant's motion for summary disposition, evidently under MCR 2.116(C)(7) because it rested its decision on the collateral estoppel issue.

Plaintiff now argues that summary disposition was inappropriate because collateral estoppel did not bar its current alter ego claim, through which it attempted to collect a money judgment entered on July 2, 1996. At issue is whether the previous litigation between the parties involving garnishment issues barred this claim.

II. Standard Of Review

As with the general question whether collateral estoppel bars a claim,⁴ we review de novo a trial court's order granting a motion for summary disposition.⁵

III. Legal Standards

MCR 2.116(C)(7) permits a trial court to dispose of a claim summarily if "[t]he claim is barred because of . . . assignment or other disposition of the claim before commencement of the action," including claims barred by collateral estoppel.⁶ MCR 2.116(G)(2) allows, but does not require, a party moving for summary disposition under subsection (C)(7) or a party opposing such a motion to submit documentary evidence in support of the party's position.⁷ However, if the grounds for the motion "do not appear on the face of the pleadings," the party moving for

³ MCR 2.116(C)(7).

⁴ See *Minicuci v Scientific Data Management, Inc*, 243 Mich App 28, 34; 620 NW2d 657 (2000).

⁵ See *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

⁶ See, generally, *Alterman v Provizer, Eisenberg, Lichtenstein & Pearlman, PC*, 195 Mich App 422, 423; 491 NW2d 868 (1992).

⁷ See *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994).

summary disposition must submit supporting documentary evidence, including affidavits, depositions, and admissions.⁸ Once the trial court receives any documentary evidence in support of or opposing the motion, it must⁹ consider the evidence “to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion.”¹⁰ “If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay.”¹¹

With respect to a motion for summary disposition under MCR 2.116(C)(10), this Court considers the affidavits, pleadings, depositions, admissions, and documentary evidence submitted by the parties in the light most favorable to the nonmoving party.¹² Nevertheless, the party opposing summary disposition has an obligation to respond to the motion with its own documentary evidence and “may not rest upon the mere allegations or denials of his or her pleading. . . .”¹³ A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if there is no genuine issue of material fact in dispute, entitling the moving party to judgment as a matter of law.¹⁴

IV. Collateral Estoppel

As this Court explained in *Ditmore v Michalik*:¹⁵

Collateral estoppel . . . precludes relitigation of an issue in a subsequent, different cause of action between the same parties or their privies when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding.

However, this doctrine “applies only when the basis of the prior judgment can be clearly, definitely, and unequivocally ascertained”¹⁶ because this information is necessary to determine whether the issue being litigated in the present action is “identical” to the issue in the previous suit and whether that issue was essential to the resulting judgment and, therefore, “necessarily determined.”¹⁷

⁸ MCR 2.116(G)(3)(a).

⁹ MCR 2.116(G)(5).

¹⁰ MCR 2.116(G)(6).

¹¹ MCR 2.116(I)(1).

¹² *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998).

¹³ MCR 2.116(G)(4).

¹⁴ *Morales*, *supra* at 294.

¹⁵ *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001).

¹⁶ *Id.* at 578.

¹⁷ See *Bd of Co Road Comm’rs for the Co of Eaton v Schultz*, 205 Mich App 371, 376-377; 521 NW2d 847 (1994).

Courts generally honor the "fiction" of the corporation as a distinct entity to serve the ends of justice, but may ignore this identity when justice would be subverted, such as when a corporation is attempting to avoid paying its creditors.¹⁸ A three-prong test determines whether it is appropriate to pierce this corporate veil, as plaintiff contends must occur so that it may collect the judgment entered in its favor in 1996. "First, the corporate entity must be a mere instrumentality of another entity or individual. Second, the corporate entity must be used to commit a fraud or wrong. Third, there must have been an unjust loss or injury to the plaintiff."¹⁹

This action is a subsequent, different cause of action between the same parties, and the prior garnishment proceeding culminated in a valid, final judgment, namely an order summarily disposing of the garnishment action. The basis of the previous judgment can be clearly, definitely, and unequivocally ascertained.²⁰ The garnishment proceeding as a whole concerned the details of the debts owed to Sombur, which plaintiff could then attempt to collect to satisfy the judgment in its favor, such as the accounts receivable the automobile manufacturers owed Sombur. The trial court's holding in the garnishment proceeding established that plaintiff could not collect from defendant because defendant's secured interest was superior to plaintiff's interest in these debts as a judgment creditor, and because defendant "owed no amount to Sombur."

Defendant attempts to interpret the trial court's statement in the garnishment action, that it did not owe Sombur any money, to mean that it did not hold any of Sombur's property and, therefore, could not control Sombur. However, while defendant did not owe Sombur any money, it had purchased Sombur's assets and name at the foreclosure sale and, allegedly, had taken over the company's daily operations. Similarly, defendant emphasizes its superior position as one of Sombur's secured creditors in comparison to plaintiff, factors that came out in the garnishment action. Yet, this does not resolve whether defendant controls Sombur. As we understand it, plaintiff's theory is that defendant may occupy this position as a secured creditor with high priority and, in fact, be exploiting it to deny plaintiff an opportunity to collect the judgment entered in its favor. Neither case law nor logic inescapably holds that the corporate form must be respected simply because the allegedly controlling corporation is also a creditor of the corporation being controlled. Rather, the evidence of the asset purchase and further operation of Sombur to avoid liquidation is relevant to the control element.

Simplified, the garnishment proceeding can be envisioned as plaintiff's attempt to cut to the head of the long line of Sombur's creditors to collect any of Sombur's remaining assets, including a failed attempt to collect from defendant. However, this case is different. Plaintiff is not attempting to establish its rank among the creditors to collect from third parties, but to attempt to collect from the entity that now owns Sombur's assets and, purportedly, controlled how its assets were managed or diverted while still in business. Thus, we cannot say that the

¹⁸ See *Foodland Distrib v Al-Naimi*, 220 Mich App 453, 456; 559 NW2d 379 (1996).

¹⁹ *Id.*, quoting *SCD Chemical Distributors, Inc v Medley*, 203 Mich App 374, 381; 512 NW2d 86 (1994).

²⁰ *Schultz, supra* at 376-377.

issue of control was actually and necessarily determined in the prior proceeding.²¹ There was a new and unrelated issue of control for the parties to litigate. Summary disposition under MCR 2.116(C)(7) was, therefore, inappropriate.

V. Alter Ego

Nevertheless, defendant also challenged the evidence that plaintiff could use to pierce its corporate veil to collect the judgment against Sombur, arguing that there was insufficient proof that it, defendant, had abused this corporate distinction. We agree with defendant that a plaintiff attempting to pierce the corporate veil under an alter ego theory must demonstrate more than that the defendant merely controlled the other corporation.²² If control, alone, were enough to prove an alter ego claim, there would be no market for assets sold in foreclosure because it would expose all purchasers to the seller's liability. However, by demonstrating wrongdoing involving the corporate form, the law avoids this problem; only those individuals and entities that use the corporate form to "subvert justice or perpetuate fraud" have the equities weighted so heavily against them that courts pierce the corporate veil.²³

In this case, the lock-box account at Comerica presents an interesting question regarding actual control and potentially fraudulent manipulation of Sombur's assets and credit. The problem with this argument, however, is the complete absence of supporting evidence in the record. We have searched the trial court record in this case and can find no affidavits, deposition testimony, or other documentary evidence concerning the complex arrangement surrounding the accounts and credit with Comerica and whether the creditors defendant and Comerica allegedly paid actually had lower priority than plaintiff. Nor is there any evidence of a whistleblower who has come forward to reveal details about the defendant's financial arrangements as a purposeful attempt to subvert plaintiffs' rights to be paid the judgment in its favor. Plaintiff does refer to an answer to an interrogatory that defendant submitted as proof of defendant's control over Sombur and its allegedly improper denial of payment on the judgment in plaintiff's favor. However, the interrogatory refers only to facts that others might testify to if called at trial. The record does not include an affidavit or deposition testimony from any of these individuals, and none of the individuals mentioned in the answer to the interrogatory signed it. Rather than serving as evidence, the answer to this interrogatory consisted merely of additional allegations that might be proved at trial, which is insufficient to defeat a motion for summary disposition under MCR 2.116(C)(10).²⁴ In contrast, a signed affidavit from Sombur's former vice-president who went to work for defendant suggests that defendant's efforts to rehabilitate Sombur were honest, intended to save employee jobs, and designed to improve the company's financial situation, which would have benefited all Sombur creditors. As far as we can tell from the record, this attempt to revive Sombur failed, which was as much to defendants' detriment as a secured creditor as it was detrimental to plaintiff as a judgment creditor.

²¹ *Ditmore*, *supra* at 578.

²² See, generally, *Bitar v Wakim*, 456 Mich 428, 431; 572 NW2d 191 (1998) (Brickley, J.).

²³ *Id.*

²⁴ See *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999).

On the basis of the limited record we have, there is insufficient evidence to conclude that a disputed issue of material fact exists concerning whether defendant subverted Sombur's corporate form to perpetrate a fraud or commit an injustice in denying plaintiff the ability to collect the money Sombur owed it on the judgment, meriting summary disposition under MCR 2.116(C)(10). The trial court correctly granted summary disposition, which we will not reverse even though the trial court articulated an incorrect reason for reaching this result.²⁵

Affirmed.

/s/ William C. Whitbeck

/s/ Kurtis T. Wilder

/s/ Brian K. Zahra

²⁵ See *Detroit v Presti*, 240 Mich App 208, 214; 610 NW2d 261 (2000).