United States Bankruptcy Court
Western District of Wisconsin

Cite as: [Unpublished]

In re Petition of Robert F. Craig as Joint Official Liquidator of the Estate of Alpine Assurance, Ltd., Debtor in a Foreign Proceeding
Bankruptcy Case No. 99-31664-11

United States Bankruptcy Court
W.D. Wisconsin

March 6, 2000

Mark E. Novotny, Lamson, Dugan & Murray, Omaha, NE, for petitioner.
Dona J. Merg, Merg and Anderson, S.C., Madison, WI, for Royal Bank - Hillsboro.
James E. Bartzen, Boardman, Suhr, Curry & Field, LLP, Madison, WI, for Robert Feala.

Robert D. Martin, United States Bankruptcy Judge.

MEMORANDUM DECISION

A trial on the Petition of Robert F. Craig, as Joint Official Liquidator of the Estate of Alpine Assurance, Ltd., was held on December 9, 1999. On December 29, 1999, this court entered its proposed Findings of Fact and Conclusions of Law. Petitioner, Robert F. Craig, moved for a new trial under Bankruptcy Rule 9023, which adopts Federal Rule of Civil Procedure 59, alleging that this court's Proposed Findings of Fact and Conclusions of Law constituted a mistake of fact or manifest error of law. In the alternative, the petitioner moves that this court amend Finding of Fact #44 and Conclusions of Law #9, 9(a), 10, 10(b), 10(f), 11, 11(a), 11(d), 11(e), 14, 15, and 16.

The petitioner argues that this court erred on four grounds: (1) that this court should have found Feala and Hardy personally liable for Alpine premium funds in the hands of HIMI; (2) that this court should have pierced the corporate veil and found Feala and Hardy personally liable for HIMI's debt to Alpine; (3) that Alpine was the Royal Bank of Hillsboro's customer; and (4) as the bank's customer, Alpine had a right to close the trust accounts.

Federal Rule of Civil Procedure 59 provides:

A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits of equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

F.R.C.P. 59(a). The Seventh Circuit has held that for the court to grant a Rule 59 motion, the petition must "clearly establish either a manifest error of law or fact or must present newly discovered evidence." *See* LB Credit Corp. v. Resolution Trust Corp., 49 F.3d 1263, 1267 (7th Cir. 1995); *see also* Anderson v. Flexel, Inc., 47 F.3d 243, 247 (7th Cir. 1994) (holding that post-judgment motions may not be used to raise arguments or legal theories that were not raised at before the judgment). Furthermore, in Libutti v. United States, 178 F.3d 114, 118-119 (2nd Cir. 1999), a case cited by the petitioner, the Second Circuit stated that:

[A] trial court should be most reluctant to set aside that which it has previously decided unless convinced that it was based on a mistake of fact or clear error of law, or that refusal to revisit the earlier decision would work a manifest injustice.... Certainly, a trial court should not grant a new trial simply because, like the proverbial second bite at the apple, the losing party believes it can present a better case if afforded another chance. Nonetheless, in certain circumstances, newly discovered evidence constitutes a recognized ground for a new trial.

Id.

The petitioner has not alleged that there is any newly discovered evidence; therefore, this court will only determine whether there has been a mistake of fact or manifest error of law. The court's pre-trial order made clear that the parties could submit memoranda of law to support their proposed findings of fact and conclusions of law. This court will not grant the petitioner a "second bite at the apple" by considering any legal arguments that could have been raised in the memoranda or at trial. Finally, all the arguments raised by the petitioner attack specific proposed Conclusions of Law that this court made. Since those conclusions are subject to *de novo* review by the district court, this court will grant a new trial only if there was a manifest error of law leading to the exclusion of evidence which should have been admitted or other limitation on the conduct of a proper trial in this proceeding. No such exclusion or limitation has been identified in the motion.

Petitioner's first argument is that it was a manifest error of law for this court to conclude that Feala and Hardy were not personally liable for HIMI's conversion of Alpine funds. In support of this argument, the petitioner relies on an Ohio case that found that officers and directors may be held personally liable if the corporation engaged in the tort of conversion. Furthermore, the petitioner relies on Capen Wholesale, Inc. v. Probst, 180 Wis. 2d 354, 509 N.W.2d 120 (Wis. Ct. App. 1993), a Wisconsin case holding directors and officers liable for a corporation's conversion of construction funds. As an initial matter, this court notes that neither of these cases were raised by the petitioner in its memoranda of law or at trial. Second, this court finds that it was not a manifest error of law to find that Feala and Hardy were not personally liable for two reasons: (1) the Ohio law cited by petitioner has no binding precedential value, and this court is not bound to follow the decision of an Ohio court; and (2) the personal liability imposed in Capen was imposed by Wisconsin statute which provides that misappropriation of construction funds by a contractor or subcontractor is deemed to be a misappropriation by "any officers, directors or agents of the corporation responsible for the misappropriation." *See* Wis. Stat. § 779.02(5). This court will not extend Capen into the insurance context. Rather, Wis. Admin. Code § 42.03(3) governs the personal liability of insurance agents. Section 42.03(3) provides that "funds collected for the account of an insurer will be held by the managing agent in a fiduciary capacity...." However, as I found in Proposed Conclusion #10(e), § 42.03(3) does not apply to Alpine because Alpine never held a certificate of authority under Wisconsin law. There was no manifest error of law in my conclusion that Feala and Hardy are not personally liable for the Alpine funds in the hands of HIMI.

Second, the petitioner argues that it was a manifest error of law for this court to refuse to pierce the corporate veil and find Feala and Hardy personally liable for the debt to Alpine. The general rule regarding piercing the corporate veil in Wisconsin is:

[T]he existence of the corporation as an entity apart from the natural persons comprising it will be disregarded, if corporate affairs are organized, controlled and conducted so that the corporation has no separate legal existence of its own and is the mere instrumentality of the shareholder and the corporate form is used to evade an obligation, to gain an unjust advantage or to commit an injustice.

Wiebke v. Richardson, 83 Wis. 2d 359, 363, 265 N.W.2d 571, 573 (Wis. 1978). Furthermore, "the fiction of corporate entity is not to be lightly regarded." *See* Milwaukee Toy Co. v. Industrial Commission, 203 Wis. 493, 234 N.W. 748, 749 (Wis. 1931). The petitioners argue that it was a manifest error of law for the court to refuse to pierce the corporate veil because Feala took out a $5,000 loan from the Alpine trust account for his personal use. The petitioner relies on an Ohio case that has no binding precedential value in this case and Weibke. In Weibke, however, Richardson, the sole shareholder, ignored the corporate entity by commingling his finances with that of the corporation, by using the corporate checking account as his personal checking account, by failing to take wages, and by failing to repay any amounts he withdrew. 83 Wis. 2d at 364, 265 N.W.2d at 574. The facts in this case do not approach the level of Weibke. The petitioner presented no evidence at trial that HIMI had no separate legal existence and was nothing more than a mere instrumentality of Feala. The only evidence presented is that Feala borrowed $5,000 from the Alpine Policyholders Trust Account for his personal use, which loan was separately accounted for by the corporate bookkeeper. This fact is not enough to prove that HIMI was nothing more than Feala's alter ego, and it was not a manifest error of law for this court to refuse to pierce the corporate veil. The petitioner argues, however, that it cannot verify that there was only one loan for personal use without an accounting from HIMI, and urges this court to order an accounting. It should be noted, that the court did exactly this in Proposed Conclusion of Law #12.

Petitioner's third argument is that it was a manifest error of law for this court to conclude that Alpine was not the Royal Bank of Hillsboro's customer. Petitioner relies on the Uniform Commercial Code definition of "customer" as well as case law from jurisdictions other than Wisconsin interpreting the Uniform Commercial Code definition of "customer." The Wisconsin Uniform Commercial Code defines "customer" as "any person having an account with a bank or for whom a bank has agreed to collect items and includes a bank carrying an account with another bank." Wis. Stat. § 404.104(1)(e). There was no evidence presented that Alpine was a customer of the bank, as defined by the Wisconsin Uniform Commercial Code. First, the only authorized signatories on the account were Robert Feala and Danita Hammer, employees of HIMI. Second, the account was opened by an agent of HIMI, and an agent of HIMI controlled the account. Alpine did not control the account. Third, the name of the account was not the Alpine Account, but rather the Alpine Policyholders Trust Account. Therefore, if anyone other than HIMI had an interest in the account, it would have been the Alpine Policyholders, not Alpine itself. It was not a manifest error of law for this court to conclude that Alpine was not a customer of the Royal Bank of Hillsboro.

Finally, the petitioner argues that because Alpine was a customer of the Royal Bank of Hillsboro, it had the right under Wis. Stat. § 404.403(1) to close the Alpine Policyholder Trust Accounts. Because this court has found that Alpine was not a customer of the Bank, the Bank had no duty to close the accounts upon instructions from the Joint Official Liquidator. It was not a manifest error of law for this court to conclude that the Bank owed no duty to Alpine.