

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

TRUMAN'S ECLECTIC IRISH PUB,
INC.,

Plaintiff,

vs.

THOMAS W. DAILEY,

Defendant.

) IN THE COURT OF COMMON PLEAS
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) CIVIL ACTION NO: 2011-CP-07-02216
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**ORDER DENYING MOTION TO
 AMEND COUNTERCLAIM**

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CLERK OF COURT
 BEAUFORT COUNTY, S.C.

This matter was before the Court on Friday May 15, 2015 for a hearing on Defendant Thomas W. Dailey's Motion to Amend his Counterclaim, wherein he sought to bring Helena Tirone back into this case after she was dismissed on summary judgment grounds almost three years ago. The motion again seeks to assert individual liability against Helena Tirone based on piercing the corporate veil.

The within motion was originally scheduled to be heard before the Honorable Carmen Mullen, who requested that the undersigned hear the motion. Counsel for the parties consented to the undersigned hearing the motion, and also consented to it being heard without a court reporter present.

Present for argument before the undersigned was J. Ashley Twombly, Esq. who appeared for Plaintiff and Ms. Tirone, and Andre Rembert, Counsel for Dailey. After reviewing the record and fully and carefully considering the arguments of counsel, Dailey motion to amend his counterclaim is denied.

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Background

This action began in May of 2011, over four years ago. After discovery, the case was placed on the trial roster (on 3 separate occasions) and trial was scheduled (on 3 separate occasions). Plaintiffs moved for summary judgment as to the individual liability of Helena Tirone, asking that the Court grant Tirone summary judgment and dismiss her from the case in her individual capacity.

On July 30, 2012, a motions hearing was held. Dailey defended the motion for summary judgment on the ground that Tirone should stay in the case because she may face liability through piercing the corporate veil. At that hearing, Dailey made an oral motion to amend his complaint to pierce the corporate veil and establish individual liability against Tirone. (Dailey's Final Brief to Court of Appeals p. 19 (dated 7/8/13).

In his Memorandum of Law for the July 30, 2012 motions hearing, Dailey stated that

A party does not need to plead veil piercing as a separate cause of action in South Carolina. To the extent these allegations are not properly encompassed in the Second Amended Counterclaims, Dailey moves to amend his Second Amended Counterclaims consistent with these allegations.

(Dailey's Memorandum of Law for 7/30/12 Motions Hearing p. 14). Thus, Dailey moved to amend his Counterclaim to seek individual liability against Tirone under a veil piercing theory in July 2012.

On August 10, 2012, the undersigned granted summary judgment to Tirone and dismissed her from the case, rejecting Dailey's argument that Tirone should remain in the case for purposes of veil piercing:

Dailey also argues that Tirone should remain in the case as he may seek to pierce the corporate veil. A review of the Dailey's Second Amended Counterclaim reveals that he has not plead any facts at all to set up a veil piercing theory, nor does his prayer/demand for judgment request that the

corporate veil be pierced. While there is authority to support the idea that a party is not required to affirmatively plead veil piercing as a separate cause of action (and can in some instances attempt to pierce post-judgment), a party seeking to pierce the corporate veil is still required to set forth basic facts (as well as a request for relief) to put an individual on notice that it seeks to hold the individual liable for the debts of the corporation under a veil piercing theory. Rule 8(a), SCRPC; see also Drury Dev. Corp. v. Found. Ins. Co., 380 S.C. 97, 104, 668 S.E.2d 798, 802 (2008) (finding that only when a party has “pled facts sufficient to survive a motion to dismiss as to the corporate liability claims and the alter ego claim, [should] the trial court [] move forward to determination of both matters.”)

Here, Dailey has filed three (3) separate counterclaim pleadings over the course of twelve (12) months: June 3, 2011; December 5, 2011 and June 21, 2012. Dailey has never alleged any facts to support a veil piercing theory or even requested that the corporate veil be pierced. Based on the above, Plaintiffs’ Motion for Summary Judgment as to the individual liability of Tirone is hereby granted.

(Order dated August 10, 2012 p. 2-3). In doing so, I denied Dailey’s Motion to Amend to seek liability against Tirone through piercing the corporate veil.

On September 13, 2012, thirty-three days after summary judgment was entered and as the parties were climbing on the trial roster, Dailey filed a motion to reconsider/Rule 60(b). In prosecuting the motion, Dailey orally made another motion to amend his counterclaim to include an allegation of veil piercing, and further included a footnote in his motion that read “To the extent a motion to amend the counterclaim is necessary, Defendant also makes such a motion.” (Motion to Reconsider dated 9/13/12 p. 1). Plaintiff and Tirone asked the Court not to reconsider its order on several grounds, including that Tirone would be prejudiced with allowing a veil piercing claim as such a late stage of the proceeding. I declined to allow Dailey to amend his pleading, and denied Dailey’s Motion to Reconsider/Rule 60(b) Motion on December 7, 2012. (Order Denying Motion to Reconsider p. 1). On December 7, 2012, Dailey filed a Notice of

Appeal, appealing my decision refusing to allow him to amend his complaint to include a veil piercing argument.

On appeal, Dailey argued that I erred in not allowing him to amend his counterclaim to include a veil piercing argument. Specifically, Dailey argued that “The Circuit Court abused its discretion by refusing to allow Dailey to amend his pleading, especially in light of the substantial evidence [Dailey] presented to the court.” (Dailey’s Final Brief to Court of Appeals p. 2). After briefing and oral argument in front of the Court of Appeals, my order was affirmed, and Dailey was not allowed to amend his counterclaim to include a veil piercing. (Court of Appeals Order filed 5/28/14).

On or about June 12, 2014, Daily filed a Petition for Rehearing with the Court of Appeals. In the Petition, Dailey argued that the Court has overlooked and misapprehended issues related to his request to amend his counterclaim. Nevertheless, the Petition for Rehearing was denied on September 4, 2014. (Court of Appeals Order filed 9/4/14).

On or about October 3, 2014, Daily filed a Petition for Writ of Certiorari with the South Carolina Supreme Court. In his Petition, Dailey argued that the trial court and the Court of Appeals erred in failing to specifically address Dailey’s Motion to Amend his pleading to include veil piercing. Specifically, Dailey argued that the Court of Appeals’ opinion “does not appear to address the issue of amendment [of the counter claim to include veil piercing]. Petitioner would respectfully aver that this has been overlooked, and would ask this Court to reverse the Court of Appeals.” (Petition for Writ p. 8.). The Supreme Court denied the Petition for a Writ of Certiorari. (Supreme Court Order dated 1/23/15).

The case was remitted back to this Court by letter on January 30, 2015. (Court of Appeals Remittitur Letter dated 1/30/15). Now that remittitur has been made to the Beaufort

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County Clerk of Court, Dailey has refiled his Motion to Amend to include veil piercing arguments.

Ruling

The issue of whether or not Daily should be allowed to amend his counterclaim to include veil piercing claims against Tirone was ruled on by me when I denied the summary judgment motion on August 10, 2012. In that order I specifically addressed Dailey's argument as to whether or not "Tirone should remain in the case as [Dailey] may seek to pierce the corporate veil." In finding that Tirone should not remain in the case for this purpose, I found that "Dailey has filed three (3) separate counterclaim pleadings over the course of twelve (12) months: June 3, 2011; December 5, 2011 and June 21, 2012." I also found that even though Tirone has been a party in the case since day one, "Dailey has never alleged any facts to support a veil piercing theory or even requested that the corporate veil be pierced. Based on the above, Plaintiffs' Motion for Summary Judgment as to the individual liability of Tirone is hereby granted." While Dailey is correct that the order did not expressly state that his "motion to amend his counterclaim was denied," the implication from reading the entire order is clear that the Court was not allowing Dailey to keep Tirone in the case for purposes of veil piercing. This was particularly true when she has been in the case from the start, and despite filing three separate counterclaim pleadings, Dailey had never attempted to assert veil piercing liability against Tirone.

Dailey argues now that the issue of whether or not he was allowed to amend his complaint "has NOT been adjudicated." Dailey Memo in Support at 1. However, Dailey expressly argued on appeal that "[t]he Circuit Court abused its discretion **by refusing to allow Dailey to amend his pleading**, especially in light of the substantial evidence [Dailey] presented

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to the court.” (Dailey’s Final Brief to Court of Appeals p. 2) (emphasis added). Clearly, Dailey believed the issue was addressed by the undersigned, and he appealed the same. The Court of Appeals affirmed, and the Supreme Court denied cert.

Moreover, irrespective of whether or not my 8/10/12 order specifically adjudicated Dailey’s request to amend his pleading or whether or not the Court of Appeals “adjudicated” the issue, Dailey argued on appeal that that the Court of Appeals’ opinion “does not appear to address the issue of amendment [of the counter claim to include veil piercing]. Petitioner would respectfully aver that this has been overlooked, and would ask this Court to reverse the Court of Appeals.” (Petition for Writ p. 8.). Again, the Supreme Court denied the Petition for a Writ of Certiorari. (Supreme Court Order dated 1/23/15).

Dailey takes issues with whether or not his attempt to re-litigate this issue is properly analyzed under the theory of *res judicata* or under the theory or *law of the case*. Irrespective of which theory applies, the important feature here is that the issue has been decided, appealed, and resolved. Tirone was dismissed from the case and Dailey was not allowed to assert veil piercing against her. Dailey cannot re-litigate the issue now.

As an alternative sustaining ground, I find that even if the issue had not previously been decided, it would be improper for Dailey to amend his counterclaim now because Tirone (and Plaintiff) would suffer significant prejudice. First, Tirone has been out of this case for three years, and is no longer subject to any individual liability in this case. Allowing the amendment would thrust her back into litigation she has been out of for years. Second, Tirone and Plaintiff would be prejudiced because allowing a veil piercing claims would arguably require a new body of evidenced to be developed, require the parties to hire new experts, take new depositions, retake deposition that have already been taken, and further delay the trial of this case, which had

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already been on the trial roster three times as of 2012.

Conclusion

Dailey's Motion to Amend his Counterclaim to assert individual liability against Helena Tirone is denied. The issue has already been decided, appealed, and the South Carolina Supreme Court has denied cert.

IT IS SO ORDERED!!



MARVIN H. DUKES, III
Master-In-Equity and Special Circuit Court Judge

Beaufort, South Carolina

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