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United States Court of Appeals
Tenth Circuit

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ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

WALTER G. SEINSHEIMER COMPANIES, INC., Plaintiff-Appellee, v. F. DAIL HARPER, Defendant-Appellant.	No. 86-2670 (D.C. No. CIV-86-313-W) (W.D. Okla.)

ORDER AND JUDGMENT*

Before **McKAY**, **SEYMOUR**, and **EBEL**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. Therefore, the cause is ordered submitted without oral argument.

Plaintiff Walter G. Seinsheimer Companies, Inc. brought suit against defendant F. Dail Harper to hold him personally liable for

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

the balance of a judgment plaintiff obtained against the Harper Land and Cattle Company (the "Cattle Company"). The jury returned a verdict against defendant and the district court awarded plaintiff attorneys' fees. Defendant appeals from the district court's denial of his motion for judgment notwithstanding the verdict or, in the alternative, for new trial. Defendant also appeals from the order awarding attorneys' fees. We affirm.

Facts

The Cattle Company was incorporated in 1973 or 1974 for the purpose of running cattle on the Harper Ranch, which was owned by defendant and his family. Defendant was the sole shareholder of the Cattle Company.

In 1981, plaintiff entered into a contract with Cattle Company whereby plaintiff agreed to render consultative and advisory services to Cattle Company in connection with a multi-year, multi-million dollar development of the Harper Ranch. After family disputes, the development project folded, and the Cattle Company unilaterally terminated its contract with plaintiff.

Plaintiff originally brought suit against the Cattle Company and recovered a judgment for the sum of $85,000 plus $30,000 in attorney fees and costs. Plaintiff recovered $6,844.61 in partial satisfaction of this debt before the Cattle Company became insolvent.

Plaintiff subsequently brought this suit against defendant under alter ego and agency theories to hold defendant personally liable for the balance of the judgment against the Cattle Company.

The jury returned a verdict in favor of plaintiff under both the alter ego and agency theories for the sum of $108,175.39, with interest thereon and costs. The district court also awarded plaintiff $12,000 in attorneys' fees. Defendant moved for judgment notwithstanding the verdict or, alternatively, new trial, which the district court denied. Defendant now appeals.

Issues

Defendant raises five issues on appeal: (1) whether plaintiff is barred under the doctrine of res judicata from pursuing a claim against defendant because defendant's liability could have been litigated in the previous action against the Cattle Company; (2) whether the district court erred in allowing the jury to find defendant liable under the agency theory when that theory was presented for the first time in the Pretrial Conference Order; (3) whether plaintiff presented sufficient evidence to sustain a verdict under the agency theory; (4) whether the a plaintiff must prove fraud in order to pierce the corporate veil; and (5) whether the court erred in awarding plaintiff attorneys' fees.

I. RES JUDICATA

Defendant argues in general terms that plaintiff is barred under the claim preclusion doctrine of res judicata from bringing this action because defendant's liability could have been litigated in the previous action against the Cattle Company. This issue was not properly raised below in defendant's Motion for Judgment Nothwithstanding the Verdict or, alternatively, Motion for New Trial. Thus, it is not properly preserved on appeal. Nevertheless, if we were to reach the issue we would conclude that it is without merit because while it is true that plaintiff could have proceeded against defendant in the previous action, plaintiff was not required to do so. See Ponderosa Development Corp. v. Bjordahl, 787 F.2d 533, 536 (10th Cir. 1986) ("The defendants against whom plaintiffs seek to assert their alter ego claim were not 'opposing' parties [under Fed. R. Civ. P. 13(a)] in the earlier action. . . . Because plaintiffs' [present] claim against defendants was not against an opposing party in the earlier action, it is not barred by the compulsory counterclaim doctrine.").

II. AGENCY THEORY

Plaintiff argues that the district court erred in submitting the agency theory to the jury because that theory was mentioned for the first time as an issue in plaintiff's portion of the pretrial order.[1] We find no merit to defendant's argument. Defendant's counsel signed the pretrial order without any objection. In fact, defendant made no objection to the inclusion

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[1] Plaintiff's issues in the pretrial order are as follow:

(a) Whether Harper Land and Cattle Company was so organized, controlled, and its affairs so conducted, that it was but a mere adjunct and alter ego of the Defendant, such as to create personal liability of the Defendant?

(b) Whether Harper Land and Cattle Company executed the contract with Plaintiff as agent of the Defendant so as to create personal liability?

(Doc. 39, emphasis added.)

of the agency issue until the first day of trial. Although defendant's objection may have been well-taken if it had been made during the pretrial conference when the issue first came to his attention, we believe the objection was untimely and did not preserve the issue for our review. See Fed. R. Civ. P. 46 ("it is sufficient that a party, at the time the ruling or the order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor); see also Neu v. Grant, 548 F.2d 281, 286-88 (10th Cir. 1977).

III. SUFFICIENCY OF THE EVIDENCE ON AGENCY

Defendant argues that plaintiff presented no evidence to support a verdict on the agency theory.[2] A judgment notwithstanding the verdict may be granted "only if the evidence points but one way and is susceptible to no reasonable inferences supporting the party [opposing the motion]; we must construe the evidence and inferences most favorably to the nonmoving party." Zimmerman v. First Federal Sav. & Loan Ass'n, 848 F.2d 1047, 1051 (10th Cir. 1988).

We find sufficient evidence in the record to support a verdict finding that the Cattle Company was an agent to defendant:

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[2] In a related argument, defendant asserts that under the doctrine of election of remedies, plaintiff is barred from recovering against him as a principal to the contract when plaintiff had already recovered against the Cattle Company, the alleged agent. Defendant did not raise this issue below, so we need not consider it on appeal. See Singleton v. Wulff, 428 U.S. 106, 120 (1976) (federal appellate courts generally do not consider issues not raised below); United States v. Richard, 738 F.2d 1120, 1121 n.2 (10th Cir. 1984) (same).

[Direct examination of plaintiff by plaintiff's attorney:]

Q. Let's concentrate for a few minutes on the development scheme behind the project. What is your understanding from the family's point of view as to who was spearheading the project?

A. This was [Harper's] project, no question about it.

. . . .

A. These documents indicated that a corporation or a partnership would be formed. There were different types, different entities would be formed by [Harper] to be the general partner and the developer/partner of the ranch lands and that other family members would be limited partners and invest, in essence, put the land into the deal. [Harper] would be the developer and there was a whole series of these documents I looked at.

. . . .

Q. Why were you told that it was Harper Land and Cattle Company that was to sign this contract?

A. Only was because it was a temporary vehicle that he was using. It was a corporation that he totally controlled and none of the other family members were involved in that corporation.

. . . .

Q. What were you told was the need for a temporary vehicle?

A. I was told by [Harper] that the need for the company -- the corporation was that it was only temporary until they formed the development company, which would be the actual development corporation for the ranch land, for the ranch development. And that this was only a temporary vehicle.

. . . .

A. That [the Cattle Company] had been in business for a long time and he said, you know, "Stop it, don't worry about it. You are doing business with me anyway."

. . . .

[Direct examination of defendant by plaintiff's attorney:]

Q. Do we understand correctly that it was never the intent that Harper Land and Cattle Company, the corporation which you own, was to ultimately be the responsible party for the fees of [plaintiff]?

A. Well, yeah, I assume that's right.

Q. [Plaintiff] knew that he was dealing with you, Mr. Dail Harper, did he not?

A. Yes.

(Tr. at 23, 24, 31, 32, 33, 128.)

The above quoted portions of the record leave us with no doubt that there was sufficient evidence to sustain a verdict that the Cattle Company was the agent of defendant.

IV. ALTER EGO

Defendant argues that the district court erroneously instructed the jury on the necessary elements of alter ego. Because the jury separately and independently found for plaintiff on the alternate theory of agency, which is supported by the record (Doc. 44 at 1.), we need not address the propriety of the jury instruction on alter ego.

V. ATTORNEYS' FEES

Defendant argues that the district court erred in awarding plaintiff attorneys' fees. Defendant argues that 12 Okla. Stat. Ann. § 936, which allows attorneys' fees for certain civil actions, does not proved for attorneys' fees in actions to hold a principal or alter ego liable on a debt. We disagree. The issue tried in this case is whether defendant is liable to plaintiff under the contract. The fact that the amount of liability had already been established in the previous action does not diminish the true nature of this case, which is defendant's personal liability under the contract. Therefore, we find no fault with the district court's award of attorneys' fees to plaintiff under Oklahoma law.

VI. CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgment and award of attorneys' fees against defendant.

Entered for the Court

DAVID M. EBEL
Circuit Judge