

STATE OF MICHIGAN
COURT OF APPEALS

AMAR HUSSAIN DARWEESH and YASER
JASIM a/k/a YASER AL-SAADY,

UNPUBLISHED
September 13, 2012

Plaintiffs-Appellants,

v

KING AUTO SALES, INC and FARID HIRMIZ,

No. 305071
Wayne Circuit Court
LC No. 09-022980-NO

Defendants-Appellees.

Before: FORT HOOD, P.J., and METER and MURRAY, JJ.

PER CURIAM.

Plaintiffs, Amar Hussain Darweesh and Yaser Jasim, a/k/a Yaser Al-Saady, appeal as of right a final order dismissing their complaint, with prejudice, after the trial court granted summary disposition in favor of defendants. We affirm.

I. INTRODUCTION

This case arises from a shooting that occurred on May 11, 2007, at King Auto II, a used car dealership where plaintiffs were working at the time. Plaintiffs both sustained injuries during the shooting and subsequently sought benefits under the Worker's Disability Compensation Act (the Worker's Compensation Act or the Act), MCL 418.601 *et seq.* It is undisputed that King Auto II did not have worker's compensation insurance at the time of the shooting in violation of MCL 418.611(1). As a result, plaintiffs brought suit pursuant to MCL 418.641(2), which provides:

The employee of an employer who violates the provisions of section 171 or 611 [of the Worker's Compensation Act] shall be entitled to recover damages from the employer in a civil action because of an injury that arose out of and in the course

of employment notwithstanding the provisions of section 131.^[1] [Footnote added.]

King Auto II was incorporated by defendant, Farid Hirmiz, who also acted as the sole officer, shareholder, and agent of King Auto II. Hirmiz was also the sole officer, shareholder, and agent of defendant, King Auto Sales, Inc., a second used car dealership commonly known as “King Auto I.” In both their original and first amended complaints, plaintiffs named Hirmiz and King Auto I as defendants. Following the close of discovery and argument on defendants’ motion for summary disposition, plaintiffs sought leave to file a second amended complaint adding King Auto II as a defendant, or substituting King Auto II for King Auto I. Ultimately the trial court granted defendants’ motion for summary disposition and denied plaintiffs’ motion to amend.

II. ANALYSIS

A. AMENDMENT OF COMPLAINT

Plaintiffs’ first contention is that the trial court abused its discretion in denying them leave to file a second amended complaint. This Court reviews for an abuse of discretion a trial court’s decision to grant or deny leave to amend a pleading. *In re Kostin Estate*, 278 Mich App 47, 51; 748 NW2d 583 (2008). A court has abused its discretion when its decision falls outside the range of reasonable and principled outcomes. *Id.* “The question whether a proposed amendment relates back to the original complaint represents an issue of law that is reviewed by this Court de novo on appeal.” *Doyle v Hutzel Hosp*, 241 Mich App 206, 212; 615 NW2d 759 (2000).

Except as provided by MCR 2.118(A)(1), a party cannot amend a pleading without leave of court or written consent of the adverse party. See MCR 2.118(A)(2). However, “[l]eave shall be freely given when justice so requires.” MCR 2.118(A)(2). “Leave to amend should be denied only for particularized reasons, such as undue delay, bad faith or dilatory motive on the movant’s part, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party, or where amendment would be futile.” *Miller v Chapman Contracting*, 477 Mich 102, 105; 730 NW2d 462 (2007) (quotations and citation omitted). “An amendment would be futile if (1) ignoring the substantive merits of the claim, it is legally insufficient on its face; (2) it merely restates allegations already made; or (3) it adds a claim over which the court lacks jurisdiction[.]” *PT Today, Inc v Comm’r of the Office of Fin & Ins Servs*, 270 Mich App 110, 143; 715 NW2d 398 (2006) (citations omitted). For example, amending a pleading to add a claim that is barred by the statute of limitations would be futile. See *Miller*, 477 Mich at 107-108.

¹ MCL 418.131 provides that the right to recover worker’s compensation benefits under the Act “shall be the employee’s exclusive remedy against the employer for a personal injury or occupational disease.”

The trial court did not abuse its discretion in denying plaintiffs' motion for leave to file a second amended complaint on the basis of futility, as the second amended complaint would have been barred by the three-year statute of limitations. See MCL 600.5805(10). Plaintiffs were shot on May 11, 2007, which was also the last day they worked at King Auto II. Plaintiffs did not move for leave to amend their amended complaint until September 24, 2010, approximately three and one half years after they sustained their injuries. Consequently, plaintiffs' claims against King Auto II would be barred by the statute of limitations unless the relation-back doctrine applied.

The relation-back doctrine allows an amended pleading to "relate back" to the date of the original pleading, and thus come within the statute of limitations. See MCR 2.118(D); see also *Miller*, 477 Mich at 105. MCR 2.118(D) provides, in the relevant part:

An amendment that adds a claim or a defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading.

Although MCR 2.118(D) only refers to amending a pleading to add a claim or defense, courts have also applied the relation-back doctrine in cases of misnomer. See *Miller*, 477 Mich at 106. "The misnomer doctrine applies only to correct inconsequential deficiencies or technicalities in the naming of parties . . ." *Id.* at 106-107 (quotations and citations omitted). The misnomer doctrine, and therefore the relation-back doctrine, does not apply when a party seeks to amend a pleading to add a completely new and different party. *Id.* at 106-107.

The relation-back doctrine, however, does not apply in this case. Plaintiffs are not seeking to correct "inconsequential deficiencies or technicalities in the naming of parties[.]" *Miller*, 477 Mich at 106-107 (quotations and citations omitted). Rather, they are seeking to add a "wholly new and different party[.]" which the Supreme Court has specifically stated does not fall within the misnomer doctrine. *Id.* (quotations and citations omitted). King Auto I and King Auto II are two separate corporations, and therefore two separate entities. Because the relation-back doctrine is inapplicable, the claims brought against King Auto II in the proposed second amended complaint are barred by the statute of limitations. Thus, amendment would be futile, and the trial court did not abuse its discretion in denying plaintiffs leave to amend. *Id.* at 107-108.

Denial of leave to amend was also appropriate based on undue delay or failure to cure deficiencies by amendment previously allowed. *Miller*, 477 Mich at 105. The fact that King Auto I and King Auto II are two separate corporate entities was a matter of public record that plaintiffs could have accessed at any time before filing their original complaint. In addition to their public corporate filings, defendants' discovery responses made clear that King Auto II, not King Auto I, was plaintiffs' employer. Plaintiffs also admitted this at their depositions. And, finally, plaintiffs did not seek to add or substitute King Auto II as a defendant until more than a year after filing their original complaint and two and a half months after discovery ended on July 30, 2010.

B. SUMMARY DISPOSITION

Plaintiffs also argue that the trial court erred in granting summary disposition in favor of defendants because there is a question of fact regarding whether defendants are civilly liable to plaintiffs for failure to comply with the Worker's Compensation Act.

A trial court's decision on whether to pierce a corporate veil is reviewed de novo, "because piercing a corporate veil is an equitable remedy." *Florence Cement Co v Vettraino*, 292 Mich App 461, 468; 807 NW2d 917 (2011). The trial court's findings of fact are reviewed for clear error. *Id.*

This Court also reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition brought pursuant to MCR 2.116(C)(10) challenges the factual support for a party's cause of action. *Id.* at 120. When reviewing a motion for summary disposition brought under MCR 2.116(C)(10), this Court considers the pleadings, affidavits, and other evidence in the light most favorable to the nonmovant. *Id.* A motion for summary disposition should be granted "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A genuine issue of material fact exists when "reasonable minds could differ . . . after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

Under MCL 418.641(2),

[t]he employee of an employer who violates the provisions of section 171 or 611 [of the Worker's Compensation Act] shall be entitled to recover damages from the employer in a civil action because of an injury that arose out of and in the course of employment notwithstanding the provisions of section 131.^[2] [Footnote added.]

Under § 611, employers must "secure the payment of compensation[,]" under the Worker's Compensation Act by being an authorized self-insurer or by insuring against liability with an authorized insurer.³ MCL 418.611(1); see *Fuller v Olson*, 907 F Supp 257, 259 (WD Mich, 1995).

Plaintiffs assert that Hirmiz is individually liable under this provision of the Act because (1) King Auto II's corporate veil should be pierced to reach Hirmiz or (2) Hirmiz's wrongful conduct caused King Auto II to commit an unlawful act. Plaintiffs do not argue on appeal that King Auto I is liable under a theory of piercing the corporate veil. Therefore, summary disposition was properly granted in favor of defendant, King Auto I.

² MCL 418.131(1) provides that the right to recover worker's compensation benefits under the Act "shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease."

³ MCL 418.171 extends the requirement to secure payment for worker's compensation to "principals" who pay contractors to execute work on their behalf.

1. PIERCING THE CORPORATE VEIL⁴

“In order for a court to order a corporate veil to be pierced, the corporate entity (1) must be a mere instrumentality of another individual or entity, (2) must have been used to commit a wrong or fraud, and (3) there must have been an unjust injury or loss to the plaintiff.” *Florence Cement*, 292 Mich App at 469. Generally, “the law treats a corporation as an entirely separate entity from its stockholders, even where one person owns all the corporation’s stock.” *Lakeview Commons Limited Partnership v Empower Yourself, LLC*, 290 Mich App 503, 509; 802 NW2d 712 (2010), quoting *Foodland Distrib v Al-Naimi*, 220 Mich App 453, 456; 559 NW2d 379 (1996). However, courts will pierce the corporate veil when a corporation is misused by a parent company or individual to “subvert justice.” See *Lakeview Commons*, 290 Mich App at 509.

Plaintiffs have failed to create a genuine issue of material fact with respect to the first element of a piercing the corporate veil theory, that King Auto II was a mere instrumentality of Hirmiz. See *Florence Cement*, 292 Mich App at 469. It is true, as plaintiffs argue, that Hirmiz was the sole incorporator and resident agent for King Auto II, and that King Auto II had no other officers or directors. Likewise, Hirmiz held record title to the property where King Auto II was located, and owned and controlled the structures and vehicle sale lot at King Auto II. Additionally, Hirmiz set each stores’ hours, determined employees’ schedules and vacation times, set vehicle prices, and finalized sales. But none of these facts come close to establishing that King Auto II was a mere instrumentality of Hirmiz; instead, they show that Hirmiz owned and operated the corporation. *Lawton v Gorman Furniture Corp*, 90 Mich App 258, 266; 282 NW2d 797 (1979). Not one of the facts relied upon help prove that Hirmiz used the corporate status for his own personal benefit.

Plaintiffs also failed to allege or present any evidence that Hirmiz used King Auto II to commit a fraud or wrong. See *Florence Cement*, 292 Mich App at 469. A wrong occurred in that both plaintiffs were shot and were unable to collect worker’s compensation benefits because King Auto II did not have worker’s compensation insurance. Nonetheless, there is no evidence that Hirmiz used the corporate form of King Auto II to commit that wrong, or to avoid obtaining worker’s compensation insurance.⁵ See *Lakeview Commons*, 290 Mich App at 509. Piercing the corporate veil is appropriate only when a parent company or individual is “abusing its corporate shield for its own purposes.” *Dutton Partners, LLC v CMS Energy Corp*, 290 Mich App 635, 644; 802 NW2d 717 (2010). An employer⁶ is required to have worker’s compensation insurance regardless of whether it is incorporated or not. See MCL 418.611.

⁴ The Michigan Supreme Court has not yet opined on the validity of the tests used to consider whether to pierce the corporate veil. See *Daymon v Fuhrman*, 474 Mich 920; 705 NW2d 347 (2005).

⁵ Hirmiz testified that King Auto II did not have such insurance because Hirmiz thought there were not enough employees to make it required.

⁶ The Worker’s Compensation Act applies to “[a]ll private employers, other than agricultural employers, who regularly employ 3 or more employees at 1 time.” MCL 418.115(a).

2. PERSONAL LIABILITY FOR TORTIOUS ACTS

In certain circumstances “officers of a corporation may be held individually liable when they personally cause their corporation to act unlawfully.” *Dep’t of Agriculture v Appletree Mktg, LLC*, 485 Mich 1, 17-18; 779 NW2d 237 (2010). Moreover, “corporate officials may be held personally liable for their individual tortious acts done in the course of business, regardless of whether they were acting for their personal benefit or the corporation’s benefit.” *Id.* at 17 (concluding that the sole member and manager of the defendant could be held personally liable for conversion of funds in violation of the Agricultural Commodities Marketing Act, MCL 290.651 *et seq.*); see also *Elezovic v Ford Motor Co*, 274 Mich App 1, 13-14; 731 NW2d 452 (2007) (stating that a supervisor could be held personally liable for sexually harassing an employee); *Allen v Morris Bldg Co*, 360 Mich 214, 218; 103 NW2d 491 (1960) (holding that the defendant’s majority stockholder and president, who personally supervised grading and construction that resulted in damages, could be held individually liable). In addition, it is unnecessary to “pierce the corporate veil . . . to hold corporate officials liable for *their own* tortious misconduct[.]” *Dep’t of Agriculture*, 485 Mich at 18. (Emphasis in the original.)

As noted at the beginning of this opinion, the Worker’s Compensation Act provides that a civil action can be brought against an employer who does not comply with the provisions of § 611 to recover damages from an injury “that arose out of and in the course of employment[.]” MCL 418.641(2). Plaintiffs have not, however, created a question of material fact regarding whether Hirmiz can be held individually liable for his failure to obtain worker’s compensation insurance on behalf of King Auto II. See *Dep’t of Agriculture*, 485 Mich at 17-18. First, most of plaintiff’s argument on this point is based upon the facts relied upon to support their piercing the corporate veil theory that we have already rejected. Second, because there was no duty to provide worker’s compensation coverage for employees prior to the act, plaintiffs cannot recover under the common law against Hirmiz personally for failing to purchase that type of insurance. See *Dep’t of Agriculture*, 485 Mich at 10-13; *Monroe Beverage Co, Inc v Stroh Brewery Co*, 454 Mich 41, 44-45; 559 NW2d 297 (1997).

3. EMPLOYER

Finally, plaintiffs argue that the trial court erred in concluding that neither Hirmiz, nor King Auto I, could be considered plaintiffs’ employer for purposes of the Worker’s Compensation Act.

This Court reviews a trial court’s decision on a motion for summary disposition *de novo*. *Maiden*, 461 Mich at 118. The determination whether an entity is a particular employee’s employer, for purposes of the Worker’s Compensation Act, “is a question of law for the courts to decide if the evidence on the matter is reasonably susceptible of but a single inference.” *James v Commercial Carriers, Inc*, 230 Mich App 533, 536; 583 NW2d 913 (1998) (quotations and citations omitted). This issue is for the trier of fact to decide only “where the evidence bearing on the company’s status is disputed, or where conflicting inferences may reasonably be drawn from the known facts[.]” *Id.* (quotations and citations omitted).

The Worker’s Compensation Act is intended to compensate employees if they sustain employment-related injuries. *James*, 230 Mich App at 538. Under the Act, MCL 418.611(1),

employers must have some kind of insurance for worker's compensation, whether as an authorized self-insurer or through a policy with an authorized insurer. If an employer fails to have such insurance, an employee who sustained an injury in the course of employment may bring a civil action against his employer. See MCL 418.641(2). The Act, MCL 418.161(1)(l), defines an employee, in part, as:

Every person in the service of another, under any contract of hire, express or implied, including aliens; a person regularly employed on a full-time basis by his or her spouse having specified hours of employment at a specified rate of pay[.]

This Court uses the economic-reality test to determine if an employment relationship exists under the Worker's Compensation Act. *James*, 230 Mich App at 537. This test takes into account all the circumstances of the employment relationship, and focuses on four factors: "(1) control of the worker's duties; (2) payment of wages; (3) the right to hire, fire, and discipline; and (4) performance of the duties toward the accomplishment of a common goal." *Id.*

In this case, Hirmiz controlled both plaintiffs' duties, paid their wages, and hired them. There was no on-site supervisor at King Auto II, but plaintiffs required Hirmiz's approval for some final sales, selling a vehicle below certain minimum prices, and taking days off from work. Hirmiz paid plaintiffs in cash each week. Hirmiz hired both plaintiffs and was in charge of all hiring and firing for both King Auto I and King Auto II. Plaintiffs both worked at King Auto II selling and setting up financing for vehicles, working toward the common goal of King Auto II, which was to sell used vehicles. Notably, plaintiffs were not performing duties for Hirmiz directly, but for the benefit of King Auto II. And, both plaintiffs admitted that King Auto II was their employer.

Because the undisputed evidence showed that plaintiffs were working for King Auto II – which was closely run by Hirmiz, and because plaintiffs have not created a question of material fact regarding whether they can hold Hirmiz liable under a theory of piercing the corporate veil, we are unable to conclude that Hirmiz was plaintiffs' employer in addition to, or instead of, King Auto II. To conclude that Hirmiz was plaintiffs' employer under the Worker's Compensation Act would require one to disregard that King Auto II is a corporation, independent from Hirmiz himself. Finally, there is no evidence that plaintiffs sustained their injuries in the course of working for King Auto I. Plaintiffs were indisputably working at the King Auto II lot when they were shot.

Affirmed. No costs to either party. MCR 7.219(A).

/s/ Karen M. Fort Hood

/s/ Patrick M. Meter

/s/ Christopher M. Murray