

1999

Paria Group; Stephen M. Zimmerman v.  
Westchester Investment Partners, LTD. : Reply  
Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

UTAH  
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DOCKET NO. 990035

IN THE UTAH COURT OF APPEALS

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PARIA GROUP,

Plaintiff,

STEPHEN M. ZIMMERMAN,

Plaintiff/Appellant,

-vs-

WESTCHESTER INVESTMENT  
PARTNERS, LTD.,

Defendant/Appellee.

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APPELLANTS REPLY BRIEF

Civil No. 960400573

Court of Appeals No. 990035-CA

Argument Priority: 15

APPEAL FROM A FINAL JUDGMENT  
OF THE FOURTH JUDICIAL DISTRICT COURT  
OF UTAH COUNTY, STATE OF UTAH  
THE HONORABLE HOWARD MAETANI, DISTRICT JUDGE

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**FILED**

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COURT OF APPEALS

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## STATEMENT OF FACTS

Westchester's statement of facts states that "[Zimmerman] was not listed as president on corporate documents from 1992 until Paria filed its reinstatement application with the Division of Corporations in November of 1996, after he signed the lease with Westchester." That statement is false. Minutes of the meeting of the board of directors clearly indicate that he was elected president on April 14, 1995. Exhibit 88 and Tr. I at 157. Minutes of directors' meetings presumably qualify as corporate documents.

POINT I: THE EVIDENCE IS INSUFFICIENT FOR PIERCING THE CORPORATE VEIL.

Westchester states that Zimmerman has failed to marshal the evidence and asserts that there is ample evidence to support each prong of the alter-ego test. Westchester goes on to state that there is no evidence the corporation did certain things and recites several of the findings of fact. Westchester is the party seeking to pierce the corporate veil and has the burden of proof. The fact that there is no evidence is not Zimmerman's problem and findings of fact are not evidence.

Neither prong of the two prong test cited by Westchester and set forth in Salt Lake City Corp. v. James Contractors, Inc., 761 P.2d 42, 46 (Utah App. 1998) has been met. There is no sufficient evidence to show a unity of interest and ownership.

The shareholders of Paria Group are Jane Haynie and Zimmerman's wife. Even if the court could find, without any evidence being offered, that Zimmerman controlled his wife's shares, there is no evidence as to how many shares she owned. No question was ever asked to determine who owned how much of the corporation. Instead of offering evidence as to who owned the corporation, Westchester cites 1990 records that show Zimmerman and his wife are two of five shareholders. From that counsel concludes that Zimmerman and his wife "are the principal shareholders". Brief at 8. This is not evidence which can sustain the judgment. The burden of proof for piercing the corporate veil was on Westchester, yet they offered no evidence that Zimmermans were any more than nominal shareholders. For all we know from the record, Haynie, Haynie, and Walker, the other shareholders, may have owned 99% of the stock. Presumably, Westchester offered no evidence because supposition served better than the facts. Nor does Westchester cite any evidence that observance of the corporate form would sanction a fraud, promote injustice, or an inequitable result would follow. All we have is counsel's speculation.

The same is true of most of the eight factors set forth in Colman v. Colman, 743 P.2d 782, 786 (Utah App. 1987). Paria Group is not a one man corporation and it had at least \$600,000.00 in assets. It could not be said to be undercapitalized.

No evidence was offered that Paria operated without observing corporate

formalities. Westchester's brief refers to the incomplete minutes. This is the same evidence relied upon for factor six, absence of corporate records. While it is true that there is evidence of the minutes being incomplete, there is no evidence that the meetings weren't held. Counsel's speculation is not evidence.

The evidence did establish that no dividends had been paid to shareholders.

No evidence was offered that the dominant shareholder or any other person or entity siphoned corporate funds. Likewise there is no evidence that there was a dominant shareholder.

No evidence was offered of the nonfunctioning of other officers or directors. There were minutes of several directors' meetings and no exploration of whether there had been other meetings. Exhibit 88. Earlene Biggs testified as to her duties as vice president. Tr. I at 23. Scott Schumway testified to his functioning as a vice president. Tr. III at 9. Westchester offered no evidence of officers or directors not functioning.

No evidence was offered of the use of the corporation as a facade for operations of the dominant shareholders. While we have counsel's assertions that Zimmermans were the dominant shareholders, there is no evidence of what interest in the corporation they owned nor is there evidence of how the corporation was used as a facade. The only evidence is that Paria conducted its research business in a proper corporate form.

Finally, there is no evidence of the use of the corporate entity in promoting

injustice or fraud. Counsel asserts that this factor and the prior factor are evidenced by the sale of assets to PGM, Inc. The evidence concerning that sale does not in any way support Westchester's position.

The only testimony regarding the sale of assets was that the assets were appraised by an independent appraiser then sold for their fair market value. Tr. I at 176. At the time of the transfer Paria Group received a note in the amount of \$600,000.00 and a security agreement. The note calls for payments of not less than \$9,000.00 per month. Exhibit 90. By the time of trial approximately \$500,000.00 had been paid on the note. Tr. I at 146-147. That evidence is uncontroverted. Westchester suggests that the trial court was justified in not believing that evidence despite the fact that there was not a single word of evidence to justify believing anything else.

To support that position, Westchester suggests that Zimmerman contradicted himself. That suggestion is nonsense. Counsel argues that had "payments actually been made according to the promissory note, only \$108,000 would have been paid up until the date of trial." In fact the \$108,00 would have been a minimum and more than that minimum was paid. She also suggests that the fact that the shareholders wanted to be cashed out but that as of the time of trial none of the money had been distributed to shareholders is inconsistent. In fact, as of the time of trial the note hadn't been paid in full, some of Paria Groups liabilities were still in dispute as is evidenced by this

lawsuit, and it would have been premature and improper for Paria to have made a distribution to shareholders. There were no inconsistencies in Zimmerman's testimony on that point, it was uncontradicted by any other evidence, and the trial court had no basis for finding otherwise.

Counsel also suggests that the sale for fair market value somehow violated the Fraudulent Transfer act and that there was an actual intent to hinder, delay, or defraud creditors. It should be obvious that the transfer could in no way hinder creditors. Paria's financial position, having converted assets to cash, is exactly the same except for being more liquid. That could hardly hinder creditors.

In summary, the evidence presented to the trial court established only one of the eight factors for piercing the corporate veil. The nonpayment of dividends is easily explained by the fact that the corporation was never sufficiently profitable to continue expansion while paying dividends. One factor out of eight is not sufficient to support the trial court's ruling.

## POINT II: THE COURT HAD NO JURISDICTION OVER PGM, INC.

The cases relied upon by Westchester to assert the court had jurisdiction against PGM, Inc. are uniform in one respect: In each of those cases the party sought to be held had the opportunity to litigate the question as is clear from the quotes in Westchester's brief: ". . . unlike Hazeltine, Pierce has had a full and complete opportunity to litigate

the alter-ego question . . .” Mansfield v. Pierce, 153 F.3d 721, 728 (4<sup>th</sup> Cir. N.C. 1988), “This case [Hazeltine] is clearly distinguishable from the case at hand, in which [the unnamed defendant] . . . had a full opportunity to defend itself.” Performance Plus Fund, Ltd. v. Winfield & Co., Inc., 443 F.Supp. 1188, 1193 (U.S.D.C., N.D. Cal. 1977).

PGM, on the other hand, had no opportunity to litigate. Besides not being a party to the action, the trial court stated on the first day of trial that “. . . she’ll never get a judgment against PGM, . . .” Tr. I at 178. Having that ruling from the court, and that being the law of the case, litigating that question and establishing the independence of PGM was not an issue that was addressed.

#### CONCLUSION

There is no substantial evidence in the record to support the piercing of the corporate veil. The trial court had no jurisdiction to enter judgment against PGM, Inc. The judgment of the trial court as to Zimmerman and PGM, Inc. should be reversed.

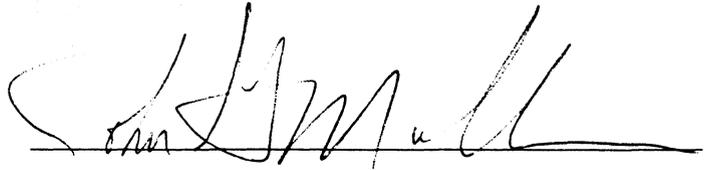
RESPECTFULLY SUBMITTED this 30 day of July, 1999.

  
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Mailing Certificate

Served the foregoing Reply Brief this 30 day of July, 1999 by Mailing a true and correct copy thereof, postage prepaid, addressed as follows:

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A handwritten signature in black ink, appearing to read "Cameron S. Denning", is written over a horizontal line.