

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO  
CIVIL DIVISION

G. SCOTTCO INVESTMENT CO., et al.,

Plaintiffs,

Case No. 05CVH09-10023

Judge: Sheward

v.

FRANKLIN COUNTY, et al.,

Defendants,

And,

STATE OF OHIO,

Third-Party Plaintiff

v.

Gayle Scott, Jr., et al.,

Third-party Defendants,  
Third-Party Plaintiffs,

v.

WATER SPECIALISTS, INC., et al.,

Third-Party Defendants.

FILED  
COMMON PLEAS COURT  
FRANKLIN CO., OHIO  
2008 DEC - 8 PM 4: 29  
CLERK OF COURTS

**DECISION AND ENTRY**

**DENYING THE MOTION OF THIRD-PARTY DEFENDANTS GEORGE  
DAGRACA AND KDM DEVELOPMENT CORPORATION FOR SUMMARY  
JUDGMENT AS FILED ON SEPTEMBER 15, 2008**

Rendered this      day of      , 2008

**Sheward, Judge**

On September 15, 2008, the Third-Party Defendants George Dgraca and KDM Development Corporation, (Hereinafter referred to as Third-Party Defendants) filed a motion for summary judgment requesting that the State of Ohio's claims against them be

dismissed. The Third-Party Defendants supplemented the record on October 6, 2008 by filing a 'Notice of New Controlling Authority'. On October 22, 2008 the State of Ohio (hereinafter referred to as the State) filed its 'Memorandum in Opposition'.<sup>1</sup> Third-Party Defendants filed their 'Reply' on November 7, 2008. For the reasons that follow, this Court **DENIES** the Third-Party Defendants motion for summary judgment.

### **FACTUAL HISTORY**

The following is taken directly from the State's 'Memorandum Contra':

On September 13, 2005, Plaintiffs Oak Hills and G. Scottco Investment Co. filed a civil suit against former Defendant Franklin County Board of Commissioners and other County officials concerning whether the Plaintiffs could be compelled to connect their respective manufactured home communities to the County's sewer. On August 31, 2006, Plaintiffs filed an Amended Complaint bringing the State of Ohio into this matter through the State's Director of Environmental Protection. On December 1, 2006, Plaintiffs filed a Second Amended Complaint narrowing their alleged claims against the County and the State. [Footnote: Plaintiffs subsequently entered into a settlement with Franklin County that resolved both the previously contested issue of the Plaintiffs' manufactured home communities connection to the County's sewer system, and the claims set forth in the Plaintiffs' Second Amended Complaint.] On December 4, 2006, the State filed its Claim in this Court against Oak Hills. The State's Claim alleged five counts that include violations of Ohio's water pollution laws, R.C. Chapter 6111 and the Oak Hills' National Pollutant Discharge Elimination System (hereinafter "NPDES") permits Nos. 4PV00008\*DD and 4PV00008\*ED. Oak Hills answered the State's Claim on January 2, 2007. On April 17, 2008, the State amended its Claim to add Mr. DaGraca and KDM as parties. On June 6, 2008, Oak Hills, Mr. DaGraca and KDM jointly answered the State's amended Claim ("Answer").

There have been a number of additional pleadings. However, this 'Decision and Entry' addresses the arguments of the Third-Party Defendants for summary judgment.

### **STANDARD OF REVIEW**

First this Court must enumerate the required standard concerning a motion for summary judgment. The Court shall grant a motion for summary judgment if the

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<sup>1</sup> The filing of the pleading was timely due to a stipulation filed with the Court.

evidentiary materials in the case show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). The Ohio Supreme Court has ruled that “the moving party bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent's case.” *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292.

A motion for summary judgment must be backed by some type of evidence which shows that the nonmoving party has no evidence to support its claims. The moving party must point to Civ.R. 56(C) evidence in the record (i.e., pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, or stipulations of fact) that demonstrates the absence of any genuine issues of material fact. *Id.* at 293. If the moving party meets this test, the nonmoving party must rebut the motion with specific facts and/or affidavits showing a genuine issue of material fact that must be preserved for trial. *Id.* The court must construe the evidence against the moving party and grant summary judgment only when it appears that reasonable minds can reach but one conclusion which is against the nonmoving party. *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1, 2.

Having addressed the standard for review, this Court must now review the arguments of counsel.

### **LAW AND ARGUMENT**

This Court has reviewed the evidentiary material filed by the parties concerning this motion. When this Court has specifically relied upon a document or testimony, the source is referenced.

The Third-Party Defendants have asserted that the State cannot meet the requirements of *Belvedere Condominium Unit Assoc. v. R. E. Roark Cos., Inc.*, (1993) 67 Ohio St.3d 274 as modified by *Dombroski v. Wellpoint, Inc.*, Slip Opinion No. 2008-Ohio-4827.

The Third-Party Defendants have advanced evidence to establish that Mr. DaGraca is a resident of New York. They also asserted that KDM provided nothing more than payroll services to Oak Hills. (Affidavit of DaGraca at ¶6) Concerning the payroll issue the Third-Party Defendants cited to *Starner v. Guardian Industries* (2001), 143 Ohio App.3d 461. In *Starner* a payroll company was found not to be responsible because it did not exercise the necessary control to meet the *Belvedere* test.

The Third-Party Defendants also asserted that KDM is a New York corporation with its principal place of business in Pittsford, New York. (Martin Depo at P. 8) The Third-Party Defendants advanced evidence that showed that Mr. DaGraca was not the controlling shareholder in Oak Hills and therefore he could not exercise the type of control required to pierce the corporate veil.

The Third-Party Defendants claimed that the lack of common ownership was a defect in the State's claim that could not be cured. They pointed to the evidence that showed that KDM had no ownership interest in Oak Hills. Furthermore, the Third-Party Defendants established that there were at least seven different shareholders in KDM and Oak Hills and only two are shared. (Affidavit of Martin at ¶¶ 8 – 9) Building on that evidence, the Third-Party Defendants claimed that DaGraca's minority ownership of Oak Hills made it impossible for him to exercise the type of control necessary to pierce the corporate veil.

Next the Third-Party Defendants claimed that the corporate records where in existence and that Oak Hills was not undercapitalized. The only evidence of those two claims was Mr. Martin's deposition testimony. However, said testimony is not as clear as the Third-Party Defendants claim. Please note the following from the Martin deposition transcript filed with the court at page 98:

Q. Mr Martin, you should have in front of you what is marked as Exhibit 11. It should say at the top Minutes of the Annual Meeting of Oak Hills MHC, LLC.

A. Yes.

Q. Are you familiar with this document?

A. Yes.

Q Do you regularly have annual member meetings of Oak Hills MHC?

A We do send out a letter every year telling our members that we're going to have an annual meeting at a specific time, on a specific date for that year, yes

Q Okay. And this particular meeting was December 16th, 2005?

A. Yes.

Q. Do you normally keep minutes of annual meetings?

A. Believe it or not, this is the only time that somebody has showed up at one of our meetings We will call the meetings, but if nobody shows up, we usually don't take any notes. We just call the meeting and adjourn it, because nobody shows up.

The Third-Party Defendants asserted that there was no evidence that KDM or Mr. DaGraca took any active or affirmative action that would show that they violated R.C.§6111. The Third-Party Defendants also advanced the undisputed fact that neither of them are permit holders and that Mr. DaGraca has never signed personally for any debt of Oak Hills.

The Third-Party Defendants asserted the clear legal fact that piercing the corporate veil is not a 'remedy' to be taken lightly. There needs to be all of the elements of *Belvedere* present before this Court can ignore the corporate entity. In furtherance of that position, the Third-Party Defendants advanced the case of *Dombroski*, supra to show how the *Belvedere* test has been further constricted by the Ohio Supreme Court.

Finally, the Third-Party Defendants asserted that the way the state is interpreting the various statutes is incorrect. The Third-Party Defendants argued that the State is circumventing the legislative intent of the statutes as well as reading additional language into the statutes to assert its current claims. The Third-Party Defendants advance the following from the States' Motion for Leave to Amend its Counterclaim' as evidence of that point:

Revised Code 6111.07 prohibits *any* person from violating or failing to perform any duty imposed by R.C. 6111.01 through 6111.08. In order to address this prohibition, *all* potentially responsible parties must be included in the Counterclaim to determine the parties responsible for the violations. Therefore, these proposed new parties share responsibility with Oak Hills for the violations which have occurred at the Oak Hills wastewater treatment plant and are subject to injunctive relief and civil penalties sought by the State in this action pursuant to R.C. 6111.07 and 6111.09. *State's Motion for Leave* at 2-3. (No emphasis added).

The State cites only two code sections in its Amended Counterclaim as a basis to hold DaGraca and KDM individually liable for alleged violations of Oak Hills' NPDES permit. Those code sections are: R.C. §6111.07(A) and R.C. §6111.04. (Third-Party Defendants 'Motion for Summary Judgment' at page 20.)

The thrust of this argument is that the Third-Party Defendants believe they cannot be found responsible under either of those two code sections because they are not permit holders.

The State responded by stating that the Third-Party Defendants missed the point. The State's claims against both of the Third-Party Defendants are independent of the corporate veil issue. The State relied upon the following language from its Third-Party Complaint:

2. Oak Hills is, and at all times relevant to these amended counterclaims/cross-claims has been, the owner or operator of a wastewater treatment plant ("WWTP") located on or about 5965 Harrisburg-Georgesville Rd., Pleasant Township, Franklin County, Ohio 43123.

\* \* \* \* \*

4. Oak Hills' WWTP is, and at all times relevant to this pleading has been, discharging effluent to Big Darby Creek.

\* \* \* \* \*

7. Third-Party Defendant DaGraca is a member/ owner/ officer and/or employee of Oak Hills and of KDM. As part of his duties to Oak Hills and/or KDM, he provides direct supervision of the residential manager at Oak Hills Mobile Home Community in Ohio upon which the above mentioned WWTP is located. Third-Party Defendant DaGraca currently, and at all times relevant to these amended counterclaims/cross-claims, **has acted to authorize work and expenditures regarding the operation and maintenance of Oak Hills WWTP.**

8. Third-Party Defendant KDM is a New York corporation. **KDM** currently, and at all times relevant to these amended counterclaims/cross-claims, **employs Third-Party Defendant DaGraca** to provide management and other services for various mobile home communities in various states including Ohio. Third-Party Defendant KDM specifically provides management services and oversight to Oak Hills for its mobile home community in Ohio and **the above mentioned WWTP.** See State's Claim ¶¶ 2, 4, 7, 8. (Emphasis added)

The State asserted that if Mr. DaGraca or KDM failed to properly operate the wastewater treatment plants and therefore caused, contributed, or aided in polluting the waters, then they too can be liable.

The State further asserted that the holding of a permit was not a precondition to the State's ability to pursue a polluter; i.e., its claims against the Third-Party Defendants.

The State argued as follows:

Similarly, Ohio's water pollution control laws authorize liability against the person committing the violation, providing that "no person shall cause

pollution ...” and that “no person shall violate or fail to perform any duty imposed by sections 6111.01 to 6111.08 of the Revised Code or violate any order, rule or term or condition of a permit.” R.C. 6111.04 and 6111.07. The term person, in relevant part, means any person as defined in R.C. 1.59. See R.C. 6111.01(I). Revised Code 1.59 defines a person, in part, as an individual. Accordingly, the language in R.C. Chapter 6111 alone provides a sufficient basis for individual liability. (State’s ‘Memorandum in Opposition’ at page 10.)

The State supported that argument by citing to the *State ex rel. Petro v. Tri-State Group, Inc.*, 2004-Ohio-4441 decision. In *Tri-State*, the facts clearly allowed the court to ignore the corporate entity and find the sole shareholder responsible. Here the State cited to *Tri-State* to show that even though the permit in *Tri-State* was issued to the corporation, an individual non-permit holder was still held responsible.

The State advanced the ‘participation’ theory. Said theory is set forth in *Young v. Featherstone Motors, Inc.*, (1954) 97 Ohio App. 158 at 171. Please note the following from *Young*:

The evidence shows that the plaintiff was the sales manager, an officer and a director of Featherstone. Appellants contend that if Featherstone was negligent by failing to equip the motorcycle with a rear view mirror, such negligence is chargeable to the officers and directors of Featherstone, and that, therefore, plaintiff, being an officer and director, would be charged with such negligence, which would prevent recovery. A novel situation is presented, which raises an interesting legal question. In our opinion the negligence of Featherstone, if negligence be proved, would not be imputed to a single director or officer, under the circumstances in this case.

In 3 Fletcher, Cyclopedia on Corporations (Perm. Ed.), 711, Section 1137, the controlling rule is stated as follows:

"The general, if not universal, rule is that an officer of a corporation who takes part in the commission of a tort by the corporation is personally liable therefore; but that an officer of a corporation who takes no part in the commission of the tort committed by the corporation is not personally liable to third persons for such a tort, nor for the acts of other agents, officers or employees of the corporation in committing it, unless he specifically directed the particular act to be done, or participated, or co-operated therein." \* \* \*

On page 714, Section 1137, *ibid.*, it is stated:

"Officers of a corporation 'are not held liable for the negligence of the corporation merely because of their official relation to it, but because of some wrongful or negligent act by such officer amounting to a breach of duty which resulted in an injury \* \* \*. To make an officer of a corporation liable for the negligence of the corporation there must have been upon his part such a breach of duty as contributed to, or helped to bring about, the injury; that is to say, he must be a participant in the wrongful act.' And this is the rule prevailing in most of the jurisdictions." *Id.* at 171 – 172.

The State claimed that said theory provided it with a valid claim against Mr. DaGraca.

Among other things the State claimed that the evidence showed that Mr. DaGraca allowed the WWTP to be operated by an ineffective employee. (Eitel Depo at P.P. 102 – 110) That said problem was well known to Mr. DaGraca and that he did not take any timely steps to address the issue. The State then claimed that the evidence showed violations of the permit during the time when Mr. DaGraca had knowledge of the issue of the employee and the eventual firing of the employee. (DaGraca Depo at P.P. 58 – 59) Based on that, and giving the evidence the inference that is required in a summary judgment motion, the State claimed that summary judgment in favor of Mr. DaGraca should be denied.

As to the claims advanced by the State that are not subservient to the corporate veil argument, this Court holds that the Third-Party Defendants' failed in their burden and their 'Motion for Summary Judgment' is **DENIED**.

Next the State addressed its claims against KDM by reminding this Court of the legal doctrine of *respondeat superior*. The State relied upon the following language from *Bauman et al. v. Bob Evans Farms, Inc.*, et al, 2007-Ohio-145:

For an employer to be liable under the doctrine of respondeat superior, an employee's tortious act must be committed and, if an intentional tort, it must be calculated to facilitate or promote the employer's business or interest. *Wynn v. Ohio Dep't of Job & Family Servs.*, Franklin App. No. 04AP-163, 2005 Ohio 460, at P6, citing *Browning v. Ohio State Hwy.*

Patrol, 151 Ohio App. 3d 798, 2003 Ohio 1108, 786 N.E.2d 94, at P60; DiPietro v. Lighthouse Ministries, 159 Ohio App.3d 766, 2005 Ohio 639, 825 N.E.2d 630. Generally, if the employee tortfeasor acts intentionally and willfully for his own personal purposes, the employer is not responsible, even if the acts are committed while the employee is on duty. Browning, supra (citations omitted). In other words, "an employer is not liable for independent self-serving acts of his employees which in no way facilitate or promote his business." Byrd v. Faber (1991), 57 Ohio St.3d 56, 59, 565 N.E.2d 584; see, also, Groob v. Keybank, 108 Ohio St.3d 348, 358, 2006 Ohio 1189, at P58, 843 N.E.2d 1170 ("an employer is not liable under a theory of respondeat superior unless its employee is acting within the scope of her employment when committing a tort--merely being aided by her employment status is not enough"). Id. ¶13.

The State then follows up on its 'participation' theory by reminding this Court that KDM has already admitted in its answer that it is the employer of Mr. DaGraca. KDM also admitted in its pleadings and responses to discovery that Mr. DaGraca was responsible for the environmental compliance at the WWTP. Hence, under the facts and law, KDM is responsible for the actions or inactions of Mr. DaGraca.

As to the claims advanced by the State that are not subservient to the corporate veil doctrine that are based on *respondeat superior*, this Court holds that the Third-Party Defendants' failed in their burden and their 'Motion for Summary Judgment' is **DENIED.**

Next the State claimed that there existed a number of material issues of fact still in dispute as it related to the control that the Third-Party Defendants exercised over the permit holder.

The State addressed *Belvedere* as modified by the *Dombroski, supra*, ruling. As stated in those cases the corporate form may be disregarded and individual shareholders held liable for wrongs committed by the corporation when: (1) control over the corporation by those to be held liable was so complete that the corporation has no

separate mind, will, or existence of its own, (*Belvedere*, (1993), 67 Ohio St.3d 274); 2) the plaintiff must demonstrate that the defendant shareholder exercised control over the corporation in such a manner as to commit fraud, an illegal act, or a similarly unlawful act. Courts should apply this limited expansion cautiously toward the goal of piercing the corporate veil only in instances of extreme shareholder misconduct. (*Dombroski*, 2008-Ohio-4827); and, (3) injury or unjust loss resulted to the plaintiff from such control and wrong. (*Belvedere*, (1993), 67 Ohio St.3d 274)

First the State address the control issue. It advanced the following case law:

(1) adequacy of capitalization, (2) failure to observe corporate formalities, (3) insolvency of the debtor corporation at the time the debt is incurred, (4) shareholders holding themselves out as personally liable for certain corporate obligations, (5) diversion of funds or other property of the company property for personal use, (6) absence of corporate records, and (7) the fact that the corporation was a mere facade for the operations of the dominant shareholder(s). See *LeRoux's Billye Supper Club v. Ma* (CA 6<sup>th</sup> 1991) 77 Ohio App 3d 417, 422-423. Other control factors courts consider are the sharing of common management, employees, business address, and industry. See *Minno*, *supra*. Courts have considered whether the entity has an independent board of directors and whether there are structures in place that would temper an individual's control over the entity. See *Lewis v. DR Sawmill Sales, Inc.* (CA 10<sup>th</sup>), 2006 Ohio 1297, ¶28. Courts have looked to whether employees are doing work at the request of an individual, whether that individual is the only person in the corporate structure giving direction, and whether that individual is the only person with authority to authorize placement of equipment and make financial decisions. See *Tri-State Group, Inc.*, *supra* ¶ 77. (State's 'Memorandum in Opposition' at page 22)

The Third-Party Defendants had argued that there is no ownership interest between KDM and Oak Hills. Therefore, KDM argued that the issue of control cannot be established. However, the State has cited to *Minno v. Pro-Fab*, 2007-Ohio-6565, a case currently on appeal to the Ohio Supreme Court. The State relied upon the following reasoning as contained in *Minno*:

In either case, the question of control is not dependant upon ownership. As the Court stated in *Labadie Coal Co. vs. Black* (U.S. App. D.C. 1982), 672 F.2d 92, 97, a case in which private shareholders were alleged to control the corporation, the question is "whether the corporation, rather than being a distinct, responsible entity, is in fact the alter ego or business conduit of the person in control. In many instances, the person 'controlling' a close corporation is also the sole, or at least dominant shareholder. In other cases the controlling person may seek to avoid personal liability by not formally becoming a shareholder in the corporation. *The question is one of control, not merely paper ownership.*" (Emphasis added.) Thus, since we have determined that there was sufficient showing of control to overcome summary judgment, we reject Pro-Fab's arguments. *Id.* ¶ 44.

Therefore it is the State's position that ownership is not required to show control.

Next the State advanced evidence to establish that it was still a disputed fact that the corporate entity of Oak Hills, was undercapitalized and it failed to observe corporate formalities. The State pointed to the testimony of Mr. DaGraca were he established that neither KDM or Oak Hills had meetings. (DaGraca Depo at P. 13, L. 13 -1 9)

Furthermore, the State conducted extensive discovery in this area and very limited corporate documents have been produced. Therefore, the inference is that the documents do not exist.

The State also advanced evidence that Mr. DaGraca did not have any knowledge of the operating agreement for Oak Hills even though the document was signed by him. (DaGraca Dep. at P. 16, L. 23 -24, P. 17) Furthermore, there is nothing in writing to establish the scope of the relationship between KDM and Oak Hills. There is no evidence as to the control, or lack of control, over the various employees of each entity. Further complicating the issue is the fact that KDM, Oak Hills and Mr. DaGraca all share the same business address. (Martin Depo Ex. 10, DaGraca Depo at P. 5, L. 24 & P. 6, L. 1-4)

Finally, the State also pointed out that these alleged 'separate' parties filed a joint answer to the State's request for admissions, filed a joint answer to the State's claims, filed a joint third party complaint, and that in said pleading all three claimed to have a contract with the company that was running the WWTP in question.

Setting all of the above aside, the State also claimed that that evidence is not even necessary because of the holding in *Carter-Jones Lumber Co. v. LTV Steel Company*, (2001) 237 F.3d 745. *Carter-Jones* holds that even if capitalization and corporate records exist, it will not stop a court from piercing the corporate veil if the responsible party is polluting. That argument was adopted within *State ex rel. Petro v. Mercomp, Inc.* 2007-Oio-279, 167 Ohio App.3d 64 Please note the following from *Mercomp*:

Can it be that the shareholder is immunized from personal liability if he causes the corporation to commit an illegal act, no matter the degree of his control over the corporation with regard to the illegal act, no matter the harm to third parties, and no matter the other equities? Neither we nor the Ohio courts hold that such immunity exists." *Id.*, ¶ 26 (emphasis added).

Given the Civ.R.56 standard, clearly there remains material questions of fact concerning the control, capitalization, and use of the corporate forms to warrant the denial of a motion for summary judgment.

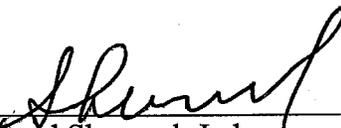
Concerning the second and third prong of the *Belvedere* test as modified by *Dombroski*, the State asserted that the violation of R.C.§6111.07 establishes the level of 'offense' necessary to pierce the corporate veil. The State reminded this Court that environmental violations are harmful to society at large. The State also cited to the authority found within *Kays v. Schregardus* (2000), 138 Ohio App.3d 225.

One must remember that a question concerning the bases for the piercing of the corporate veil is a fact question not normally susceptible to a motion for summary

judgment. And, within the framework of a Civ.R. 56 motion for summary judgment this Court agrees with the assertions of the State. Here it appears that reasonable minds can reach more than one conclusion. Therefore, the Third-Party Defendants' 'Motion for Summary Judgment' must be **DENIED**.

**DECISION AND ENTRY**

The 'MOTION OF THIRD-PARTY DEFENDANTS GEORGE DAGRACA AND KDM DEVELOPMENT CORPORATION FOR SUMMARY JUDGMENT AS FILED ON SEPTEMBER 15, 2008' is **DENIED**.

  
Richard Sheward, Judge

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