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Access Realty Group v. Kane - Another Tear In The Corporate Veil?

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Corporations are separate and distinct from their officers, shareholders, and directors. *Tower Inv'rs, LLC v. 111 E. Chestnut Consultants, Inc.*, 371 Ill. App. 3d 1019, 1033 (1st Dist. 2007). As such, corporate officers, shareholders, and directors are generally shielded from personal liability for the corporation's debts and obligations through the "corporate veil." *Id.* Though merely a "veil," Illinois courts are nevertheless reluctant to pierce the corporate veil, and attach personal liability to owners of a corporation – particularly in breach of contact cases. *See e.g. id.* at 1033; *Roiser v. Cascade Mountain, Inc.*, 367 Ill. App. 3d 559, 566 (2006); *Cosgrove Distributors, Inc. v. Haff*, 343 Ill. App. 3d 426, 429 (2003); *Ted Harrison Oil Co. v. Dokka*, 247 Ill. App. 3d 791, 795 (1993). Indeed, Illinois courts typically undertake a rigorous analysis before piercing the corporate veil – analysis that considers whether: "(1) there is such a unity of interest and ownership that the separate personalities of the corporation and the parties who compose it no longer exist, and (2) circumstances are such that adherence to the fiction of a separate corporation would promote injustice or inequitable circumstances." *Tower Inv'rs, LLC*, 371 Ill. App. 3d at 1033-34. Despite courts' reluctance, piercing the corporate veil does happen. And *Access Realty Group, Inc. v. Kane*, presents a unique, and some would say "backdoor" approach to veil piercing. 2019 IL App (1st) 180173 ¶ 37.

In *Access Realty Group* the court did not apply the usual veil piercing analysis described above nor did it consider all of the relevant outcome determinative factors – *i.e.* capitalization, failure to issue stock, failure to observe corporate formalities, nonpayment of dividends, insolvency, nonfunctioning of officers/directors, absence of corporate records, diversion of assets, failure to maintain arm's length relationships. Nevertheless, the court disregarded the distinct legal existence of the corporate plaintiff through the merger doctrine.

In *Access Realty Group*, plaintiff's predecessor – SFG – sued defendant for defaulting on a loan. *Id.* at ¶ 4. SFG and defendant settled and the trial court entered a consent judgment in the amount of $783,000 against defendant (the "Judgment"). Defendant failed to satisfy the Judgment, so SFG initiated supplementary proceedings to discover defendant's assets. During that time, defendant's estranged business partner ("Platt"), executed a promissory note payable to defendant with a face value of $1.2 million (the "Note"). *Id.* ¶ 5.

After the Note was executed, and supplementary proceedings on the Judgment had begun, defendant was ordered to turn over the Note from Platt to SFG. SFG was permitted to pursue its Judgment amount and, upon satisfaction, was to return the Note to Platt. After SFG's Judgment was reduced to about $528,000, SFG assigned its Judgment to plaintiff, Access Realty Group. Access Realty Group then substituted into the citation proceeding against defendant as the judgment creditor.

But, Access Realty's sole shareholder, president, secretary, and registered agent was Platt – the obligor on the Note. Based on the relationship between Platt and Access Realty, payments Platt made to defendant on the Note would ultimately go to Access Realty. The trial court applied the "merger doctrine," which provides that "when one person, who is bound to pay an obligation, also becomes entitled to receive that same obligation, there is an extinguishment of rights." *Id.* at ¶ 22. Because Platt was obligated to pay defendant, and defendant was obligated to pay Access Realty (*i.e.*, Platt's entity), the court merged Platt's debt with Access Realty's Judgment, thereby extinguishing the Judgment. Thus, even though the Platt and Access Realty were separate and distinct, the court treated them as one in the same.

In doing so, the court noted that:

> Platt exclusively controls the decision of whether [Access Realty] would sue Platt to recover the [the Judgment] debt, which is nonsensical. It would be unsound and an absurd result to permit [Platt], through the company he wholly owns and controls, to hold his own note and fail to pay himself, and then collect the [Judgment] from [defendant's] other assets.

Id. at ¶ 25. The court also suggested that it likely would have reached the same conclusion had it applied the veil-piercing factors to the relationship between plaintiff and Platt. *Id.* However, the reality is that the court did not apply the "stringent" veil-piercing test or consider all of the relevant factors, thereby adding another tear to the corporate veil. And, as the dissent points out, *Access Realty Group* could be interpreted to set a precedent for eliminating any debtor/creditor relationship between a closely held corporation and its sole shareholder, because the merger doctrine would automatically extinguish a shareholder loan at the moment of inception. *Id.* at ¶ 45.

Perhaps to allay concerns that its decision may lead to a more liberal application of the merger doctrine or piercing the corporate veil, the court noted that "we do not imply nor do we assert that the merger doctrine would automatically extinguish loans between a sole shareholder and his corporation. We confine our analysis to the unique facts of this case, in which the qualities of the debtor (Platt) clearly united with the qualities of the creditor (Access) to trigger the merger doctrine." *Id.* at ¶ 27.

Although the *Access Realty* decision is one that future litigants may cite to support a veil piercing argument, the decision will likely be, as the majority states, confined "to the unique facts of this case."

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