

STATE OF MICHIGAN
COURT OF APPEALS

JACK E. LIPP and JANET L. LIPP,

Plaintiffs-Appellants,

v

JOHN O. BRUCE, d/b/a J.B. LOG HOMES, INC.,

Defendant-Appellee.

UNPUBLISHED

October 9, 2007

No. 270264

Iron Circuit Court

LC No. 04-003099-CH

Before: Jansen, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Following a jury trial in this breach of contract case, plaintiffs were awarded \$60,000 in damages. Plaintiffs now appeal by right the trial court's pretrial order granting summary disposition in favor of defendant John O. Bruce, individually, and dismissing him as a party from this action. We affirm.

I

This action arose out of the defective construction of plaintiffs' log home. There was conflicting testimony regarding whether plaintiffs contracted with John Bruce or J.B. Log Homes, Inc., and regarding whether the contract was in writing. As sole shareholder of J.B. Log Homes, defendant stated during his deposition that all individuals who worked on the log home were employees of J.B. Log Homes, that he was in charge of construction, and that he personally directed all those involved. A log homebuilder inspected the home after it was finished and concluded that there were numerous construction defects.

Plaintiffs filed this action against J.B. Log Homes and John Bruce, individually, alleging inter alia breach of contract, negligence, and violation of the residential builder's act, MCL 339.2401 *et seq.* Defendants moved for summary disposition, arguing that the corporate structure should not be disregarded and that Bruce should not be held individually liable. The trial court granted the motion for summary disposition and dismissed John Bruce as a party from this action. Following a jury trial, plaintiffs were awarded \$60,000 in damages against J.B. Log Homes.

II

We review de novo a trial court's decision on a motion for summary disposition. *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003). We also review de novo the question whether to pierce the corporate veil. *Law Offices of Lawrence J Stockler v Rose*, 174 Mich App 14, 43; 436 NW2d 70 (1989).

III

Plaintiffs argue that the trial court erred by dismissing John Bruce individually because a corporate shareholder or employee is personally liable for all tortious conduct, including negligence, in which he or she participates even if done on behalf of the corporation. We disagree.¹

While agents and officers of a corporation are generally not personally liable for contracts made on behalf of the corporation, 18B Am Jur 2d, Corporations, § 1587, p 576, they may be held individually liable for the torts that they commit while acting on behalf of the corporation, *Baranowski v Strating*, 72 Mich App 548, 559-560; 250 NW2d 744 (1976); *Warren Tool Co v Stephenson*, 11 Mich App 274, 300; 161 NW2d 133 (1968). Although plaintiffs claim that Bruce was negligent in this case, and despite the fact that negligence is a tort, plaintiffs' argument that Bruce should have been held personally liable for his negligent conduct must fail as a matter of law.

Plaintiffs assert that Bruce should have been held personally liable for the negligent construction of their log home. But the failure to properly perform a contractual duty cannot give rise to a negligence action unless the plaintiff alleges a violation of a duty separate and distinct from the duty imposed under the contract. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 461-462; 683 NW2d 587 (2004). Such a separate duty was not alleged here. In this case, plaintiffs' allegations of "negligence" were based solely on Bruce's alleged breach of the obligation undertaken pursuant the contract with plaintiffs. The pleadings contained absolutely no allegation that Bruce owed plaintiffs a duty separate and distinct from this contractual obligation. See *id.* Accordingly, there was no negligent or otherwise tortious conduct in this case for which Bruce could have been held personally liable. We reject plaintiffs' argument in this regard.²

¹ Defendant argues that this issue is not properly preserved because it was not raised before and decided by the trial court at the time of the hearing on the motion for summary disposition. We acknowledge that the motion for summary disposition was based primarily on the question whether the corporate veil should be pierced in this case. However, we reject defendant's argument in this regard. Contrary to defendant's position, plaintiffs raised this issue in their response to the motion for summary disposition. Accordingly, even though the trial court did not strictly address it, this argument is preserved for appellate review. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

² According to the special verdict form contained in the lower court file, the jury was instructed to answer the question whether the contract was "inadequately improperly and/or negligently performed by the Defendant, J.B. Log Homes, Inc." The jury answered this question in the affirmative. Strictly speaking, the jury should not have been permitted to consider whether the
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IV

Plaintiffs also argue that that the trial court erred in granting summary disposition in favor of Bruce because there was sufficient evidence that the corporate form should be disregarded. Again, we disagree.

It is a general principle that Michigan courts will respect the existence of separate entities. *Wells v Firestone Tire & Rubber Co*, 421 Mich 641, 650; 364 NW2d 670 (1984). The fiction of distinct corporate existence is a convenience introduced into the law to serve the ends of justice. *Id.* “However, when this fiction is invoked to subvert justice, it may be ignored by the courts.” *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 456; 559 NW2d 379 (1996).

Generally, a court is warranted in disregarding the separate existence of a corporation where (1) the corporate entity is a mere instrumentality of another individual or entity, (2) the entity was used to commit a wrong or fraud, and (3) there is an unjust injury or loss to the plaintiff. *Rymal v Baergen*, 262 Mich App 274, 293-294; 686 NW2d 241 (2004). “There is no single rule delineating when a corporate entity should be disregarded, and the facts are to be assessed in light of a corporation’s economic justification to determine if the corporate form has been abused.” *Id.* at 294.

It is true that piercing the corporate veil is not in and of itself a cause of action, but rather a doctrine that may fasten liability on an individual who misuses the corporate form. See *In re RCS Engineered Products Co, Inc*, 102 F3d 223, 226 (CA 6, 1996); see also *Aioi Seiki, Inc v JIT Automation, Inc*, 11 F Supp 2d 950, 953-954 (ED Mich, 1998). Nonetheless, the burden of proving that the corporate form should be disregarded is on the party seeking to have the trial court pierce the corporate veil. 1 Fletcher, *Cyclopedia Corporations*, § 41.28, pp 610-611.

With respect to the first prong of the *Rymal* test, the evidence in this case showed that non-payroll transfers were made from the corporate account to Bruce’s personal account and to pay Bruce’s child support obligations. This evidence suggested that John Bruce, at times, used J.B. Log Homes as an instrumentality of himself. We will therefore assume for the sake of argument that the first prong of the *Rymal* test was satisfied in this matter.

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contract was “negligently performed” because, as noted above, the mere failure to perform a contractual duty gives rise only to liability for breach of contract and cannot give rise to liability for negligence. *Fultz, supra* at 461-462. However, we find that the jury’s verdict was nonetheless proper because the jury alternatively found that defendant had breached its contract with plaintiffs. Instructional error warrants reversal only if the error resulted in such unfair prejudice that the failure to vacate the jury verdict would be inconsistent with substantial justice. MCR 2.613(A); *Ward v Consolidated Rail Corp*, 472 Mich 77, 84; 693 NW2d 366 (2005). Here, while it was error to instruct the jury to consider the theory of negligent performance of the contract, it is not inconsistent with substantial justice to allow the verdict to stand. The verdict is adequately supported by the jury’s alternative finding that there was a contract between the parties and that defendant breached the contract.

On appeal, plaintiffs argue that the second prong of the *Rymal* test was satisfied as well because Bruce misused the corporate form to commit a violation of 1979 AC, R 338.1533,³ which required him to deliver written and executed copies of all construction contracts to plaintiffs. The problem with plaintiffs' assertion in this regard is that it was never pleaded below. A thorough examination of the record reveals that plaintiffs never suggested that the corporate form had been misused, or that defendant had violated 1979 AC, R 338.1533, until responding to the motion for summary disposition.

Plaintiffs who seek to have the trial court disregard the corporate form must specifically plead facts sufficient to justify piercing the corporate veil. 18 CJS, Corporations, § 17, p 289. If such grounds for piercing the corporate veil are not pleaded, they are waived. 1 Fletcher, Cyclopaedia Corporations, § 41.28, pp 614-615. Because plaintiffs never raised or otherwise addressed the alleged violation of 1979 AC, R 338.1533 in any of their pleadings, we conclude that they waived this alleged ground for disregarding the corporate form. Without sufficient allegations to show that J.B. Log Homes, itself, was used to commit an alleged fraud or wrong, plaintiffs have failed to make the requisite showing to allow piercing of the corporate veil. See, e.g., *SCD Chem Distributors, Inc v Medley*, 203 Mich App 374, 382; 512 NW2d 86 (1994). Summary disposition was properly granted in favor of Bruce on this issue.

In light of our conclusions above, we need not address the parties' remaining arguments on appeal.

³ At the time, 1979 AC, Rule 338.1533 provided:

(1) A builder or contractor shall deliver to his customers fully executed copies of all agreements between them, including specifications, and when construction is involved, both plans and specifications. He shall make certain that all such writings are definite in their terms and sufficient to express the intent of the parties with regard to the transaction, the type and amount of work to be done, and the type and quality of materials to be used, and the parties shall adhere to applicable building, housing, and zoning regulations.

(2) If a purchase or sales agreement is for a new structure which is either substantially completed or in substantial conformance with a model, plans and specifications need not be furnished if the structure is specifically identified or related to the model and any changes, additions to or subtractions from the model are specifically agreed to and noted.

(3) Changes in the agreement shall be in writing, dated and initialed by the parties to be bound.

Affirmed.

/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey