

IN THE COMMON PLEAS COURT OF ERIE COUNTY, OHIO

FILED COURT
COMMON PLEAS, OHIO
ERIE COUNTY, OHIO
2009 MAR 11 PM 4:12
BARBARA J. JOHNSON
CLERK OF COURTS

State of Ohio, ex rel. : CASE NO. 2006-CV-802
Nancy Hardin Rogers, etc. :
Plaintiff(s) : Judge Roger E. Binette
vs :
Estate of James Roberts, et al. : **JUDGMENT ENTRY**
Defendant(s) :
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: :
: :

This matter is before this Court on two Motions: 1) *Plaintiff State of Ohio's Motion For Summary Judgment ("Plaintiff's Summary Judgment Motion")* (filed on or about December 19, 2008) and 2) *Third-Party Defendants Citizens National Bank And Citizens Banking Company's Motion For Summary Judgment And Memorandum In Support ("Citizens' Summary Judgment Motion")* (filed on or about December 19, 2008). This Court has carefully considered both filings, the Memoranda accompanying each; *Defendant Third Party Plaintiff's Memorandum In Opposition To Third Party Defendant Citizens National Bank And Citizens Banking Company's Motion For Summary Judgment* (filed on or about February 3, 2009); *Third Party Defendant Citizens National Bank And Citizens Banking Company's Reply To Defendants Third Party Plaintiffs' Memorandum In Opposition* (filed on or about February 20, 2009); the record and applicable law.

This Court **FINDS** and **HOLDS** as follows:

1. This is an Environmental Enforcement action brought by the Ohio Attorney General ("*Plaintiff*"). The action relates to certain conduct at 1702 Campbell Street in Sandusky, Ohio. This location was used as a small manufacturing facility to make plastic covered, artificial rocks and waterfalls used in gardening and landscaping. The Plaintiff brought this enforcement action for alleged 'Air and Hazardous Waste Storage' violations against Ultimate Industries Inc., ("*Ultimate*") Estate of James Roberts ("*Roberts' Estate*") and Thomas Roberts ("*Roberts*") – (collectively "*the Defendants*");
2. The Air Emission violations have been resolved. Plaintiff moves for *Partial Summary Judgment* on the issue of liability on Counts Eight through Seventeen of the Amended Complaint relating to the 'storage, evaluation, labeling, removing etc.. of hazardous waste(s)';
3. The Defendants filed a Third Party Complaint against Citizens National Bank and Citizens Banking Company (collectively "*Citizens Bank*"). The allegation is that Citizens Bank has some responsibility because it bought the property back at Foreclosure Sale, knew or should have known about the hazardous wastes and failed to remedy the problem;
4. Summary Judgment may not be awarded unless the evidence demonstrates that: 1) there is no genuine issue as to any material fact to be litigated; 2) the moving party is entitled to judgment as a matter of law and 3) reasonable minds can come to but one conclusion, and after reviewing the evidence most strongly in favor of the non-moving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *Temple v. Wean United, Inc.* (1977), 50 Ohio St. 2d 317, 327; *Vahalia v. Hall* (1997), 77 Ohio St.3d. 421, 429-30. All inferences are to be drawn in the light most favorable to the non-moving party and any doubt is to be resolved in favor of the non-moving party. *Viock v. Stowe Woodard Co.* (1983), 12 Ohio App. 3d 7, 12;
5. This Court will first address Plaintiff's *Summary Judgment Motion* and then turn to Citizen Bank's *Summary Judgment Motion*.

PLAINTIFF STATE OF OHIO'S MOTION FOR SUMMARY JUDGMENT

6. As noted before, *Plaintiff's Summary Motion* is really one for 'partial summary judgment' – on the hazardous waste claims, and at that, just on liability. This Court observes that Defendants did not file any 'memorandum in opposition' or any evidentiary materials relating to *Plaintiff's Summary Judgment Motion*. Nevertheless, this Court must still be certain that the State of Ohio met its initial burden of pointing to the evidentiary record to establish that Defendants can point to no evidence, which would create a genuine issue of material fact;
7. This Court notes an initial procedural problem for the Plaintiff. The Plaintiff has sued *Roberts' Estate*; but acknowledges (see fn 1 of *Memorandum In Support of Motion*) that no formal estate has been opened in Probate Court. Thus, there is no such entity (i.e., no such defendant). Without a proper entity, judgment cannot be rendered in Plaintiff's favor. The proper method of handling a claim against the estate of a deceased person is to file a claim against an estate opened in Probate Court through the duly appointed administrator. If the decedent's family has not opened an estate, it is incumbent upon the party or person making the claim to open an estate and apply for appointment of an administrator. Those who have claims to make must file them with the administrator within six (6) months. None of that was done here. No estate was ever opened. For this reason, summary judgment cannot be granted against *Roberts' Estate*;
8. Plaintiff has provided sufficient evidentiary materials to support its *Summary Judgment Motion* on liability as to Ultimate. Plaintiff has established, among other things, that Ultimate is a title owner of the property; that unmarked, undated, unlabelled 55 gallon drums (some containing hazardous waste) were stored on the property; that drums or containers of discarded waste were present; that drums were selectively sampled, tested and contained high volatile organic compound (VOC) reading; that other sampling revealed drums contained hazardous waste on the basis of ignitability; that sampling revealed drums exceeded the regulatory limit for methyl ethyl ketone; that Ultimate did not give proper notice that it was ceasing regulated activities; that the same drums are on site, and that Ultimate did not have a permit to treat, store or dispose of hazardous wastes at this site;
9. Plaintiff has therefore established liability as to Count Eight (operation of an unpermitted hazardous waste facility); Count Nine (illegal storage of hazardous waste); Count Ten (failure to evaluate waste); Count Eleven (failure to label and date hazardous waste containers); Count Twelve (failure to maintain sufficient aisle space)¹; Count Thirteen (failure to post emergency information); Count Fourteen (failure to maintain emergency equipment); Count Fifteen (failure to give notice of cessation of regulated operations); Count Sixteen (failure to have a closure plan and close the facility) and Count Seventeen (failure to remove hazardous waste in accordance with an approved closure plan) with respect to Ultimate;
10. The remaining issue is the 'personal' liability of Roberts. Plaintiff advances several theories in its quest to impose personal liability: 1) the statutory and regulatory framework; 2) Ohio common law on Piercing the Corporate Veil, and 3) cancellation of the Corporate Articles of Incorporation;
11. First, cancellation of the Articles of Incorporation ("*Articles*") is significant because after the corporation ceased to function, the ongoing acts and responsibilities associated therewith are no longer attributable to Ultimate. For instance, the hazardous waste in drums at the site continue to violate regulations. With the corporation no longer in existence, responsibility would shift. The problem is that the cancellation of the Articles has not been put into the record. For purposes of summary judgment procedure this Court cannot consider matters which are not of proper evidentiary quality and are outside the record. Consequently, this Court cannot properly determine when the corporation ceased to legally function/exist;

¹ As it relates to aisle space, posting emergency information and maintaining emergency equipment, the affidavit of Edgar V. Pulido incorporates a July 13, 2007 Notice of Violation which documents his personal observations from the May 8, 2007 inspection.

12. With respect to the statutory and regulatory framework, an “operator” is the person responsible for the overall operation of a facility. Roberts acknowledged he had responsibility and management of the facility after his father (James Roberts), became too ill to handle the daily operations. See e.g., *State v. Dearing, et al. Northwest Environmental Services* Cuyahoga App. Nos. 51209, 51220, 51221 (Nov. 13, 1986) and *State ex rel. Petro v. Mercomp, Inc.* 2006-Ohio-2729, ¶40. This Court finds that Roberts meets the statutory and regulatory framework and definitions to be found personally liable. Again, Roberts did not provide any evidence or contest this point;
13. With respect to applying Ohio common law to “Pierce the Corporate Veil” further analysis is required. Plaintiff presented very little legal authority and a meager discussion of the facts. Ordinarily, Shareholders, Officers and Directors of a corporation are not liable for a corporation’s debts. *Belvedere Condominium Unit Owners’ Assn. V. R.E. Roark Cos. Inc.* (1993), 67 Ohio St.3d 274, 287. However, the veil of the corporate entity can be “pierced” and individual Shareholders held liable for corporate misdeeds when it would be unjust to allow Shareholders to hide behind the fiction of the corporate entity. *Id.* The Ohio Supreme Court established a three pronged test in *Belvedere* to determine whether the corporate veil can be pierced: the corporate form may be disregarded and individual Shareholders held liable when: 1) control over the corporation by those to be held liable was so complete that the corporation had no separate mind, will, or existence of its own, 2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and 3) injury or unjust loss resulted to the Plaintiff from such control and wrong. *Id.* paragraph three of the syllabus;
14. Each case must be decided on its own facts. *Yo-Can, Inc. v. The Yogurt Exchange, Inc.* 149 Ohio App.3d 513, 2002-Ohio-5194, ¶45. The party seeking to have the corporate form disregarded bears the burden of proof. *Starnier v. Guardian Industries* (2001), 143 Ohio App.3d 461, 469. Because of the judgment involved in assessing the facts of each case, and whether the corporation has been used to an end subversive, whether to pierce the corporate veil is primarily a matter for the trier of fact. *Clinical Components, Inc. v. Leffler Industries, Inc.* (Jan.22, 1997) Wayne App. No. 95 CA 0085; *Wiencek v. Atcole Co., Inc.* (1996), 109 Ohio App.3d 240, 245;
15. In *Dombroski v. Wellpoint, Inc.* 119 Ohio St. 3d 506, 2008-Ohio-4827, the Supreme Court recently modified the second prong of the *Belvedere* test to require that a Plaintiff demonstrate that the Defendant Shareholder exercised such control over the corporation in such a manner as to commit fraud, an illegal act, or a similarly unlawful act. The Court reiterated that piercing the corporate veil is “a rare exception, to be applied only ‘in the case of fraud or certain other exceptional circumstances.’” *Dombroski* at ¶17 and 26. The Supreme Court further directed that “[C]ourts should apply this limited expansion cautiously toward the goal of piercing the corporate veil only in instances of extreme Shareholder misconduct.” *Id.* ¶29;
16. Applying the *Belvedere* test as modified in *Dombroski* here, this Court cannot conclude that as a matter of law there is no genuine issue of material fact. Plaintiff has failed to meet its initial burden of demonstrating that it would be entitled to pierce the corporate veil of Ultimate as a matter of law. The burden of proof lies with Plaintiff and that burden has not been met here. First, there is an utter absence of proof that there was such control over the corporation that it had no separate mind, will, or existence of its own. Typically, this can be demonstrated through a number of factors such as: 1) a sole Shareholder (although that in and of itself is not conclusive); 2) failure to observe corporate formalities; 3) Shareholders holding themselves out as personally liable for corporate obligations; 4) diversion of funds for personal use; 5) absence of corporate records; 6) corporation a mere façade for operations by dominant Shareholder(s); 7) under capitalization and 8) co-mingling of funds. See e.g., *Le Roux’s Billyllye Supper Club v. Ma* (1991), 77 Ohio App.3d 417, 422-3; *Link v. Leadworks Corp.* (1992), 79 Ohio App.3d 735, 744. Plaintiff has provided no evidentiary materials whatsoever which speak to these factors. By comparison, this Court considered several Environmental Enforcement cases where the State of Ohio did introduce extensive evidence supporting its position on piercing the corporate veil. *State v. Tri-State Group, Inc.* 2004-Ohio-4441, ¶ 74-81; *State ex rel Petro v. Mercomp, Inc.* 2006-Ohio-2729, ¶23-26, and *Kays v. Schregardus* 138 Ohio App.3d 225;

17. This Court need not address the other two prongs of *Belvedere* because Plaintiff has utterly failed to provide any evidentiary basis to establish the "alter ego" theory - i.e., that there was such control over this corporation by Roberts that the corporation had no will, mind or existence of its own;
18. In conclusion, *Plaintiff's Summary Judgment Motion* is 'well-taken' as to Ultimate on the issue of liability, and on liability as to Roberts with individual liability conferred only under the Statutory/Regulatory Authority and should be granted. However, it is not 'well-taken' as to Robert's Estate and should be denied.

**THIRD PARTY DEFENDANTS CITIZENS NATIONAL BANK AND CITIZENS BANKING COMPANY'S
MOTION FOR SUMMARY JUDGMENT**

19. The Defendants filed a Third Party Complaint against Citizens Bank entities alleging two claims: 1) a Breach of the Duty of Good Faith and Fair Dealing and, 2) Breach of Contract. Notably, Defendants did not allege any other claims invoking liability for Environmental Clean up or any claim for Indemnification or Contribution. Citizens Bank moves for summary judgment arguing that: 1) the Breach of Duty of Good Faith and Fair Dealing fails as a matter of law, and 2) Citizens Bank did not breach the contract with the Defendants;
20. Because a contractual relationship carries with it an obligation to act in good faith and with fair dealing, a Breach of Contract claim subsumes any accompanying claim for Breach of the Duty of Good Faith and Fair Dealing. *Firelands Regional Medical Center v. Jeavons* 2008-Ohio-5031; *Wauseon Plaza L.P. v. Wauseon Hardware Co.* 156 Ohio App. 3d 575; 2004-Ohio-1661, ¶56-56. In short, there is no separate cause of action, independent of the underlying Breach of Contract claim. *Lakota Local School District Board of Education v. Brickner* (1996), 108 Ohio App.3d 637, 646. Therefore, Citizens Bank's *Summary Judgment Motion* on this point is 'well-taken';
21. In order for there to be a breach by Citizens Bank, there must be a 'failure without legal excuse to perform a contractual duty'. The written document memorializing the "meeting of the minds" in this case is the "Open End Mortgage" which was recorded September 7, 2000. In paragraph 16 of that document (which is in the record not only as an attachment to the complaint but also as Exhibit 1 to the Affidavit of James McGookey), the parties agreed in relevant part:

Mortgagor represents, warrants and agrees that:

- A. Except as previously disclosed and acknowledged in writing to Lender, no hazardous Substance is or will be located, stored or released on or in the Property. This restriction does not apply to small quantities of Hazardous Substances that are generally recognized to be appropriate for the normal use and maintenance of the Property.
- B. Except as previously disclosed and acknowledged in writing to Lender, Mortgagor and every tenant have been, are, and shall remain in full compliance with any applicable Environmental Law.
- C. Mortgagor shall immediately notify Lender if a release or threatened release of a Hazardous Substance occurs on, under or about the Property or there is a violation of any Environmental Law concerning the Property. In such an event, Mortgagor shall take all necessary remedial action in accordance with any Environmental Law.
- D. Mortgagor shall immediately notify Lender in writing as soon as Mortgagor has reason to believe there is any pending

or threatened investigation, claim, or proceeding relating to the release or threatened release of any Hazardous Substance or the violation of any Environmental Law.

22. In paragraph 10 of this document, Citizens Bank has discretionary authority to perform any covenant which the Defendants do not perform:

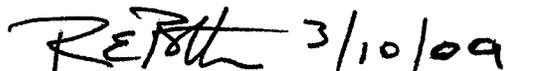
AUTHORITY TO PERFORM: If Mortgagor fails to perform any duty or any of the covenants contained in this Security Instrument, Lender may, without notice, perform or cause them to be performed..... (emphasis added)

23. There is no contractual duty on Citizens Bank to remediate, respond or clean up hazardous waste. Conversely, this duty is upon the Defendants. The most that can be said is that Citizens Bank has discretion to do so, but it is not obligated. The Defendants have failed to point to any provision which requires Citizens Bank to assume liability or active responsibility for an environmental obligation or duty;
24. This Court observes that Citizens Bank had filed a Foreclosure action. The Foreclosure case was assigned to a different judge². Citizens Bank foreclosed on the property and obtained an Order of Sale from that judge. Moreover, apparently Citizens Bank bought the property at the Sheriff's Sale; but never recorded the Transfer of Title. The sale was vacated by that judge, which made a specific finding that "Plaintiff was never legally entitled to the inspection Defendant claims. The Deed to the property is, and always has been, in the name of the Defendants (before and after the sale)."³ That Order - vacating the sale by that judge - was apparently never appealed. While there may be some liability of a financial institution under environmental statutes for remediation, that theory of recovery was never pled. Moreover, another Court has specifically found that the property was never titled in Citizens Bank's name. So the responsibility for environmental remediation, which generally accompanies ownership under some environmental legislation, does not apply here;
25. This Court finds there is no genuine issue of material fact and the Defendants cannot show that Citizens Bank breached a contractual duty. The Defendants have failed to point to anything of evidentiary quality which demonstrates that a genuine issue of material fact exists. Accordingly, *Citizens Bank's Summary Judgment Motion* is 'well-taken' and should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, based on the foregoing, that *Plaintiff State of Ohio's Motion For Summary Judgment* (filed on or about December 19, 2008) is **GRANTED** as to Defendant Ultimate Industries, Inc. on the issue of 'liability'. **FURTHER**, it is **GRANTED** on 'liability' as to Defendant Thomas Roberts with individual liability conferred only under the Statutory/Regulatory Authority. **FURTHER**, it is **DENIED** as to the Estate of James Roberts.

FURTHER, IT IS ORDERED *Third-Party Defendants Citizens National Bank And Citizens Banking Company's Motion For Summary Judgment And Memorandum In Support* (filed on or about December 19, 2008) is **GRANTED**. The Third Party Complaint is 'dismissed with prejudice'. Costs to Defendant

IT IS SO ORDERED.


JUDGE

Gary L. Pasherlich/Daniel J. Martin
Kevin J. Zeiher
Michael S. Scalzo/Amy M. Natyshak

² Judge Tygh M. Tone.

³ Paragraph 9 of the "Open End Mortgage" seems in conflict with the Court's finding as it provides in part: Lender or Lender's agents may, at Lender's option, enter the Property at any reasonable time for the purpose of inspecting the Property."