

1976

Centurian Corporation v. Fiberchem, Inc. : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Centurian Corporation v. Fiberchem, Inc.*, No. 14583 (Utah Supreme Court, 1976).

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

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CENTURIAN CORPORATION,)	
)	
Plaintiff-Respondent,)	
)	
vs.)	Case No. 14583
)	
FIBERCHEM, INC.,)	
)	
Defendant-Appellant.)	

BRIEF OF APPELLANT

Appeal from Judgment of the District Court of the
Third Judicial District
In and For Salt Lake County, State of Utah

Honorable Stewart M. Hanson,
Judge

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FILED

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BRIEF OF APPELLANT

NATURE OF THE CASE

Plaintiff-Respondent Centurian Corporation (referred to hereinafter as "plaintiff") brought this action alleging breach, by non-delivery, of an agreement for the purchase and sale of goods. Defendant-Respondent Fiberchem, Inc. (referred to hereinafter as "defendant") denied the making of the contract and asserted the defense of alter ego, alleging that the check delivered to it was for payment on the account of plaintiff's alter ego corporation, Centurian Custom Boats, Inc.

DISPOSITION IN LOWER COURT

The District Court for the Third Judicial District in and for Salt Lake County, State of Utah, The Honorable Stewart

M. Hanson presiding, granted plaintiff judgment in the amount of \$3,300.00 together with interest and costs. Defendant's defense of alter ego was held inapplicable, and its counterclaim was dismissed.

RELIEF SOUGHT ON APPEAL

Defendant seeks an order of this Court vacating and reversing the judgment rendered by the trial court.

STATEMENT OF FACTS

On August 1, 1973, plaintiff Centurian Corporation delivered to defendant a check in the amount of \$3,300.00. Plaintiff alleged, and through its president, Richard Nickles, testified that the check was issued to defendant for the purchase of raw materials used in its boat manufacturing operation.

Defendant denied the existence of a contract for the purchase and sale of goods; and through Fred Schwab, its branch manager, testified that the check was in payment of sums due defendant by Centurian Custom Boats, Inc. and was intended by plaintiff as such.

Centurian Custom Boats, Inc. was organized under the laws of the State of Utah in October of 1968 (R. 106, Ex. 11-D). From the time of its organization until its involuntary dissolution in 1974, Richard Nickles and his wife Margaret Nickles were the sole shareholders, two of the three

directors and the primary officers of the company (Ex. 11-D). Plaintiff Centurian Corporation was organized under the laws of the State of Utah approximately nine months later, in August of 1969. Richard Nickles and his wife Margaret, together with her father, William Kaiser, were the sole shareholders from the time of incorporation through the period material to this cause. Mr. and Mrs. Nickles served at all material times as two of the three directors, and served as the primary executive officers of the corporation (Ex. 12-D).

Commencing some time in late 1968 or early 1969, the defendant, a wholesaler in materials used in boat manufacturing, sold raw materials to Centurian Custom Boats, Inc. This relationship between Fiberchem, Inc. as a supplier of raw materials and Centurian Custom Boats, Inc. and/or Centurian Corporation as purchasers existed until November of 1973 when Centurian Corporation made its last purchase.

Plaintiff maintains that it purchased no raw materials from defendant until the litigated transaction of August 1, 1973, and that all prior purchases were made by Centurian Custom Boats, Inc. Both plaintiff and defendant, however, maintained a flimsy and often inconsistent regard for the separation of the corporations as evidenced by invoices for materials designated at one time Centurian Corporation and at other times Centurian Custom Boats, Inc. (Exs. 23-25-D). The statement of accounts was maintained by defendant in the name

of Centurian Custom Boats, Inc., although defendant was not aware until the filing of this action that two corporations actually existed.

While it was contested below as to which corporation was actually purchasing the raw materials, the destruction of the boat manufacturing facility at 620 Wilmington Avenue, Salt Lake City, in January of 1972, brought an end to all purchases for a period of one year (Ex. 8-P).

As of July 13, 1973, Centurian Custom Boats, Inc. owed to defendant the sum of \$3,313.15 on open account for the purchase of raw materials, primarily resins, coatings and fiberglass mats (Ex. 8-P). On August 1, 1973, plaintiff Centurian Corporation issued defendant a check in the amount of \$3,300.00 which defendant applied to the account of Centurian Custom Boats, Inc. to extinguish a long delinquent account (Ex. 8-P). Plaintiff, through Richard Nickles, testified that the check was issued for the purchase of raw materials which were never delivered by defendant. In November of 1973, notwithstanding the failure of delivery on the alleged August 1 transaction, plaintiff purchased raw materials from defendant totalling \$851.95 (Ex. 5-P) on a C.O.D. basis and issued its check. On January 25, 1974, plaintiff made vague demand on defendant, presumably for the delivery of the goods specified in the August 1, 1973 transaction, although its written demand does not specify the goods in question (Ex. 13-D).

ARGUMENT

I

THE TRIAL COURT ERRED IN GRANTING JUDGMENT TO PLAINTIFF AND IN DENYING DEFENDANT'S DEFENSE OF ALTER EGO.

This case involves the believability of witnesses, one produced by the plaintiff, Richard Nickles, and one by the defendant, Fred Schwab. The variances in testimony are so disparate as to cast grave doubt on the veracity of one or the other. But this matter exceeds the formal believability of either on the question of whether a discussion took place forming a contract, but goes further and involves the conduct, actions and activities of two corporations, Centurian Corporation and Centurian Custom Boats, Inc., both controlled by Richard Nickles. If, on the record and as a consequence of the trial court's findings that a contract was made, this Court cannot infringe the providence of the trier of fact, then the issue of alter ego and offset can be applied. That is that defendant has an admitted offset in the amount of \$3,300.00 against Centurian Custom Boats, Inc., which corporation is the alter ego of plaintiff and must be offset against any sum due the plaintiff.

The trial court's judgment for plaintiff was grounded on three principal findings: (1) that a contract existed between plaintiff and defendant for the purchase and sale of

goods; (2) that the contract was breached by defendant's failure to deliver those goods; and (3) that defendant, because of the grounds specified by the trial court in its memorandum decision (R. 55), could not assert a defense of alter ego and corresponding offset.

Defendant, throughout the proceedings below, denied the making of the August 1, 1973 contract for the purchase and sale of goods and presented substantial evidence that Centurian Corporation and Centurian Custom Boats, Inc. were for all practical purposes the same entity, the corresponding alter ego of each. The trial court concluded the inapplicability of the alter ego defense on four grounds which are either erroneous conclusions of law or irrelevant matters bearing on the legal issues of its defense.

A. THE TRIAL COURT ERRONEOUSLY FOUND NO EVIDENCE OF TRICKERY OR FRAUD AND FURTHER ERRONEOUSLY HELD THAT DEFENDANT MUST ESTABLISH TRICKERY OR FRAUD IN ORDER TO ASSERT A DEFENSE OF ALTER EGO.

There is substantial evidence in the record to demonstrate that plaintiff, by and through Richard Nickles, its chief executive officer, has, since its inception, used the two corporate entities, Centurian Custom Boats, Inc. and Centurian Corporation to avoid creditors, liability, and in general to protect its assets. There is substantial evidence to demonstrate that plaintiff has engaged in a course of conduct

calculated to avoid the payment of the debt due defendant through the manipulation of the two corporations.

Centurian Corporation asserted throughout the trial below that prior to the fire which destroyed its Wilmington manufacturing plant in January of 1972, it purchased no goods or materials from defendant, since it was only a holding company which either held real estate or purchased molds which it leased to Centurian Custom Boats, Inc. Richard Nickles testified, although no documentary evidence was introduced, that corporate formalities were maintained by the corporations. The record of this case, together with the record of two other proceedings involving Centurian Corporation, shows that in fact Nickles represents the relationship between the corporations to suit the purposes of the particular case, and in this case his purpose was to defeat a just obligation that was owed to defendant.

Nickles testified that Centurian Corporation was organized to hold real estate in 1969 (R. 111) and that in 1970 it purchased molds from third parties and leased those molds to Centurian Custom Boats, Inc. (R. 112). All leases between the companies were lost in a fire in January, 1972, although Nickles testified that Centurian Corporation maintained its offices at his home located elsewhere. Nickles further testified that Centurian Corporation did not manufacture, produce or own boats, that it bought no raw materials from

defendant at any time prior to August 1, 1973. In short, Centurian Corporation had no dealings with defendant.

In another action, Scantlin v. Centurian Corporation, the record of which was admitted in this action as Exhibit 16-D, Nickles testified that Centurian Corporation in fact produced 85 to 90 boats in 1971 (Nickles deposition at 11, Ex. 16-D), and that Centurian Custom Boats manufactured no boats in 1971 but only acted as the sales agent for Centurian Corporation. At the trial below Nickles explained this contradiction by saying that the reporter in the Scantlin case got the two companies mixed up, "an easy thing to do" (R. 131).

In proceedings in the Federal District Court for the District of Utah, Central Division, (Centurian Corporation v. Transwestern General Agency, Civ. No. C-263, 1973), Centurian Corporation brought an action against its insurance carriers for the destruction of the manufacturing plant at 620 Wilmington and its contents (R. 120-128). The affidavit of Richard Nickles (Ex. 15-D) in support of Centurian Corporation's claim states that from August of 1969 until the fire in January of 1972, Centurian Corporation manufactured boats. No mention is made of Centurian Custom Boats, Inc. and Centurian Custom Boats, Inc. made no claim for insurance proceeds. In the complaint filed in that proceeding (Ex. 22-D), plaintiff attached as an exhibit its accounts payable through

September 30, 1971, and detailed on the exhibit is a balance owing to defendant in the amount of \$4,191.05 for purchase of raw materials, which sums correspond to sum detailed on defendant's statement to Centurian Custom Boats, Inc. (Ex. 8-P). Again, neither Nickles nor his wife could make any satisfactory explanation of the contradictions of the testimony at this trial and the affidavits filed in the federal court proceeding, but said in effect that their lawyers and accountant were confused (R. 133). At the very least, however, plaintiff's exhibit to its complaint (Ex. 22-D) constitutes an admission of liability to defendant for the purchases, for which the \$3,300.00 was paid.

Defendant would also refer the Court to Ex. 20-D, an additional affidavit made by Nickles in the federal court action, wherein a detailed list of the material lost in the fire is attached. Again, Centurian Corporation is shown as the owner of materials used in the manufacture of boats. The contradiction between the testimony of Nickles at the trial in this matter and the other proceedings is striking and cannot be resolved, except that on one or more occasions the testimony was inaccurate.

With respect to plaintiff's dealings with defendant, the record below makes clear the following:

A. Invoices were labeled both Centurian Corporation and Centurian Boats, Inc. and were received without objection

or request for clarification by plaintiff (Exs. 23-25-D).

B. Defendant received at least one check drawn on the account of Centurian Corporation paying for purchases of raw materials (Ex. 18-D) prior to the fire in January, 1972.

C. Fred Schwab, branch manager of defendant, did not know of the existence of the two corporations and assumed that he was dealing with one entity (R. 185).

D. Richard Nickles admitted that confusion often resulted from the similarity of the names of the two companies (R. 131).

This Court, in the case of Chatterley v. Omnico, Inc., 26 Utah 2d 88, 485 P.2d 667 (1971), held that one corporation was the alter ego of another and enforced a wage claim against the parent corporation incurred by its subsidiary. This Court stated that it would disregard the corporate fiction without a showing of fraud or trickery when considerations of justice so required. At page 670 of the Omnico decision, this Court stated:

In this situation the consideration of justice which so requires is simply that a controlling corporation such as Omnico should not be permitted to manage and operate a business from which it stands to gain whatever profit may be made, have the advantage of the efforts of those who serve it, and then use the nomenclature of another corporation as a facade to insulate it from responsibility for paying for such services.

While plaintiff Centurian Corporation is not the parent of Centurian Custom Boats, Inc., the similarities to Omnico are

striking since there is common ownership, benefit and control of both corporations.

Nickles testified, as did his wife Margaret, in explanation of checks written to defendant prior to January, 1972, that Centurian Corporation would commonly make loans to Centurian Custom Boats, Inc. However, plaintiff introduced nothing at the trial to demonstrate the formalities of loans, promissory notes, ledger entries or minutes. Conveniently, all such records were destroyed in the fire (R. 146).

Nickles also testified that Centurian Corporation was the financing arm of Centurian Custom Boats in that it held the molds and leased them to Custom Boats (R. 154-55). If that is true, all the assets of the operation, together with the insurance proceeds were left in the plaintiff Centurian Corporation and Centurian Custom Boats, Inc. was left as a bankrupt and dissolved corporate shell, the result of which is that defendant, like the wage claimant in Omnico, would be left with a useless judgment.

The trial court, while admitting and hearing the evidence, held that the Omnico decision required evidence of fraud or trickery which it found to be absent in this action. The Omnico decision does not so require, but requires a merger of corporate identity resulting in injustice to creditors. Defendant met that burden at trial.

The trial court found and held as a bar to defendant's

claim of alter ego and course of dealing defendant's knowledge that Centurian Custom Boats, Inc. had ceased doing business as of January, 1972. This finding is irrelevant to the issues of the lawsuit. Fred Schwab testified that he was not aware two corporations were in existence.

The equitable doctrine of alter ego, or the piercing of the corporate veil, was developed very early by the courts to combat abuses of corporations. The disregard of corporate status is transactional; that is, it does not operate to dissolve the corporation, rather it binds either a shareholder or another corporation to its acts. The remedy is equitable and therefore both a trial court and appellate court have great latitude and discretion in finding fact and formulating a remedy. See Fletcher, Corporations (Perm. Ed.) § 41 et seq.; O'Neal, Close Corporations (Perm. Ed.) § 1 et seq.; 46 ALR 3d 428.

This Court is not unfamiliar with the equitable doctrine and has decided a number of cases dealing with the disregard of corporateness or alter ego. While the Omnico decision, supra, is the nearest in point, the cases of Omass v. Bennion, 18 Utah 2d 251, 420 P.2d 47 (1966); Stine v. Girola, 9 Utah 2d 22, 337 P.2d 62 (1959); Western Securities Co. v. Spiro, 62 Utah 623, 221 P. 856 (1923) look at the transaction course of dealing involved and do not require fraud or trickery nor hold the aggrieved party to duties arising, if at all

at law, but not in equity.

In Western Securities Co. v. Spiro, supra, the defendant in an action to recover on notes, asserted that the plaintiff corporation was the alter ego of its sole shareholder. The trial court agreed, and this Court affirmed. The evidence adduced at that trial showed that the shareholder used the corporation for his personal business and commingled assets and funds. The opinion of the court speaks not in terms of fraud or trickery but in terms of real party in interest as disregarding the corporate entity.

The trial court below, by its denial of the defense ignores the equitable nature of the relief requested and the conduct of the parties, and in particular the perfidious use of Centurian Custom Boats, Inc. by the plaintiff. Defendant can find no cases or statutory authority supporting the proposition that it had a duty to ascertain the existence of two corporations. The thrust of the equitable doctrine of alter ego and piercing corporate veils is that of the conduct of the parties, the real intent, the real party in interest and in doing equity.

II

THE TRIAL COURT'S FINDINGS THAT A CONTRACT WAS ENTERED INTO FOR THE PURCHASE AND SALE OF GOODS FOR WHICH THE CHECK WAS CONSIDERATION IS NOT SUPPORTED BY THE EVIDENCE.

The trial court found that a contract for the purchase and sale of raw materials in the amount of \$3,300.00 was made by and between plaintiff and defendant. Richard Nickles testified that after the fire which destroyed the manufacturing operation conducted by Centurian Custom Boats, Inc., Centurian Corporation decided to enter that business and engage in manufacturing. Notably that was after Centurian Corporation filed a claim for all the proceeds under the fire insurance policies. In any event, he alleged he contacted Fred Schwab regarding the purchase, and a decision was made as to prices and commodities. The only evidence aside from the testimony of Nickles is the check voucher produced at the trial by plaintiff containing a list of goods adding up to approximately \$3,300.00, a coincidental figure with what was owed to defendant. Nickles testified that after a period of time he brought the action for defendant's failure to deliver.

Fred Schwab, the branch manager at Fiberchem, tells an entirely different version. Schwab testified that from the time of the fire until July of 1973, he made every reasonable attempt to collect the \$3,300.00 owed by Centurian Custom Boats to defendant. Schwab stated that due to the reported fire and financial difficulties described by Nickles, the head office finally decided to give up collection attempts as fruitless and write the debt off.

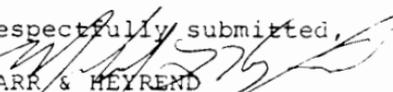
Schwab, just prior to August 1, 1973, had renewed conversations with Nickles regarding the debt. Nickles told Schwab that he would pay the debt if Schwab would "dummy an invoice" (R. 183). This Schwab refused to do. Nickles finally acquiesced, and on August 1, 1973, delivered a check to defendant's office. Schwab testified that there was no discussion of materials and the check was payment on account. As far as he knew, Centurian Corporation manufactured the Centurian Boat and there was one business. Nickles' testimony when laid against Schwab's is either believable or it is not. Both cannot be truthful in their testimony. Apparently in the face of constant impeachment, Richard Nickles' prior conviction for felonious mail fraud (R. 140), the trial court chose to believe Nickles.

Defendant elsewhere at the trial demonstrated that Nickles not only had motive to hide the truth, but the means by which Nickles utilized the corporations not only in this action but in the prior actions as well. These are harsh words, but deliberately chosen. Defendant is well aware of the scope of review this Court may exercise in reviewing the findings of the trial court but must urge that the testimony of Richard Nickles was riddled with inconsistencies both internally and when viewed against his prior testimony, to which defendant has directed the Court's attention. There can be no balance or harmony struck between the testimony of

the two men. The trial court, in view of the record in this matter, found the making of the contract erroneously.

CONCLUSION

Defendant is entitled to an order of this Court vacating the judgment reached herein and for whatever further relief or proceedings this Court deems proper.

Respectfully submitted,

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