IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,532

GENERAL BUILDERS CORPORATION OF FORT LAUDERDALE, INC., et al.,

Petitioners,

vs.

KELLEY SISK, etc.,

Respondent.

FILED
SID J. WHITE
AUG 27 1984
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

REPLY BRIEF OF PETITIONERS GENERAL BUILDERS CORPORATION OF FORT LAUDERDALE, INC., et al. ON THE MERITS

Wicker, Smith, Blomqvist, Tutan, O'Hara, McCoy, Graham & Lane

and

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REPLY ARGUMENT

THE DECISION IN THE PRESENT CASE MUST BE REVERSED BASED ON THE FLORIDA SUPREME COURT'S SUBSEQUENT REVERSAL OF DANIA JAI-ALAI, SINCE THE ONLY PROOF WAS OF DOMINATION OF THE SUBSIDIARY BY THE PARENT, AND THERE WAS NO PROOF OF FRAUD OR WRONGDOING.

The Respondent makes two arguments in an attempt to salvage the appeal even after the Florida Supreme Court has reinstated the traditional law:

1. The Respondent argues that even though he did not show fraud or wrongdoing in the trial court and therefore there is absolutely no evidence of this, the Summary Judgment should nonetheless be reversed. The Respondent's reasoning is that the reason he did not prove fraud or wrongdoing in the trial court was that he did not know he had to. As stated in the conclusion of the Answer Brief of Respondent at page 17:

> " The record does not presently demonstrate any improper or misleading purpose intended by the present corporation. Those facts were not developed because they were not deemed necessary during the discovery phase of this cause." Page 17.

We want to make certain that it is clear that the law at the time of the Summary Judgment is exactly the same as the law presently. In other words the Summary Judgment was entered on August 7, 1981 (R 895). The Vantage View and Dania Jai-Alai cases which temporarily changed the law were both decided in 1982. Vantage View, Inc. v. Bali East Development Corp., 421 So.2d 728 (Fla. 4th DCA 1982); Dania Jai-Alai Palace v. Sykes, 425 So. 2d 594 (Fla. 4th DCA 1982).

Therefore, when the case was in the trial court the

Plaintiff had exactly the same burden as he does now, namely showing fraud or wrongdoing. The Plaintiff had discovery as to this but simply was unable to produce any evidence whatsoever of fraud or wrongdoing. Therefore the question devolved down to whether the evidence presented by the Plaintiff, namely mere domination without fraud or wrongdoing was sufficient. The trial court held based on the law that it was not.

Therefore we want to make clear that the law at the time of the Summary Judgment is the same law as it presently stands. The Plaintiff was not mislead by Vantage View or Dania Jai-Alai since they were not decided until a year later. The discovery simply showed only domination and the Plaintiff produced no evidence whatsoever of fraud or wrongdoing, so the ruling was correct then and is still correct in view of the Supreme Court's decision in Dania Jai-Alai Palace v. Sykes, a FLW 163 (Case No. 63,394, filed May 3, 1984).

2. The Respondent seeks to avoid The Supreme Court's decision in Dania Jai-Alai by seizing upon certain wording in that case. Specifically this Honorable Court stated:

> " At the close of the evidence, the trial court directed a verdict on the issue of Dania's liability, finding that Dania and Carrousel were operating a close-knit operation and held themselves out to he public as a single enterprise. The district court agreed, holding that when two corporations hold themselves out to the public as a single enterprise and that enterprise involves an inherent risk to members of the public, both corporations incur tort liability for the torts of the enterprise. Stuyvesant Corp. v. Stahl,62 So.2d 18 (Fla. 1952); Orlando Executive Park, Inc. v.P.D.R., 402 So.2d 442 (Fla 5th DCA 1981).[2]

The Respondent mischaracterizes this language and argues that the present corporate structure would constitute a single enterprise. However a review of the Stuyvesant and Orlando cases, supra, reveal that this rule of law is not applicable to the present situation. Stuyvesant, Orlando and Dania Jai-Alai involve the doctrine of "apparent authority" which is not involved in the present case. The facts in Stuyvesant were that the Plaintiff was a guest at a hotel and was injured by a car driven by the hotel doorman. The doorman wore a uniform with the name of the hotel on it, gave parking tickets with the name of the hotel and parked cars for the hotel. Nonetheless the hotel sought to avoid liability stating that the doorman was not an employee or agent of the hotel and therefore the hotel was not vicariously liable for the torts of the doorman. However the Court of Appeal held that the customer checking into the hotel would think that the doorman worked for the hotel and therefore the hotel would be vicariously liable under the doctrine of apparent authority.

Similarly the case of Orlando Executive Park Inc. involves the doctrine of apparent authority. The facts in that case were that a guest at a Howard Johnson's Hotel was assaulted and filed suit against Howard Johnson's. However the Howard Johnson's Hotel in question was a franchise and was not owned by the parent company.

The hotel was named "Howard Johnson's", had the distinctive color scheme of Howard Johnson's, the standard signs,

standard Howard Johnson design and all other indicia to represent to the public that this was a Howard Johnson's. Therefore the court held that the public checking into the hotel would be under the impression that it was a part of the Howard Johnson chain and since the national Howard Johnson's had given the local franchise authority to use these indicia to the public checking in there was apparent authority that this was a national Howard Johnson's hotel. Therefore the national chain was liable under the doctrine of apparent authority.

Similarly the Dania Jai-Alai case involved the similar apparent authority situation. In Dania Jai-Alai when a person went to the fronton the valet stationed at the fronton would take the automobile at the entrance, give the patron a ticket and would park the car. However after the valet injured someone the fronton denied liable to the injured party stating that the valets were not employees but were independent contractors. However the Florida Supreme Court relied upon Stuyvesant and Orlando Executive Park and held that there was a question as to whether there will be thousands of people who came to the fronton each day, the valets were held out to the public as being employed by the fronton, and therefore this also is an apparent authority case.

On the other hand the present case does not involve "The Public" and therefore is not a point. In the present case there was no "Public" which was enticed by signs, fine colors schemes, uniforms etc. to come on to business to spend his money.

The fact that a workman did not know the corporate structure is completely irrevelent. Therefore this statement in the Dania Jai-Alai case about "single enterprise" is taken out of context and does not remotely apply to the present situation. In the present case the Plaintiff showed that one corporation was a subsidiary of the other corporation and that there was no fraud and no wrongdoing and therefore under the Supreme Court's reversal of Dania Jai-Alai the Judgment for the Defendant must be reinstated.

CONCLUSION

Any confusion in the law has been clarified by the subsequent decision of the Florida Supreme Court in Dania Jai-Alai which reversed the decision which was the authority of the Fourth District for its decision in the present case. Acordingly this case must be reversed and the Judgment in the trial court reinstated.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 25th day of August 1984 to:

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