

STATE OF MICHIGAN
COURT OF APPEALS

JAMES BAKER and HELEN BAKER,

Plaintiffs-Appellees,

UNPUBLISHED
September 11, 2012

v

ASAP INVESTMENTS, INC., LARRY D.
FRANK and KIMBERLEE J. FRANK,

Defendants-Appellants.

Nos. 304742; 305573
Iosco Circuit Court
LC No. 10-005661-CK

Before: SERVITTO, P.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

In this consolidated appeal, ASAP Investments, Inc., (“ASAP”), Larry D. Frank and Kimberlee J. Frank (“the Franks”) appeal as of right from the trial court’s June 6, 2011, opinion and judgment in favor of James and Helen Baker (“the Bakers”), and the court’s July 29, 2011, post-judgment order granting attorney fees to the Bakers.¹ We reverse and remand.

The Bakers were familiar with real estate transactions, having previously purchased approximately 16 properties. The Bakers became associated with the Franks when the Franks bought land contracts on three single-family homes from the Bakers. On June 27, 2003, a mortgage was entered into by the Land Trust of 1114 Maginn Court, ASAP Trustee (as mortgagor), and the Bakers (as mortgagees). The mortgage was secured by property located at 1114 Maginn Court in Mount Morris, Michigan (“Maginn Property”), and was in the amount of \$45,000 at 12 percent annual interest, with the balance to be paid in full within five years.

The parties executed a second mortgage on April 19, 2005. The Bakers loaned an additional \$30,000 to the “Land Trust of 1114 Maginn Ct., ASAP Investments, Inc., Trustee” at 12 percent interest, which was to be paid annually for five years, with the balance of the loan due at the end of the five-year period. The Bakers received a total of \$28,200 in interest payments from ASAP, the trustee of the Maginn Land Trust. In 2008, Kimberlee Frank contacted James Baker and informed him that ASAP would no longer be making payments on the mortgages. James Baker subsequently accepted a quitclaim deed to the Maginn Property dated May 7, 2008.

¹ MCR 2.114(F).

Foreclosure proceedings were initiated, and James Baker eventually bid \$20,000 on the Maginn Property at a sheriff's foreclosure sale. ASAP and Brothers and Company, Inc. ("Brothers"), corporations wholly owned by the Franks, were dissolved and all property owned by Brothers were foreclosed on and lost.

The Bakers filed the instant default and deficiency action against ASAP and the Franks on May 17, 2010, seeking damages in the amount of \$80,584. ASAP and the Franks then filed a motion for summary disposition, arguing that the Bakers failed to state a claim upon which relief could be granted. After a hearing, the trial court granted ASAP and the Franks' motion and gave the Bakers 15 days in which to file an amended complaint specifying a claim for fraud. The Bakers consequently filed an amended complaint, alleging that the Maginn Land Trust was invalid and was only created to defraud the Bakers by shielding the Franks from liability, that the Franks were "regularly engaged in the business of defrauding investors in exactly the same manner in which they defrauded [the Bakers]," and that the Franks failed to disclose or intentionally misrepresented that ASAP would be fully liable on the mortgage notes.

A bench trial was held and the trial court issued an order in favor of the Bakers. Following post-judgment hearings held on the Bakers' motion to assess attorney fees, the court awarded attorney fees to the Bakers in the amount of \$6,915.

On appeal, ASAP and the Franks argue that the trial court erred in finding that they committed fraud sufficient to warrant piercing the corporate veil and imposing individual liability on the Franks. We agree.

Following a bench trial, this Court reviews findings of fact for clear error and conclusions of law de novo. This Court also reviews de novo a trial court's decision on whether to pierce a corporate veil because piercing a corporate veil is an equitable remedy.²

"The traditional basis for piercing the corporate veil has been to protect a corporation's creditors where there is a unity of interest of the stockholders and the corporation and where the stockholders have used the corporate structure in an attempt to avoid legal obligations."³ In order to pierce the corporate veil, the following elements must be proven: "(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."⁴ "There is no single rule [however] delineating when a corporate entity should be disregarded, and the facts are to be assessed in light of a corporation's economic justification to determine if the

² *Florence Cement Co v Vettraino*, 292 Mich App 461, 468; 807 NW2d 917 (2011).

³ *Foodland Distrib v Al-Naimi*, 220 Mich App 453, 456; 559 NW2d 379 (1996).

⁴ *Lakeview Commons Ltd Partnership v Empower Yourself, LLC*, 290 Mich App 503, 510; 802 NW2d 712 (2010).

corporate form has been abused.”⁵ Disregard of corporate formalities alone is not sufficient to justify piercing the corporate veil; fraud, illegality, or injustice must also be demonstrated.⁶

In the instant case, there is little evidence that the corporate entities were mere instrumentalities of the Franks. Brothers was created with the purpose of buying, renovating, and reselling properties. ASAP was created as a real estate management company to handle properties owned by Brothers. Although Kimberlee Frank admitted that the Maginn Land Trust did not have a separate bank account, she testified that its funds were not commingled and were held in separate accounts with separate statements. Kimberlee Frank further stated that she maintained separate financial records and statements for each corporate entity and that separate tax returns were also filed. Larry Frank testified that ASAP had a separate office in 2003 when the first mortgage was executed. Testimony from the Franks regarding whether required corporate meetings were held was more equivocal.

It is undisputed that the Franks were the sole owners of Brothers and ASAP. In ruling from the bench, the trial court implied that piercing the corporate veil was appropriate because the Franks created the corporations to avoid personal liability. “The organization of a corporation for the avowed purpose of avoiding personal responsibility does not in itself constitute fraud justifying the disregard of the corporate entity.”⁷ Moreover, the Bakers failed to introduce evidence to support the proposition that ASAP was a mere instrumentality of the Franks or that corporate formalities were not maintained. In sum, there was little evidence presented to support the conclusion that ASAP was a mere instrumentality of the Franks.⁸

There is also a paucity of evidence to support a finding of fraud or wrong resulting in unjust injury or loss to the Bakers. Essentially, the issue boils down to whether the Franks committed fraud through their scheme of having title transferred to the Maginn Land Trust, naming Brothers as the beneficiary to that trust, and having ASAP manage the Maginn Property as trustee. The issue requires consideration of whether the purported invalidity of the land trust and the failure to disclose this to the Bakers represented fraud.

While the trial court called the corporate structure of ASAP and the Franks, and their use of land trusts to hold title to their various properties a “big scam, sham,” the court failed to articulate any specific basis for finding fraud in ASAP and the Franks’ activities. The record is devoid of any evidence that the Franks or ASAP somehow intentionally misrepresented anything in the course of the transactions. James Baker admitted that he sought to invest additional money without thoroughly investigating the value of the Maginn Property at the time. James Baker admitted that prior to entering into the agreements he received mortgage and loan documents to review. James Baker was not a naïve or inexperienced party; he indicated that he

⁵ *Rymal v Baergen*, 262 Mich App 274, 294; 686 NW2d 241 (2004).

⁶ *Soloman v Western Hills Dev Co*, 110 Mich App 257, 263; 312 NW2d 428 (1981).

⁷ *Gledhill v Fisher & Co*, 272 Mich 353, 359; 262 NW 371 (1935).

⁸ *Lakeview Commons Ltd Partnership*, 290 Mich App at 510.

has bought approximately 16 properties over time, and had previously entered into land deals with the Franks. The Franks testified that they never represented that they would be personally liable, which James Baker acknowledged. James Baker further admitted that he never asked the Franks to sign a personal guaranty on the mortgages or notes. James Baker testified that throughout his relationship with ASAP and the Franks, he dealt solely with ASAP as the management company and trustee of the Maginn Land Trust, in making mortgage payments.

In their brief on appeal, ASAP and the Franks seemingly concede that the land trust used to hold the Maginn Property was not valid under Michigan law.⁹ ASAP and the Franks argue, however, that any misrepresentation on their part regarding the validity of the land trust was immaterial, because it did not prevent transfer of title or affect the interest of ASAP and the Franks in the Maginn Property in any way. This is logically compelling. The Bakers were not misled to believe that the Franks would be individually liable on the mortgages, and James Baker admitted that he received mortgage documents to review before entering into the transaction. Both mortgages clearly stated that the Maginn Property would be held by the Maginn Land Trust, and that the trustee thereof was ASAP. The Maginn Property was the only security for either loan. James Baker admitted that he approached the Franks about entering a second mortgage, and further admitted that he did not investigate the value of the Maginn Property at the time. Kimberlee Frank testified that she cautioned James Baker to investigate the property value before entering into a second mortgage. James Baker, however, stated that he did not thoroughly investigate, believing that Mount Morris property values would rise because it is a nice area and has a good school system. In the end, James Baker received title to the Maginn Property through quitclaim deed; any purported invalidity in the trust did not affect James Baker's ability to receive the property. Consequently, any purported misrepresentation regarding the validity of the trust did not result in damages or loss to the Bakers. There is no evidence that ASAP and the Franks used the trust mechanism to defraud the Bakers in any way. Absent fraud and an accompanying unjust loss or injury to the Bakers, piercing the corporate veil and imposing individual liability on the Franks was an inappropriate remedy.¹⁰ Thus, the trial court erred in finding fraud sufficient to pierce the corporate veil and hold the Franks individually liable.¹¹

ASAP and the Franks also argue that the trial court clearly erred in finding that they asserted a frivolous defense such that the award of attorney fees to the Bakers¹² was appropriate. We agree. This Court generally reviews a trial court's grant of attorney fees for an abuse of discretion.¹³ "Findings of fact on which the court bases its award of attorney fees are reviewed for clear error; questions of law are reviewed de novo."¹⁴ Thus, this Court "will not reverse a

⁹ The trial court did not specifically make a finding on the validity of the land trust, nor was this issue raised on appeal.

¹⁰ *Lakeview Commons Ltd Partnership*, 290 Mich App at 510.

¹¹ *Florence Cement Co*, 292 Mich App at 468.

¹² MCR 2.114(F).

¹³ *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 286; 761 NW2d 761 (2008).

¹⁴ *Id.*

trial court's finding concerning whether a claim was frivolous unless the finding was clearly erroneous."¹⁵ "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed."¹⁶

"Michigan adheres to the general rule that attorney fees are not recoverable, either as an element of costs or as an item of damages, unless expressly authorized by statute, court rule, or a recognized exception."¹⁷ MCR 2.114(F), however, provides as follows:

In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages.

"[I]f the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591."¹⁸ Consequently, sanctions under MCR 2.114(F) may include "all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees."¹⁹ An action or defense is "frivolous" if at least one of the following conditions is met:

- (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
- (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
- (iii) The party's legal position was devoid of arguable legal merit.²⁰

At the close of the July 7, 2011, hearing on the Bakers' motion to assess attorney fees, the trial court concluded:

Here is what I am going to do. Because of the fraudulent—based essentially on the fraudulent activity, you know, that went on here, the frivolousness of some of the positions, many of the positions taken by the defendants, including all this shell game activity, or what I will call that, I find that this case is where attorney fees are appropriate, and even the defendants have

¹⁵ *Gramer v Gramer*, 207 Mich App 123, 126; 523 NW2d 861 (1994).

¹⁶ *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

¹⁷ *Ypsilanti Charter Twp*, 281 Mich App at 286, quoting *Brooks v Rose*, 191 Mich App 565, 574-575; 478 NW2d 731 (1991).

¹⁸ MCR 2.625(A)(2).

¹⁹ MCL 600.2591(2).

²⁰ MCL 600.2591(3)(a).

come up with a figure. I am going to award the \$6,915 in attorney fees. I don't think there is much to argue there about that.

In its July 29, 2011 order, the trial court granted attorney fees to the Bakers "based upon the fraudulent activities and the frivolousness of many of the positions taken by Defendants including the shell game activity."

ASAP and the Franks argue that the trial court committed clear error in finding that their defense was frivolous because their defense resulted in the reduction of greater than 75 percent of the damages alleged in the amended complaint. Specifically, damages were alleged to be greater than \$99,000, and the ultimate judgment against ASAP and the Franks was for \$22,140, including costs. The reduction in damages from the amount alleged to the ultimate judgment may represent evidence that ASAP and the Franks did not present an entirely frivolous defense, or may be a result of the Bakers overstating their losses in the initial complaint. The causal relationship between the validity of ASAP and the Franks' defenses and the reduction in damages is unclear.

More importantly, however, the trial court's finding that ASAP and the Franks presented a frivolous defense seems to be based not on the specific defenses presented at trial, but instead on the allegations of fraud underlying the Bakers' claims against ASAP and the Franks. The trial court did not make specific findings regarding which defenses were frivolous, only referencing "fraudulent activity" and "this shell game activity." In essence, it appears that the trial court imposed attorney fees based on the alleged underlying conduct that constituted much of the bases of the suit against ASAP and the Franks, rather than on specific defenses to the charges that were deemed frivolous. The trial court showed a continued fixation on the Franks' utilization of multiple corporations and land trusts in their real estate business; the purported "shell game" referenced in the July 29, 2011, order. As discussed above, the Franks never represented that they would be personally liable on either note, and James Baker had the opportunity to inspect the mortgage-related documents prior to entering into the agreements, which would have alerted James Baker to the fact that the Franks never made any personal guaranty. The defense that the Franks should not be personally liable on either note was not frivolous because the factual background supported their argument that piercing the corporate veil was unwarranted.²¹ Consequently, the trial court clearly erred in finding that ASAP and the Franks presented a frivolous defense.²²

The matter is remanded for entry of an order in favor of ASAP and the Franks and dismissal of the case with prejudice, and for reversal of the order awarding attorney fees to the Bakers.

²¹ *Lakeview Commons Ltd Partnership*, 290 Mich App at 510.

²² MCL 600.2591(3)(a); *Walters*, 239 Mich App at 456.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot