STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

CES ELECTRIC, LLC,
Plaintiff,

Case No. 18-110304-CB

Hon. F. Kay Behm

v

ALPHA FOOD DISTRIBUTION, LLC, RAMSAY SADEK, JAMES MCCOLGAN, HAMADY COMPLETE FOOD CENTERS, INC., HALLWOOD PLAZA, INC., PHOENIX PROPERTY DEVELOPMENT, LLC AND CLIO & PIERSON, LLC
Defendants.

OPINION AND ORDER

I. BACKGROUND

On May 3, 2017, CES Electric, LLC ("CES") entered into a contract (the "Contract") with Defendant, Alpha Food Distribution, LLC ("Alpha") wherein CES agreed to provide electrical services and materials to real property located at 4901 Clio Road, Flint, Michigan 48504 also known as 2629 West Pierson Road (the "Property"). CES performed work pursuant to the Contract. CES was partially paid but discontinued its work when additional payments were not made. The managing member of CES, Steve Ulinski, testified that CES completed approximately 60 percent of the contracted work at the Property.

On January 3, 2018, CES sued Alpha for the balance on the Contract in the amount of $57,500.00. On March 8, 2018, CES obtained a default judgment against Alpha in the amount of $57,075.00. On July 19, 2018, CES sought to reopen this case and leave to amend its complaint. CES alleged that "Upon attempting to collect the Judgment, it has been discovered that Defendant was never a valid limited liability company, was never

funded, had no assets, and was used as a mere instrumentality of its members, James McColgan, Ramsay Sadek and Hamady Complete Food Centers, Inc. The Court granted Plaintiff's motion on July 30, 2018.

CES filed its Supplemental Complaint on August 1, 2018 and a Second Amended Complaint on November 2, 2018 adding the following parties:

1. James McColgan ("McColgan") (a 50% member of Alpha);
2. Phoenix Property Development, LLC ("Phoenix") (a 50% member of Alpha);
3. Ramsay Sadek ("Sadek") (the sole member of Phoenix Property; Development, LLC which is a 50% member of Alpha);
4. Hamady Complete Food Centers, Inc. ("Hamady Complete") (the entity through which McColgan later opened a grocery business on the Property);
5. Hallwood Plaza, Inc. ("Hallwood") (Alpha's initial landlord for the Property); and
6. Clio & Pierson, LLC ("Clio & Pierson") (successor landlord the Property).

In its Second Amended Complaint, Plaintiff alleged, among other claims, that all of the added Defendants, except Clio & Pierson, breached the Contract by failing to pay Plaintiff and were "alter egos and/or mere instrumentalities" of Alpha. Further, Plaintiff claims that these Defendants materially misrepresented to Plaintiff that Alpha was a valid entity with sufficient capital to pay Plaintiff pursuant to the Contract which Sadek signed on behalf of Alpha.

On April 15, 2019, Defendant Clio & Pierson's motion for summary disposition was granted and all claims against Clio & Pierson were dismissed. After Defendants McColgan and Hamady Complete failed to timely respond, Plaintiff's motion for summary disposition was granted and a judgment in the amount of $57,050.00 was entered against McColgan and Hamady Complete, jointly and severally. Plaintiff's motion for summary disposition was denied as to Defendants Sadek and Phoenix. A default for failure to plead

or otherwise defend was entered against Hallwood on October 11, 2018. As of the date of trial, the only remaining unresolved claims were those for Breach of Contract (Count I) and Fraud and Misrepresentation/Pierce the Corporate Veil/Successor Liability (Count II) against Sadek and Phoenix.

II. APPLICABLE LAW

"Piercing the corporate veil requires the following elements: (1) the corporate entity is a mere instrumentality of another individual or entity, (2) the corporate entity was used to commit a wrong or fraud, and (3) there was an unjust injury or loss to the plaintiff." *Lakeview Commons v Empower Yourself*, 290 Mich App 503, 510 (2010). Piercing the corporate veil is not appropriate where the corporate form has been respected. *Id*. Moreover, simply showing that an entity is a mere instrumentality of another is not enough to pierce the corporate veil; one must also show fraud or wrongdoing in the use of the corporate form. See *Dutton Partners, LLC v CMS Energy Corp*, 290 Mich App 635, 643-645 (2010) (finding that even where questions of fact exist to an entity being a mere instrumentality, piercing the corporate veil should be dismissed where there is no evidence of fraud or wrongdoing). It is insufficient to show merely that two entities are alter egos. *Id*. at 645.

Case law illustrates that piercing the corporate veil is a remedy used only in exceptional circumstances where the corporate form was both disrespected *and* used to commit a fraud - not merely where a person or entity controls the operations of the corporation. For example, in *Lakeview Commons*, the plaintiff sought to pierce the corporate veil to hold two individuals, Troy and Phyllis, liable for breach of a lease agreement. The Court rejected this attempt to pierce the veil, stating:

> The corporate forms of Empower and Hamsa were respected. Troy stated that the activities of Empower and Hamsa were not commingled. Empower paid its bills through its bank account, and Hamsa paid its bills through its bank account. Empower and Hamsa each filed separate state and federal tax returns. Troy stated that the rent and other expenses incurred by Empower exceeded its revenue, so he personally loaned Empower about $100,000. Troy would directly deposit the loaned money into Empower's bank account, and then Empower itself would pay its monthly bills. Additionally, Troy personally paid for various assets of Empower, and then upon Empower's ceasing operations, he left those assets with Empower. Troy stated that any check written to Troy or Phyllis by Empower was for the partial repayments of Troy's loans. Troy stated that he personally paid for Empower's leased vehicle for his personal use after Empower ceased operations. Additionally the record does not show that plaintiff will suffer an unjust loss because plaintiff already has a valid judgment against Empower for breaching the lease agreement. While Troy admitted that part of the reason Empower ceased operations was to avoid the lease agreement with plaintiff, this alone was not sufficient to raise a genuine issue of material fact regarding whether Empower's or Hamsa's corporate veils should be pierced. *[Lakeview Commons, supra* at 510-511.]

Similarly, in *Darweesh v King Auto Sales, Inc.*, unpublished opinion per curiam of the Court of Appeals, issued September 13, 2012 (Docket No. 305071)(2012 WL 4039285), the plaintiffs sought to pierce the corporate veil after they were shot at their place of work, but could not collect worker's compensation benefits because the employer did not have worker's compensation insurance at the time (in violation of statute). The Court rejected piercing the veil, stating:

> Plaintiffs have failed to create a genuine issue of material with respect to the first element of piercing the corporate veil theory, that King Auto II was a mere instrumentality of Hirmiz. 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. Not one of the facts relied upon help prove that Hirmiz used the corporate status for his own personal benefit. [*Id*. at *4 (citations omitted).]

The Court went on to explain that there had also been no wrongdoing, as that element is understood in the context of the piercing the veil test:

> Plaintiffs also failed to allege or present any evidence that Hirmiz used King Auto II to commit a fraud or wrong. 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 the wrong, or to avoid obtaining worker's compensation insurance. [*Id.* (citations omitted).]

The elements of common-law fraud are (1) that the Defendant made a material representation; (2) that the representation was false; (3) that the Defendant knew the representation was false when made, or made it recklessly; (4) that Defendant made the representation with the intention that Plaintiff would rely on it; (5) that Plaintiff relied on the representation; and (6) that the Plaintiff suffered injury. *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 489-490; 559 NW 2d 379 (1996).

III. ANALYSIS

There is no dispute that the Contract (Exhibit 1) was between only Alpha, as the owner, and CES, as the subcontractor, and that Sadek signed the Contract on behalf of Alpha as its authorized agent. Although both Plaintiff and McColgan dispute whether Sadek had the actual authority to act on behalf of Alpha, Plaintiff relied upon Sadek's apparent authority and has a default judgment against Alpha. None of the parties dispute that Alpha breached its Contract with CES by failing to pay CES for the electrical services and improvements that CES provided at the Property.

Plaintiff asks the Court to enter a judgment in its favor against Sadek and Phoenix by "piercing the corporate veil" for Alpha. In that regard, Plaintiff asserts that "Alpha was never capitalized by its members, owned no assets, failed to observe any corporate

formalities, never paid any dividends, never maintained any corporate records, and its existence was merely a façade or sham." In support thereof, Plaintiff points to discovery responses by Phoenix and Sadek that state only as follows:

> Defendant[s] possess no documents responsive to this request beyond the Operating Agreement enclosed herewith. James McColgan was the manager of Alpha Good Distribution, LLC. Defendant was informed and believes that all documents referencing Alpha Food or the grocery store were maintained by Mr. McColgan. Trial Exhibits 4 and 5.

In his affidavit Sadek, which was admitted by stipulation of the parties, states that to the best of his "information, knowledge and belief, no one associated with Alpha had any reason to believe that the proposed grocery store would not open or that Plaintiff would not be paid any amounts due Plaintiff at the time that Plaintiff commenced work on the renovations necessary to open the grocery store." See Trial Exhibit 7. Sadek further explained that, "Subsequent to execution of the CES-Alpha contract, the anticipated funding for the grocery store fell through." See Trial Exhibit 7.

At trial, McColgan testified that there had not been any formal meetings for Alpha but that in December 2017, PNC checking accounts were opened in Alpha's name. McColgan stated that when Alpha was formed, he believed Sadek had money to finance the project. McColgan testified that he believed Sadek was taking care of the accountings and record keeping for Alpha; Alpha's only intended business was to operate the new grocery store at the Property; and McColgan did not expect Alpha to have income or assets until the grocery store started operating. The initial Operating Agreement for Alpha was executed on April 24, 2017 identifying the initial manager of Alpha as McColgan (Trial Exhibit 2). An Amended Operating Agreement for Alpha was executed on June 20, 2017 identifying McColgan and Sadek as managers of Alpha (Trial Exhibit 6).

Steve Ulinski, the managing member of CES, testified that Sadek represented to him that Sadek had the authority to enter into the Contract with CES on behalf of Alpha. Sadek wrote a personal check for the initial amount due to CES pursuant to the Contract. Ulinski further testified that: he had worked with Sadek for years; Sadek also supplied and paid for lighting fixtures and materials for the grocery store; Sadek led him to believe Sadek was obtaining bank loans to start the business; he did not ask Sadek to sign a personal guaranty; and he had not dealt with Alpha before.

As applied to the facts of this case, there is no indication that Alpha was formed for the purpose of defrauding Plaintiff. There is no indication that misuse of the corporate form had anything to do with Plaintiff's failure to receive payment. The testimony demonstrates the formation of a new business entity, Alpha, by its members, McColgan and Phoenx through its member Sadek for the purpose of operating a newly opened grocery store. McClogan and Phoenix, through Sadek, executed two operating agreements. Alpha had a checking account but generated no profits from which it could pay its debts.

As the project progressed, the relationship between Alpha's principals deteriorated. Sadek invested his own money but was not able to secure further funding. Ultimately, the project failed. There was no testimony that the Alpha entity was used to commit fraud or wrong doing. CES and Ulinski trusted, although regrettably, that it would get paid by Sadek or the entities with which he was associated based upon Ulinski's prior dealings with Sadek. Ulinski did not ask for a guaranty from Sadek even though he was initially paid by Sadek individually while the Contract was with Alpha. There was no testimony that Sadek used Alpha's corporate status for his own personal benefit. There

was little, if any, testimony regarding Phoenix as an entity or its dealings with or on behalf of Alpha. The evidence does not support Plaintiff's claims that Alpha's corporate veil should be pierced.

Likewise, the evidence does not demonstrate that Defendants Sadek and Phoenix made material and knowing or reckless false representations with the intention that CES would rely upon those representations. Sadek's affidavit asserts that "no one associated with Alpha had any reason to believe that the proposed grocery store would not open or that Plaintiff would not be paid any amounts due Plaintiff at the time that Plaintiff commenced work on the renovations necessary to open the grocery store." Trial Exhibit 7, paragraph 6. There was no testimony to dispute the assertion that Sadek intended for Plaintiff to be paid let alone testimony that Sadek made knowingly false representations to induce CED to enter into the Contract or to perform work at the Property.

IV. CONCLUSION

IT IS HEREBY ORDERED that a judgment of no cause of action is entered as to Plaintiff's remaining claims against Defendants Sadek and Phoenix.

This is a final order and resolves all pending matters before the Court and closes the case.

Dated: September 12, 2019

/s/ Kay Behm
Hon. F. Kay Behm, Assigned Circuit Judge