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U.S. Bankruptcy Appellate Panel of the Tenth Circuit

November 10, 1998

Barbara A. Schermerhorn Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE BYOC INTERNATIONAL, INC.; and NEW BYOC INTERNATIONAL, INC., Debtors.	BAP No. WO-97-103
WILLIAM CURRY MYLES and NEW BYOC INTERNATIONAL, INC., Appellants, v. AMERICAN JET CHARTER, INC., Appellee.	Bankr. No. 96-17474 Chapter 11 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Western District of Oklahoma

Before McFEELEY, Chief Judge, PUSATERI, and BOULDEN, Bankruptcy Judges.

McFEELEY, Bankruptcy Judge.

After examining the briefs and appellate record, the Court has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. See Fed. R. Bankr. P. 8012; 10th Cir. BAP L.R. 8012-1(a). The case is therefore submitted without oral argument.

This is an appeal from an order of the United States Bankruptcy Court for

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* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

the Western District of Oklahoma. For the reasons set forth below, we conclude the decision of the bankruptcy court must be reversed and the matter remanded for further proceedings.

JURISDICTION AND STANDARD OF REVIEW

The Bankruptcy Appellate Panel has jurisdiction to hear appeals from final judgments, orders, and decrees of bankruptcy judges within this circuit. 28 U.S.C. § 158 (1994). No party to the present appeal has opted to have this appeal heard by the District Court for the Western District of Oklahoma. The parties are therefore deemed to have consented to jurisdiction of the Bankruptcy Appellate Panel. 10th Cir. BAP L.R. 8001-1(a).

The Bankruptcy Appellate Panel may affirm, modify, or reverse a bankruptcy court's judgment, order, or decree, or remand with instruction for further proceedings. Fed. R. Bankr. P. 8013. "For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')." Pierce v. Underwood, 487 U.S. 552, 558 (1988).

BACKGROUND

The Debtor, BYOC International, Inc. ("BYOC") was organized to purchase and develop property in Oklahoma City. BYOC was solely owned by Oesman Sapta ("Sapta"). William Myles ("Myles") and Sapta were business partners. On several occasions, American Jet Charter ("AJC") was chartered to fly Sapta and other parties affiliated with BYOC to Las Vegas and Los Angeles. Myles sued Sapta in District Court for the Western District of Oklahoma alleging improper business practices. A default judgment was entered against Sapta. Upon initiation of the underlying Chapter 11 action, Myles filed a claim for the award. New BYOC International, Inc. ("New BYOC"), the reorganized debtor,

objected to Myles' claim, arguing that the claim was against Sapta, not BYOC. Myles submitted a Response arguing that BYOC was Sapta's alter ego. There was no hearing on BYOC's claim objection, and no determination that Sapta and BYOC were common entities. Soon thereafter, Myles entered into an agreement with New BYOC subordinating his claim in return for New BYOC agreeing to drop opposition to Myles' claim.

AJC submitted a proof of claim seeking reimbursement for three unpaid charter flights.[1] Myles objected to AJC's invoice dated March 8, 1996 urging that Sapta was obligated personally for the debt because it was billed to him, not to BYOC. Following a November 19, 1997 hearing on the objection, the bankruptcy court concluded there was no difference between Sapta and BYOC, and that AJC's claim should be allowed in full. The court based this decision on the alter ego argument that Myles had made in responding to New BYOC's objection to his claim. The bankruptcy court issued an order allowing the claim as submitted by AJC. Both Myles and New BYOC now appeal.[2]

DISCUSSION

In the order underlying the present appeal, the bankruptcy court concluded there was "no reason why the claim of American Jet Charter should not be allowed in full." In re BYOC International, Inc., No. 96-17474-TS (W.D. Okla. December 3, 1997). We do not agree.

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[1] The invoice dated February 11, 1996 for $10,048.50 reflected travel to Las Vegas and Los Angeles and was billed to BYOC International, Inc. The invoice dated March 8, 1996 for $7,796.25 reflected travel to Las Vegas and was billed to Oesman Sapta. The invoice dated March 15, 1996 for $7,796.25 reflected travel to Las Vegas and was billed to BYOC International, Inc.

[2] AJC has filed a motion to dismiss this appeal, contending that Myles lacks standing because of a decision by the Tenth Circuit Court of Appeals. Myles v. Sapta, Nos. 96-6374 & 97-6023, 139 F.3d 912, 1998 WL 45494 (10th Cir. filed February 5, 1998) (unpublished decision). This decision does not eliminate Myles' standing. Even if it did, AJC has not challenged the standing of New BYOC to prosecute the appeal. The motion is therefore denied.

Whether the bankruptcy court had sufficient evidence to conclude that AJC's March 8, 1996 invoice is an allowable claim is a question of fact, and therefore the clearly erroneous standard of review applies. See Floyd v. Internal Revenue Service, 151 F.3d 1295, 1298 (10th Cir. 1998) (clearly erroneous standard applies in reviewing alter ego determination); Lowell Staats Mining Co. v. Pioneer Uravan, Inc., 878 F.2d 1259, 1262 (10th Cir. 1989) (whether recognition of a separate corporate entity is justified is primarily a question of fact). "A finding of fact is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." Exxon Corp. v. Gann, 21 F.3d 1002, 1005 (10th Cir. 1994) (further internal quotation marks omitted); see Stegall v. Little Johnson Assoc. Ltd., 996 F.2d 1043, 1048 (10th Cir. 1993). "[A] finding of fact is [also] 'clearly erroneous' if it is without factual support in the record . . . ." Cowles v. Dow Keith Oil & Gas, Inc., 752 F.2d 508, 511 (10th Cir. 1985); accord Davidovich v. Welton (In re Davidovich), 901 F.2d 1533, 1536 (10th Cir. 1990); Bill's Coal Co. v. Board of Pub. Utils., 887 F.2d 242, 244 (10th Cir. 1989) (decisions of a trial court need not be "correct," but the conclusion of the trial court must be "permissible" in light of evidence). A bankruptcy court may not make a finding of fact that is not supported by evidence on the record.

Under Oklahoma's interpretation of the alter ego doctrine, a court may disregard the corporate entity and hold an individual liable if there is a showing not only that the corporation is a shell, but was used to commit a fraud.[3] See

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[3] Generally, state law governs alter ego actions, including actions premised upon a reverse piercing theory. See Cascade Energy & Metals Corp. v. Banks, 896 F.2d 1557, 1575 n.18 (10th Cir. 1990) (discussing choice of law issues related to piercing the corporate veil actions). The record reveals that BYOC is a "foreign corporation," but the order of the bankruptcy court is unclear as to what law it applied to determine that Sapta and BYOC were one in the same. What is

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Home-Stake Production Co. v. Talon Petroleum, C.A., 907 F.2d 1012, 1018 (10th Cir. 1990) (applying Oklahoma law). The alter ego doctrine fastens liability on those individuals who use the corporation for conducting personal business, and where recognition of the separate corporate identity would bring about a fraud not on the corporation but on third parties. See Home-Stake Production, 907 F.2d at 1018; Lowell Staats Mining, 878 F.2d at 1262; Fitzgerald v. Central Bank & Trust Co., 257 F.2d 118, 120 (10th Cir. 1958) (claim against president of bankrupt allowed to prevent fraud, injustice, or wrong).[4] To establish the alter ego doctrine, evidence must be presented that the individuals disregarded the entity of the corporation, made the corporation a conduit for personal business, that the separate individualities of the corporation and the individuals in fact ceased to exist, and that to treat the individuals and corporation separately would promote injustice or perpetrate a fraud. See Home-Stake Production, 907 F.2d at 1018 (listing alter ego factors applied under Oklahoma law); Oklahoma Oil & Gas Exploration Drilling Program 1983-A v. W.M.A. Corp., 877 P.2d 605, 609 (Okla. Ct. App. 1994), but see Thomas v. Vertigo, Inc., 900 P.2d 458, 460 (Okla. Ct. App. 1995) (disregarding corporate entity is not limited to alter ego or fraud in order to protect rights of third persons and accomplish justice).

We cannot support the conclusion of the bankruptcy court that, based upon the argument put forth in Myles' Response and the testimony of the president of

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[3] (...continued)
clear from the record is that BYOC had significant contacts in Oklahoma and, therefore, we rely upon Tenth Circuit and Oklahoma authorities.

[4] See also Luckett v. Bethlehem Steel Corp., 618 F.2d 1373, 1378-79 (10th Cir. 1980) (applying Oklahoma law in the context of parent and subsidiary entities); In re Gulfco Inv. Corp., 593 F.2d 921, 928 (10th Cir. 1979) ("It is, of course, proper to disregard a separate legal entity when such action is necessary to avoid fraud or injustice."); In re Eufaula Enters., Inc., 565 F.2d 1157, 1161 (10th Cir. 1977) (discussion in context of consolidating Oklahoma corporate entities); Fish v. East, 114 F.2d 177, 191 (10th Cir. 1940) ("Corporate entity may be disregarded where not to do so will defeat public convenience, justify wrong or protect fraud.").

AJC, sufficient and credible evidence was presented to pierce the corporate veil. Prior to the hearing, the bankruptcy court made no determination that BYOC was Sapta's alter ego. Myles' Response was not evidence on the record since no hearing was conducted on the objection to Myles' claim. The bankruptcy court, while acknowledging that there had been no ruling on the objection to Myles' claim, nevertheless relied on Myles' Response to determine that there was no difference between BYOC and Sapta.[5] In effect, the court applied against Myles the doctrine of judicial estoppel, which bars a party from adopting inconsistent

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[5] THE COURT: Let me say that I'm sitting here looking at a pleading filed on November 25, 1996. It's entitled William Curry Myles' Response to BYOC, International's Objection to Proof of Claim Combined with Objection to Inadequate Notice of Hearing, and so forth. And in this you -- this being Mr. Myles' own pleading, -- state that BYOC is Sapta's alter ego and neither BYOC's corporate veil should be -- and either BYOC's corporate veil should be discarded [sic] or BYOC and Sapta assets and liabilities should be substantially [sic] consolidated. And the fact that Mr. Myles is sitting on the -- was sitting on the creditors committee and there was no objection, doesn't that –

MR. WRIGHT [Myles' attorney]: There was an objection, Your Honor.

THE COURT: Well, there was no hearing on it. There was no substantial objection.

MR. WRIGHT: Yes, sir. The reason there was no hearing on it, because the Court will recall, the objection filed by Mr. Mumia, there was an opportunity for a hearing provided by the Court on several occasions that was passed. The reason that the claim was ultimately paid is because William Myles subordinated his claim to everybody else.

THE COURT: Yes, but that did not make him a creditor. The only basis for keeping him a creditor was that his judgment was against the individual, and this was a corporate bankruptcy.

MR. WRIGHT: Yes, sir.

THE COURT: And the only reason that he was considered a creditor and could be considered a creditor was that there was no difference between Sapta and BYOC.

MR. WRIGHT: We felt there was not. But the Court never ruled on that issue; and as you will recall, we stepped out -- down from the creditors committee voluntarily with urging of the Court.

THE COURT: Well, the Court is going to rule that there is no difference between Mr. Sapta and BYOC and is going to approve the claim.

MR. WRIGHT: Excuse me, Your Honor. With no evidence in the record whatsoever?

THE COURT: No. If you want to put on evidence, go ahead.

Aplt. App. at p. 24-25.

positions in the same or related litigation.[6] Upon *de novo* review, we conclude the Tenth Circuit does not recognize the doctrine of judicial estoppel for federal question cases, Osborn v. Durant Bank & Trust Co. (In re Osborn), 24 F.3d 1199, 1207 n.11 (10th Cir. 1994). This holding is applicable here because Myles' prior inconsistent position was presented in a pleading filed before the bankruptcy court.

Though the testimony of the president of AJC was offered into evidence at the hearing and noted by the bankruptcy court in the order allowing AJC's claim, this Court does not find the testimony persuasive for the conclusion that BYOC was Sapta's alter ego.[7] This is especially true in this case because AJC's claim against BYOC for the invoice billed to Sapta involves what is called "outside reverse-piercing" of BYOC's corporate veil, because a third party is trying to make the corporation liable for the individual shareholder's debt. The Tenth Circuit has indicated that this theory presents so many problems that we should not apply it absent a clear statement by the appropriate state supreme court that it would allow such piercing. Floyd, 151 F.3d at 1298-1300; Cascade Energy & Metals Corp. v. Banks, 896 F.2d 1557, 1575-76 and n.17 (10th Cir. 1990). We believe it is also appropriate to require more substantial evidence before the outside reverse-piercing theory might be applied. The testimony of the president of AJC that invoices previously billed to Sapta had been paid by both Sapta and

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[6] The bankruptcy court order indicates the court felt compelled to allow another claim objected to by Myles, the claim of Sapta's personal attorney, because Myles conceded that a creditor of Sapta was a creditor of BYOC.

[7] It is unclear from the testimony of the president of the AJC whether Sapta disregarded the corporate entity or used the corporation to conduct his personal business. The substance of the testimony of AJC's president is as follows: Sapta told the president whether to bill Sapta personally or the corporation for each trip; he observed Sapta conducting business on some of these trips; he is unsure whether Sapta conducted personal business on any of these trips. Aplt. App. at 28-30.

BYOC is not sufficient evidence by itself that BYOC was Sapta's alter ego.[8] Nor is this testimony enough evidence for the bankruptcy court to determine that "[h]aving heard the testimony, I'm more convinced than I was before that the claim should be allowed." Aplt. App. at 31. This Court determines the bankruptcy court clearly erred in ruling that AJC carried its burden to prove that the invoice dated March 8, 1996 and billed to Sapta is a debt of BYOC under the alter ego doctrine.[9]

CONCLUSION

For the reasons stated herein, the order of the United States Bankruptcy Court for the Western District of Oklahoma is REVERSED and the matter is REMANDED for further proceedings in accord with this opinion.

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[8] Although this testimony is some evidence that Sapta may have disregarded the corporate entity, it is not enough alone to invoke the extraordinary remedy of the alter ego doctrine. Indeed, such payment arrangements can be made while properly observing the corporate form, for example, by treating BYOC's payments of Sapta's bills as loans, advances on wages, or capital withdrawals, and treating Sapta's payment of BYOC's bills as repayments of loans or capital contributions. No evidence was presented to show how BYOC and Sapta treated the payments AJC's president described.

[9] In Proposition Three of its Reply Brief, Appellant asserts that the Appellee's claim is invalid because of Appellee's failure to hire an attorney for the presentation of its claim in bankruptcy court. While this Court agrees that it is necessary for a corporation to be represented by counsel, Flora Construction Co. v. Fireman's Fund Insurance Co., 307 F.2d 413, 414 (10th Cir. 1962) (finding that it is a well established rule that a corporation can only appear in a court of record through an attorney at law), interestingly, there does not appear to be anyone who appeared on behalf of AJC in the objection to the claim of AJC before the bankruptcy court. Aplt. App. at p. 22.