S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

EWI WORLDWIDE, INC., f/k/a EXHIBIT WORKS, INC., Plaintiff-Appellee,	UNPUBLISHED January 20, 2011
v	No. 295167 Oakland Circuit Court LC No. 2008-093022-CK
LIFESTYLE RETAIL PARTNERS, LLC, DINO ROTONDO, KELLEY ORESKY, IZZAT HANNA, EMMETT DENHA, LIFESTYLE VENTURES, LLC, and LIFESTYLE COMMUNICATIONS, LLC, Defendants,	
and	
GLOBAL NETWORK COMMUNICATIONS, INC., a/k/a WIRELESS GIANT, Defendant-Appellant.	

Before: FORT HOOD, P.J., and MURRAY and SERVITTO, JJ.

PER CURIAM.

Defendant Global Network Communications, Inc. (Global) appeals as on leave granted from the trial court's order denying in part its motion for summary disposition. We reverse and remand for further proceedings consistent with this opinion. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

At issue in this case is whether the trial court erred in finding a question of fact that the enterprise formed by Lifestyle Ventures, LLC and Wireless Giant Investments, LLC, called

Lifestyle Retail Partners, LLC, was a joint venture or an "alter ego" of Global such that Global is liable for its debts.[1]

Lifestyle Retail Partners, LLC was created for the purpose of developing "mobile lounge" kiosks to sell mobile phones and related products. Lifestyle Ventures, LLC and Wireless Giant Investments, LLC each owned a 50% share in the new company. The articles of organization for Lifestyle Retail Partners, LLC as a limited liability company were filed with the State of Michigan on March 1, 2006.

Contracts were executed between plaintiff and Lifestyle Retail Partners, LLC to design and construct "mobile lounge/kiosks." Plaintiff received a partial payment of $300,000 from Lifestyle Retail Partners, LLC and constructed and delivered two kiosks. Plaintiff worked on, but did not deliver a third kiosk. In the meantime, sales from the kiosks were weak and Lifestyle Retail Partners, LLC failed as a business. On October 1, 2007, Lifestyle Ventures, LLC and Wireless Giant Investments, LLC executed a separation agreement ending their business relationship. That separation agreement acknowledged that Lifestyle Retail Partners, LLC currently owed plaintiff approximately $477,000 for construction of the third, undelivered kiosk. Lifestyle Retail Partners, LLC and Lifestyle Ventures, LLC agreed to indemnify and hold harmless Wireless Giant Investments, LLC and its officers and owners against any claims arising from the debt owed to plaintiff.

Plaintiff sued Lifestyle Retail Partners, LLC and Global to collect the money owed, alleging claims for breach of contract, unjust enrichment, fraud, and conversion. Plaintiff did not name Wireless Giant Investments, LLC in its complaint, but instead sued "Wireless Giant, an assumed name for Global Network Communications, Inc." Lifestyle Communications, LLC and Lifestyle Ventures, LLC were later added as necessary parties.

Global moved for summary disposition of plaintiff's complaint pursuant to MCR 2.116(C)(8) and (10), arguing that it could not be held liable because it was not a party to the contract between plaintiff and Lifestyle Retail Partners, LLC. Plaintiff argued that Global was contractually liable for the actions of its joint venture Lifestyle Retail Partners, LLC. Plaintiff also argued that it should be allowed to "pierce the corporate veil" of the subsidiary corporations and hold Global liable for their debts under an "alter ego" theory. Plaintiff argued that questions of fact existed regarding its breach of contract claims against Global based on a theory of joint venture/alter ego liability. Plaintiff claimed that Lifestyle Retail Partners, LLC was a mere instrumentality of Lifestyle Ventures, LLC and Global, with no existence of its own, and that Wireless Giant Investments, LLC was a subsidiary created by defendant Global for the sole purpose of attempting to insulate Global from liability.

The trial court found that although no valid claim for conversion or fraud was made, material questions of fact existed that precluded granting Global summary disposition of plaintiff's claims for breach of contract and unjust enrichment. The trial court found that Global

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[1] "Defendant" in this opinion refers to Global.

could be found liable for the debt "based on a theory of joint venture liability and/or alter ego liability," explaining as follows:

> The key factors in supporting the doctrine of alter ego liability is that it was Wireless Giant [meaning Global] which provided the personnel for the 2.5 million dollar training facility and according to Mr. Hanna (sole shareholder of [Global]) [Global] provided the point of sale program to operate the kiosk. Finally, there is a question of fact remaining that Wireless Giant Investments, the other partner in Lifestyle Retail Partners, LLC, was anything other than a mere instrument of [Global]. *In re RCS Engineered Prod Co Inc*, 102 F3d 223 (CA 6 1996).
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> Upon review of the materials presented, the court finds that there is a genuine issue of material fact as to plaintiff EWI Worldwide's complaint for breach of contract. The court finds that there is a genuine issue of material fact that [Global] is liable for the EWI contract based upon Memorandum of Agreement, Separation Agreement, and documents demonstrating the intent to create a joint venture in Lifestyle Retail Ventures.
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> There is also a question of fact based upon a theory of alter ego based upon the testimony of Mr. Hanna who admitted that Wireless Giant Investments was a subsidiary of [Global]. In addition, [Global] provided the personnel to train the individuals responsible for the Lifestyle Retail Partners mobile lounge kiosk project. There is sufficient evidence to create a question of fact on plaintiff's breach of contract claim against [Global] on a theory of alter ego, joint venture liability. *SCD Chemical Distributors Inc v Medley*, 203 Mich App 374; 512 NW2d 86 (1994).

Based on similar reasoning, the trial court found that questions of fact existed which allowed plaintiff's claim against Global to proceed under an alternative theory of unjust enrichment. The court wrote:

> The court finds that there is a valid unjust enrichment claim by EWI Worldwide against Wireless Giant [sic, Global] based on the evidence of the acknowledgment of the debt and the evidence of the benefit received in terms of the Oakland Mall Mobile Lounge Kiosk as well as no express contract between EWI Worldwide and [Global].

Global moved for reconsideration, which the trial court denied.

In this Court, Global first argues that the trial court erred in finding that it was a member of the joint venture. We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, the non-moving party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base

his case. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). "Whether or not a joint venture exists is a legal question for the trial court to decide." *Berger v Mead*, 127 Mich App 209, 214; 338 NW2d 919 (1983). Questions of law are reviewed de novo. *Anzaldua v Band*, 457 Mich 530, 533; 578 NW2d 306 (1998).

We find that the trial court erred by denying Global's motion for summary disposition. The project was not a joint venture because it was not organized for a single project. Also, the court cited no evidence which would justify "piercing the corporate veil" and holding Global directly liable for Lifestyle Retail Partners, LLC's debt to plaintiff.

The trial court found that Global and Lifestyle Ventures, LLC had entered into a joint venture known as Lifestyle Retail Partners, LLC, and because of this both could be held liable for the debts incurred as partners to the joint venture. When analyzing an enterprise to see if it is a joint venture, courts must look to the intent of the parties, specifically considering the existence of: (1) an agreement indicating an intention to undertake a joint venture; (2) a joint undertaking of; (3) a single project for profit; (4) a sharing of profits as well as losses; (5) contribution of skills or property of the parties; (6) community interest and control over the subject matter of the enterprise. *Berger*, 127 Mich App 214-215.

The trial court erroneously concluded this was a joint venture. It was not. Lifestyle Retail Partners, LLC was not created for a single project. The Memorandum of Agreement indicates that the project would have a certain number of "executions," kiosks, and freestanding stores "to be rolled out first regionally and then on a national basis, as well as such other opportunities as the parties may mutually agree to undertake in writing." In *Fletcher v Fletcher*, 206 Mich 153, 167; 172 NW 436 (1919), our Supreme Court observed, "In nearly all the cases cited by counsel upon the subject of joint adventure, it appears that the adventure related to a single and isolated transaction. It is true that there are some exceptions to this statement, but in the main it will be found to be true." The project envisioned by the Lifestyle Retail Partners, LLC agreement went beyond the "single project" required to be a joint venture.

Moreover, the trial court's ruling minimized or disregarded the fact that Lifestyle Retail Partners, LLC was formed as a limited liability company and, as a result, erroneously found the members of Lifestyle Retail Partners, LLC could be held liable for its debts. Plaintiff cites *Davidson v Michigan*, 42 Mich App 80, 84; 201 NW2d 296 (1972), which holds, "Members of a joint adventure in general are liable on contracts with third persons which have duly been entered into on behalf, and for the purposes, of the joint adventure, and for debts arising out of such contracts. There is an individual liability on the part of a person liable as a joint adventurer." However, this rule, even if stated in binding case law, would not control where a more specific contractual or statutory provision exists. *Goodwin v S A Healy Co*, 383 Mich 300, 307-308; 174 NW2d 755 (1970) (holding that liability cannot be decided as a matter of law without referring to the terms of the joint agreement); *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502, 507-508; 309 NW2d 163 (1981) ("a statute which expressly extinguishes a common-law right is a proper exercise of legislative authority"). In this case, the applicable statute provides that ordinarily, a "member … of a limited liability company is not liable for the acts, debts, or obligations of the limited liability company." MCL 450.4501(3). "Michigan law presumes that, absent some abuse of corporate form, parent and subsidiary corporations are separate and distinct

entities" with separate and distinct obligations and liabilities. *Seasword v Hilti Inc (After Remand)*, 449 Mich 542, 547; 537 NW2d 221 (1995). Thus, unless there is "some abuse of corporate form," the protections of the limited liability company controls, rather than the more general, common-law rule cited by plaintiff. To hold otherwise, as the trial court in this case did, would completely gut the protections offered not only by the limited liability company form but also traditional corporate form. Many corporations would also be joint ventures, dissolving the protections of the corporate form. Protection from liability is one important—and acceptable—reason parties consider adopting one of these forms. *Klager v Robert Meyer Co*, 415 Mich 402, 411; 329 NW2d 721 (1982). Global did nothing wrong by seeking the protection offered by forming a limited liability company and the trial court erred in disregarding that form and all that it means.

Even if this were a joint venture and the members liable for the debts of Lifestyle Retail Partners, LLC, the trial court erred in "piercing the corporate veil" and looking beyond the legally identified member—Wireless Giant Investments, LLC—to Global as the "true" member. The "corporate veil" protecting a parent from the actions of its subsidiary corporation may be pierced "only where an otherwise separate corporate existence has been used to 'subvert justice or cause a result that [is] contrary to some other clearly overriding public policy.'" *Seasword*, 449 Mich at 547-548. As a general rule Michigan law "requires that a subsidiary must 'become a mere instrumentality of the parent' before its separate corporate existence will be disregarded." *Id.* To pierce a corporate veil, the corporate entity must be a mere instrumentality of another entity, the corporate entity must have been used to commit a wrong or fraud, and there must have been an unjust injury or loss to the plaintiff. *Rymal v Baergen,* 262 Mich App 274, 293-294; 686 NW2d 241 (2004); *In re RCS Engineered Prods Co Inc*, 102 F3d 223, 226 (CA 6 1996).

The trial court's opinion and order does not cite any evidence or facts which would justify piercing two corporate veils to find Global directly liable for the business debts of Lifestyle Retail Partners, LLC. While there may be some evidence that Wireless Giant Investments, LLC is related in the corporate sense to Global, because Lifestyle Retail Partners, LLC is a limited liability company, it is permitted the statutory protections its corporate form allows. Plaintiff provides absolutely no argument regarding piercing the veil of Lifestyle Retail Partners, LLC, instead relying entirely on the assertion that this was a joint venture and therefore the members are liable. Thus, we need not consider the relationship between Wireless Giant Investments, LLC and Global.

Next, Global argues that the trial court erred in allowing Lifestyle Retail Partners, LLC's liability to pass to Global on an "alter ego" theory. We agree, in large part for the reasons stated above. In order to pierce the corporate veil and attach liability beyond that of Lifestyle Retail Partners, LLC, plaintiff must show that the company was a mere instrumentality of another, that the company was used to commit a fraud or wrong, and that there must have been unjust loss or injury to the plaintiff. *Nogueras v Maisel & Assoc*, 142 Mich App 71, 86; 369 NW2d 492(1985). In this case, there is no proof that Lifestyle Retail Partners, LLC was an instrumentality of another entity. It was established as a limited liability company, and it prepared financial statements and tax returns. The fact that Global formed separate LLCs to limit its liability with regard to a specific business venture is unremarkable, since limitation of liability is a common reason for creating a corporation or LLC. The fact that the two members participated in the capitalization and management of Lifestyle Retail Partners, LLC is also unremarkable; neither

company had sole control of the entity. Even if Global, and not Wireless Giant Investments, LLC is the "true" member of Lifestyle Retail Partners, LLC, as plaintiff asserts, there is no evidence that Lifestyle Retail Partners, LLC was actually a subsidiary of Global instead of its own company.

Finally, Global argues that the trial court erred in finding Global was unjustly enriched by plaintiff. "When reviewing a grant of equitable relief, an appellate court will set aside a trial court's factual findings only if they are clearly erroneous, but whether equitable relief is proper under those facts is a question of law that an appellate court reviews de novo." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008).

We agree with Global that the trial court erred in granting plaintiff a remedy under the theory of unjust enrichment. An unjust enrichment claim can only exist in the absence of an express contract. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). If, indeed, Global was the member of the "joint venture," then plaintiff's remedy is a contractual one, not an equitable one. If Global was not a party to the agreement with plaintiff, then plaintiff's unjust enrichment claim fails because Global did not receive any benefit from *plaintiff*. The facts that Global operated the kiosk it received from Lifestyle Retail Partners, LLC and that plaintiff suffered a loss does not make Global the proper party to remunerate plaintiff. The agreements initiating and terminating Lifestyle Retail Partners, LLC consistently and unambiguously state that Wireless Giant Investments, LLC was the member. Either Global was that party or it was a total stranger to the contract. Plaintiff cannot have it both ways.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen Fort Hood
/s/ Christopher M. Murray
/s/ Deborah A. Servitto