

STATE OF MICHIGAN  
COURT OF APPEALS

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NEW PROPERTIES INC, ROBERT W KITCHEN,  
and HARRIET KITCHEN,

UNPUBLISHED  
June 26, 2012

Plaintiffs-Appellants,

v

No. 301910  
Antrim Circuit Court  
LC No. 2009-008504-CZ

LAKES OF THE NORTH ASSOCIATION,

Defendant-Appellee.

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Before: M. J. KELLY, P.J., and WILDER and SHAPIRO, JJ.

PER CURIAM.

Plaintiffs appeal an order of dismissal following a bench trial. We reverse and remand for further proceedings.

In 1995, plaintiffs Robert and Harriet Kitchen formed New Properties, Inc., with George D. Newpower, Jr. (“Newpower”). Newpower embezzled approximately \$755,000 from plaintiffs through New Properties. In 1995 and 1996 Newpower was the President, Vice President, Secretary, Treasurer, Director, Chief Executive Officer and Chief Operating Officer of Lakes of the North Real Estate, Inc. (“Realty”). During that time, Newpower embezzled over \$100,000 from Realty, but replaced most of those funds with money he embezzled from plaintiffs.

Plaintiffs discovered the fraud and filed suit against Newpower and Realty, among others, by February of 1997. Eventually, this Court held that Realty was liable for the fraudulent conduct of Newpower.<sup>1</sup> On March 19, 2009, the trial court entered a judgment against Realty for plaintiffs. As of October 12, 2010, the amount of the judgment was \$847,094.31. Plaintiffs sought to recover from Realty by piercing the corporate veil to obtain the judgment amount from Lakes of the North Association (defendant or “Association”). Following a bench trial the trial court dismissed the case, concluding that plaintiffs could not pierce the corporate veil to hold defendant liable.

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<sup>1</sup> *New Properties, Inc v Newpower* (“*New Properties I*”), unpublished opinion per curiam of the Court of Appeals, issued September 14, 2006 (Docket No. 259932).

We review a trial court's findings of fact in a bench trial for clear error, and review its conclusions of law de novo. *Florence Cement Co v Vettriano*, 292 Mich App 461, 468; 807 NW2d 917 (2011). We review a trial court's decision to pierce the corporate veil de novo. *Id.*

On appeal, plaintiffs argue that the trial court erred by declining to pierce the corporate veil to hold defendant liable for plaintiffs' judgment against Realty. We agree.

Generally a corporation is treated as an entity separate from its shareholders; this is a legal fiction created to serve the ends of justice. *Foodland Distrib v Al-Naimi*, 220 Mich App 453, 456; 559 NW2d 379 (1996). The court may ignore the corporate form if it is being used to undermine justice. *Id.* "The entire spectrum of relevant facts forms the background for such an inquiry, and the facts are to be assessed in light of the corporation's economic justification to determine if the corporate form has been abused. *Klager v Robert Meyer Co*, 415 Mich 402, 411-412; 329 NW2d 721 (1982).

"In order for a court to order a corporate veil to be pierced, the corporate entity (1) must be a mere instrumentality of another individual or entity, (2) must have been used to commit a wrong or fraud, and (3) there must have been an unjust injury or loss to the plaintiff." *Florence Cement Co*, 292 Mich App at 469.

In order for plaintiffs to pierce the corporate veil, Realty must have been a mere instrumentality of defendant. *Id.* The parties agreed that Realty was incorporated in 1992 as a result of discussion with defendant; defendant was the sole shareholder of Realty, but Realty never paid any dividends to defendant; defendant owned the building from which Realty operated and charged either no rent or \$1.00 per month from 1992 through 1997; there are no records of annual shareholder meetings for Realty from 1993 through 1996; between April 29, 1996, and January 7, 1997, there is only one record of a Board of Directors meeting for Realty; and from 1992 until dissolution in 2001, Realty owned only a small amount of office equipment and supplies, valued at less than \$2,000.00.

The parties also stipulated that no evidence showed that Realty ever kept any type of minute book or issued any stock certificates; defendant covered shortfalls in Realty's trust accounts that were created because of Newpower's fraud; and defendant also paid for Realty's litigation in connection with plaintiffs' previous suit against Newpower. While Dorothy Francis, a broker at Realty, testified that she considered Realty to be a separate operation, she also called Realty an "amenity" to defendant. The parties agreed, and Francis testified, that Realty operated as an information center for defendant. Chris Olson was defendant's general manager from August 1996 to December 1998, and testified that based on the stipulated facts he did not consider Realty to be a standalone entity.

"Essentially, where members do not treat an artificial entity as separate from themselves, neither will this Court." *Florence Cement Co*, 292 Mich App at 470. Defendant failed to treat Realty as separate from itself, and the facts indicated that Realty had little regard for corporate formalities. Based on the stipulated facts and testimony regarding the relevant background, Realty was a mere instrumentality of defendant. *Foodland Distributors*, 220 Mich App at 456-457.

In addition, plaintiffs were required to show that Realty was used to commit a fraud or wrong. *Florence Cement Co*, 292 Mich App at 469. In *New Properties I*, this Court held that Realty was liable for the fraudulent conduct of Newpower. *New Properties I*, unpub op at 21. In determining that Realty was liable the *New Properties I* Court said,

Lakes of the North [Realty] benefited from Newpower's embezzlement of plaintiffs' [Kitchens] funds. Without the embezzled funds, Lakes of the North would be out the \$93,000.00 Newpower embezzled from it. However, Lakes of the North still has plaintiffs' money and thus in taking the gains of Newpower's fraud, it must also take the consequences of it. [*Id.*]

This Court and the trial court are bound by the law of the case to accept this conclusion that Realty was used to commit a fraud or wrong. *New Properties, Inc v Newpower* ("*New Properties II*"), 282 Mich App 120, 132; 762 NW2d 178 (2009).

Further, defendant, like Realty, benefited from Newpower's embezzlement of plaintiffs' funds. The parties stipulated that defendant had actual knowledge of Newpower's fraud and plaintiffs' loss by February 14, 1997. The parties further stipulated that defendant covered shortfalls in Realty's trust accounts, created by Newpower, and that none of the funds given by defendant to Realty were ever paid to plaintiffs. Defendant chose to only cover the shortfalls that plaintiffs' funds did not, which allowed defendant to save roughly \$100,000.00. Defendant effectively took the gains of Newpower's fraud by choosing only to cover the shortfalls not covered by plaintiffs' funds, despite knowing that plaintiffs' funds had been wrongfully deposited into Realty's accounts. Defendant used Realty to commit a fraud or wrong by perpetuating Newpower's fraud.

Finally, plaintiffs were required to demonstrate that they suffered an unjust loss or injury. *Florence Cement Co*, 292 Mich App at 469. Newpower embezzled approximately \$755,000.00 from plaintiffs, with roughly \$100,000.00 of that being deposited into Realty's trust accounts; therefore, plaintiffs suffered an unjust loss or injury. Defendant objects that plaintiffs have recovered more than they lost to begin with. However, plaintiffs are entitled to recover three times what they lost, and there is no dispute that this has not occurred.<sup>2</sup>

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<sup>2</sup> Plaintiffs recovered \$2,687,730.27 from defendants FMB Northwestern Bank and Muriel Hart, both parties in *New Properties I* but not parties to this current appeal. The breakdown of the award was as follows: Single damage award=\$306,996.56, which was trebled per MCL 600.2919a, to \$920,989.68; Attorney Fees=\$601,758.93; Interest=\$1,164,981.66. Plaintiffs' judgment against Realty as of October 12, 2010, was \$847,094.31. The breakdown of the award was as follows: Single damage award=\$100,000.00, which was trebled per statute MCL 600.2919a, to \$300,000.00; the remaining \$547,094.93 represents interest and attorney fees. Plaintiffs' single damage awards total \$406,996.56 and Newpower embezzled roughly \$755,000; therefore plaintiffs have not fully recovered what they are entitled to.

Based on the facts and circumstances discussed, we find that plaintiffs have satisfied the requirements to pierce the corporate veil.

The trial court erred when it did not allow plaintiffs to pierce the corporate veil. Realty was nothing more than a mere instrumentality of defendant, and Realty was used to perpetuate Newpower's fraud against plaintiffs. Plaintiffs are entitled to recover the judgment against Realty from defendant.

Reversed and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly

/s/ Kurtis T. Wilder

/s/ Douglas B. Shapiro