IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,532

FILED
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DEC 27 1983
CLERK, SUPREME COURT
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GENERAL BUILDERS CORPORATION OF FORT LAUDERDALE, INC., et al,

Petitioners,

vs.

KELLEY SISK, as Personal Representative of the Estate of JAMES LARRY SISK,

Respondent.

RESPONDENT'S SUBSTITUTED BRIEF ON JURISDICTION

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STATEMENT OF THE FACTS AND THE CASE

The Respondent takes issue with the Statement of the Facts and the Case appearing on Page 1 of the Petitioner's Brief on Jurisdiction. Customarily case citations do not appear and one would not expect argument to be made in the Statement of the Facts and Statement of the Case.

Whether the Defendant/Petitioner wishes to urge that Plaintiff produced no legally sufficient testimony at Trial to avert summary judgment on the question of whether the Defendant was an owner/builder; the Respondent reminds Petitioner that the intermediate Appeals Court held that as a matter of fact Plaintiff did produce legally sufficient testimony and record evidence, and further that the Summary Judgment was error.

The further facts of the matter are that the GENERAL BUILDERS CORPORATION described on Page 2 of Petitioner's Brief as a "public company and a large national corporation...traded on the American Stock Exchange and now traded in the over the counter market" was at the time of the incident, suspended from trading because of the very fact that it was closely held and controlled by the Risberg family which also owned and controlled GENERAL BUILDERS CORPORATION OF FORT LAUDERDALE, INC., the Petitioner herein and CEDAR LANE DEVELOPERS a co-defendant in the Trial Court below.

The facts recited on Pages 2 and 3 further misstate

the activity of GENERAL BUILDERS CORPORATION, the Petitioner, and the activity of CEDAR LANE DEVELOPERS, INC., a co-defendant below. Up to the time of the litigation, the only construction GENERAL BUILDERS CORPORATION OF FORT LAUDERDALE, INC., engaged in was construction on land owned and/or developed by CEDAR LANE DEVELOPERS, INC., GENERAL BUILDERS CORPORATION (the parent) or one of its subsidiaries. There was no evidence in the record of arms length dealing by GENERAL BUILDERS CORPORATION OF FORT LAUDERDALE, INC., or CEDAR LANE DEVELOPERS, INC., with outside companies, land holders or developers respectively. Arguably, this is what concerned the Appeal Court and necessitated a reversal of the Summary Judgment.

In summary, the Petitioner/Defendant, GENERAL BUILDERS CORPORATION OF FORT LAUDERDALE, INC., was an instrumentality used to build buildings for CEDAR LANE and/or the parent. Financing on the projects was guaranteed by the parent and the officers of all corporations were one and the same. The creation of the subsidiary corporations was designed to not just limit liability (a heretofore laudable purpose for corporate formation) but to guarantee profit, eliminate competition and to assure total and absolute control.

ARGUMENT

THE DECISION IN THE INSTANT CASE DOES NOT CONFLICT WITH THE DECISIONS CITED BY THE PETITIONER.

The decision Sisk v. General Builders Corporation of Fort Lauderdale, Inc., 8 FLW 2141 (Fla.4th DCA 1983) does not conflict with Riley v. Fatt, 47 So.2d 769 (Fla. 1950). The Riley decision has been superseded by the Supreme Court of Florida by the Supreme Court's decision in Levenstein v. Sapiro, 279 So.2d 858, 860 (Fla.1973). Therein the Supreme Court adopted language from its prior decision Biscayne Realty and Ins. Co. v. Ostend Co., 109 Fla.1, 148 So.560 (1933) which established the rule that under certain inequitable circumstances Courts may disregard corporate form where:

> "...the evidence disclosed a state of facts... as would require a court of equity to look beyond the mere form of corporate entity to the person who was the sole beneficiary of its activities, directed and managed the transactions, and used the corporate name at his pleasure..." Biscayne Realty and Ins. Co. Supra at 566.

Furthermore the Riley decision relates to a supplementary proceeding initiated by a judgment creditor who, having already tried the case on the merits, could not collect from the Defendant. The Levenstein decision is the more modern view of this Court regarding liability that a parent corporation should have for a subsidiary corporation that was operated as an "instrumentality" of the parent. Being more recently decided than Riley it is presumed that Levenstein is the controlling

law in Florida on this point.

Each of the District Courts of Appeal save the Fifth District Court of Appeal have spoken on this subject and have followed Levenstein. The Third District Court of Appeal also follows Levenstein, to wit: Bermil Corp., v. Sawyer, 353 So.2d 579 (Fla.3rd DCA 1977), Lloyd v. DeFerrari, 314 So.2d 224, 225 (Fla.3rd DCA 1975) and Dwyer v. Burrell Leasing Company, 366 So.2d 1253, 1254 (Fla.3rd DCA 1979). The Second District Court of Appeal in Charter Air Ctr. Inc., v. Miller, 348 So.2d 614, 617 (Fla.2d DCA 1977) and the Fourth District Court of Appeal in Fenick v. Robertson, 406 So.2d 1263,(Fla.4th DCA 1981), Dania Jai-Alai Palace, Inc., v. Sykes, 425 So.2d 594 (Fla.4th DCA 1982) and Vantage View v. Bali East Development Corp., 421 So.2d 728 (Fla.4th DCA 1982) has also adopted the Levenstein opinion.

The Petitioner relies upon Unijax, Inc. v. Factory Insurance Association, 328 So.2d 448 (Fla.1st DCA 1976), as proof of a conflict of decisions. Unijax deals primarily with insurance claims being asserted under an existing policy. In actuality the opinion goes on to recognize the "mere instrumentality" rule and is not in conflict with Sisk. Within the context of the insurance question raised in Unijax, the First District Court of Appeal had no reason to consider the Levenstein decision, but it is clear that it too has adopted Levenstein and its holding. See Missouri v. State, 374 So.2d 589 (Fla.1st DCA 1979).

The Appellate Rule of Procedure 9.030(a)(2)(A)(iv) requires a decision, for which discretionary review is sought, to:

"Expressly and directly conflict with the decision of another District Court of Appeal or of the Supreme Court on the same question of law;".

There is no direct or express conflict with Riley because the Riley decision has been superseded by Levenstein. The Unijax decision arose where a parent corporation was attempting to persuade the Court that its subsidiaries were in fact, its instrumentalities. As the Fourth District Court of Appeal pointed out:

> "Very different considerations are at stake when it is the parent corporation itself which is attempting to disavow the corporate fiction which it created." Vantage View, Supra 735 Note 8.

Likewise, Sisk does not directly or expressly conflict with Gulfstream Land and Development Corporation v. Wilkerson, 420 So.2d 587 (Fla. 1982). Therein a parent corporation, Gulfstream Land and Development Corporation, was seeking to prove that it operated its subsidiary, Gulfstream Utility Corporation, as a mere instrumentality, and thereby gaining immunity for Gulfstream Land and Development, from suit under Chapter 440.04(2) F.S.A. (1973). This Court rejected such immunity "unless the Court can find an absolute integration of the two entities". Gulfstream Land and Development could not prove integration by any other form than all the companies were insured under the same Worker's Compensation Policy. That case rose and fell on the proofs and the facts. In the instant case, the Fourth District Court of Appeal has not conflicted with the Gulfstream Land Opinion of this Court.

There is no conflict jursidiction and this Court is urged to reject the Petition for Discretionary Review filed by GENERAL BUILDERS CORPORATION OF FORT LAUDERDALE, INC. This case should be returned to the Trial Court for a trial on the merits including a determination of whether the parent and subsidiaries operated as an owner-builder which would therefore deny them the vicarious immunity that could be accorded a general contractor under Chapter 440.10 F.S.A. (1973).

Because the intermedicate Appellate Court did not certify this case to pass upon a question of great public importance, it is submitted that this Court has no jurisdiction to accept the case on that basis, despite the plea for same on Page 9 of the Petitioner's Jurisdictional Brief. The Petitioner had already pleaded to the District Court of Appeal to certify the case as one of great public importance and the District Court of Appeal exercising proper judicial discretion, failed and/or refused to do so.

CONCLUSION

There is no direct and express conflict and the Petition should be denied.

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WE HEREBY CERTIFY that a true copy of the foregoing was furnished by U.S. Mail this 21st day of December, 1983, to: RICHARD A. SHERMAN, ESQ., 204 E. Justice Building, 524 South Andrews Avenue, Fort Lauderdale, Florida 33301; R.O. HOLTON, ESQ., Pyszka and Kessler, P.A., 707 Southeast Third Avenue, Fort Lauderdale, Florida 33316; and JAMES A. SMITH, ESQ., Wicker, Smith, Blomqvist, Tutan, O'Hara, McCoy, Graham and Lane, 712 Citizens Building, 105 South Narcissus Avenue, West Palm Beach, Florida 33401.

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