

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

COWIN & CO., INC., MINING
ENGINEERS AND CONTRACTORS,

Plaintiff,

vs.

IRWIN CAR & EQUIPMENT, INC.; 3-H
MINING; FOX CHASE MANAGEMENT,
INC.; PHILLIPS MINE & MILL, INC.;
and SOI HOLDING COMPANY, INC.,

Defendants.

No. 3:03-cv-40014

O R D E R

This matter is before the Court on Defendant's Motion for Partial Summary Judgment. Defendant moved for partial summary judgment on June 30, 2004. Hearing was held on the motion on September 14, 2004. Attorney John Richardson appeared for Defendant, and attorney Danny Cornell appeared for Plaintiff. The matter is now fully submitted for review. For the reasons discussed below, Defendant's Motion for Partial Summary Judgment must be denied.

SUMMARY OF MATERIAL FACTS

This is a diversity action brought pursuant to 28 U.S.C. §1332. Complete diversity of citizenship exists between the parties, and the amount in controversy

exceeds \$75,000. Both parties agree that Iowa law is applicable to Plaintiff's breach of contract and breach of warranty claims.

Due to the factual issues presented in this case, some background discussion regarding the somewhat complex corporate structure of the Defendant corporations is necessary. Darrell Harper, along with two other individuals, incorporated 3-H Mining in 1983. From 1983-1997, Harper directed all aspects of 3-H Mining's business. SOI Holding Company, Inc., is a Pennsylvania corporation that was formed in 1997 for the sole purpose of acquiring all of the assets of 3-H Mining. In 1997, SOI Holding Company purchased the assets of 3-H Mining and hired Harper as the general manager of the new company that was formed.¹ SOI acquired the 3-H Mining name and has operated since 1997 under the trade name "3-H Mining". Defendant has alleged both that SOI is a wholly-owned subsidiary of Irwin Car, Inc., and that SOI is a subsidiary of Fox Chase Management, Inc.

Defendants state that Irwin Car and Equipment, Inc. ("Irwin Car, Inc."), is a Pennsylvania corporation formed in 1995 for the sole purpose of acquiring all of the assets of an ongoing business known as Masa. Irwin Car, Inc., acquired the Masa name

¹ Harper's duties as the general manager were substantially similar to the functions he performed when he was a part owner of 3-H Mining. Harper continued in the general manager position until SOI, d/b/a 3-H Mining (hereinafter "3-H Mining"), was sold to Doerr-Oliver Eimco on December 29, 2003.

and has operated since 1995 under the trade name “Masa”. Defendants state that Irwin Car, Inc., is a wholly-owned subsidiary of Fox Chase Management, Inc.

Defendants state that Fox Chase Management, Inc., d/b/a “Irwin Car and Equipment” (“Fox Chase”), is a Pennsylvania corporation that was formed in 1993 for the sole purpose of acquiring all of the assets of Irwin Car and Equipment. Defendants assert that Fox Chase acquired the Irwin Car and Equipment name and has operated since 1993 under the trade name “Irwin Car and Equipment”.

Defendant Phillips Mine & Mill, Inc. (“Phillips”), is a Pennsylvania corporation and a wholly-owned subsidiary of Fox Chase.

Plaintiff Cowin & Co. (“Cowin”) first dealt with 3-H Mining sometime during the late 1980’s, prior to 3-H Mining’s acquisition by SOI Holding Company, on a job in Tennessee. Since that time, Cowin has conducted various other business matters with 3-H Mining. Cowin asserts that in 2000, William Baker (“Baker”), President and CEO of all Defendant corporations, informed Alwyn Protheroe (“Protheroe”), Cowin’s Vice-President of Engineering, that he had formed a new company known as SOI Holding Company, d/b/a 3-H Mining. Baker allegedly indicated that SOI had acquired the former 3-H Mining and that he had hired Harper to head up the new business. Protheroe, who has been employed with Cowin for twenty-one years, recalled that Harper was a 3-H Mining representative on the job in Tennessee. During this same conversation, Baker informed Protheroe that he had a Dover Cage System for sale.

Approximately one year later, Cowin bid on a job at the U. S. Gypsum Sperry Mine and subsequently obtained the contract for the U. S. Gypsum Sperry Mine job. Under the contract, Cowin was to construct a mine shaft, hoisting system, and head frame at U. S. Gypsum's facility located in Sperry, Iowa. Consequentially, Protheroe contacted Harper regarding the Dover system Baker had indicated in 2000 was for sale. After a telephone conversation between Harper and Protheroe regarding the requirements of the U. S. Gypsum Sperry Mine project, Harper issued a quote to Cowin for a Dover Cage System on June 5, 2001, in the amount of \$145,000. After a subsequent telephone conversation and an exchange of drawings between Harper and Protheroe, a revised quote was submitted to Cowin on June 14, 2001, in the same amount as the June 5 quote. Protheroe issued an acceptance letter on behalf of Cowin on September 28, 2001.

Under the terms of the contract between Cowin and 3-H Mining, 3-H Mining agreed to design, manufacture, and otherwise supply the hoisting system and head frame to be used in the U. S. Gypsum Sperry Mine project. Cowin contends that the contract required the hoist to conform to certain specifications and to be supplied in accordance with all applicable and current requirements of the Mining Safety and Health Administration (MSHA). Cowin further contends that the contract required 3-H Mining to inspect and commission the hoisting system at the project site in Sperry.

Performance under the contract began, and the head frame was delivered to Sperry on approximately December 21, 2001. Cowin alleges that the head frame was designed and fabricated incorrectly. Cowin contends that Defendants came to the site in Sperry, conducted investigations, and determined that the head frame had to be replaced. A replacement head frame was provided on or about November 15, 2002.

Cowin made four of the five progress payments to 3-H Mining required under the contract; all four progress payments were made by checks drawn on Cowin & Co.'s account, signed by either John Cowin Jr. or John Cowin Sr., and made payable to 3-H Mining. Defendants claim that all four checks were received by 3-H Mining and deposited into 3-H Mining's bank account.

Cowin withheld the fifth payment required under the contract. Cowin contends that other portions of the hoisting system supplied and installed failed to meet the requirements of the contract.² Cowin asserts that it demanded Defendants remedy the failure of this equipment to meet the requirements of the contract and that after reasonable opportunity, Defendants failed or refused to provide any remedy for the alleged

² Specifically, Cowin alleges that the hoist motor and drum provided are not designed to handle and cannot handle a payload of 5000 pounds; the hoist motor and drum do not conform to MSHA standards because the hoist and drum employ a chaining drive in violation of 30 C.F.R. §57.19003; the "safety dogs" or "safety catches" that prevent a free-fall of the cage in the event of a hoist rope failure are not capable of handling a payload of 5000 pounds; and the emergency generator does not have sufficient capacity to operate a hoist capable of handling a 5000 pound payload.

failures. Cowin contends that Defendants' failure to address and remedy the failure of the equipment to meet the requirements of the contract constitutes a default of Defendants' obligations to Cowin. Cowin states that it has terminated Defendants' right to proceed further under the contract due to the alleged default and material breach.

On February 28, 2003, Cowin filed a Complaint against Irwin Car & Equipment and 3-H Mining, asserting a material breach of Defendants' contract with Cowin (count one) and a breach of express and implied warranties to Cowin (count two).³ In response to Cowin's Complaint, Defendants assert that Irwin Car, Inc., had no contract with Cowin and that 3-H Mining has not breached any contract that it may have had with Cowin.⁴

³ On September 25, 2004, Defendants filed a Statement of Interest listing Fox Chase, Phillips Mine and Mill, and SOI Holding Company as interested parties, describing the interest each corporation had in the litigation. On November 4, 2003, Cowin filed an Amended Complaint adding Fox Chase, Phillips Mine and Mill, and SOI as Defendants.

⁴ Specifically, Defendants assert that the contract between Cowin and 3-H Mining was for a Dover Emergency Escape device, which Defendants claim is exactly what was supplied to Cowin by 3-H Mining. Defendants assert that Cowin has suffered no damages at the hands of Defendants, the Complaint fails to state a claim, the claims are time barred by the applicable statute of limitations and barred by the doctrine of waiver, that Cowin has failed to mitigate its claimed damages, and that Cowin lacks standing. Defendants further assert that Cowin is estopped from asserting the claims set forth in the Complaint, is barred by the doctrine of accord and satisfaction, and that any damage Cowin has suffered occurred as a result of its own actions or inactions or by the actions and/or inactions of parties other than Defendants.

3-H Mining brought counterclaims against Cowin, asserting breach of contract (count one), unjust enrichment (count two), account stated (count three), and open account (count four). 3-H Mining alleges that Cowin has failed to pay for the Dover system in total and that an outstanding balance of \$9,000 exists. Cowin responded to these counterclaims by denying all allegations contained therein.⁵

On June 30, 2004, Defendants Irwin Car, Inc., SOI Holding Company, Inc., d/b/a 3-H Mining, Fox Chase Management, Inc., d/b/a Irwin Car and Equipment, and Phillips Mine & Mill, Inc., filed a Motion for Partial Summary Judgment. Defendants argue that the undisputed facts elicited through discovery clearly demonstrate that the contract at issue in this action was exclusively between Cowin and 3-H Mining. Defendants assert that Fox Chase, Irwin Car, Inc., and Phillips are all entitled to judgment as a matter of Iowa law on count one (breach of contract) because those entities were not real parties-in-interest to the contract at issue. Defendants further assert that Fox Chase, Irwin Car, Inc., and Phillips are all entitled to judgment as a matter of Iowa law

⁵ Cowin further asserted that the contract does not call for a Dover Emergency Escape device, as alleged by Defendants, that 3-H Mining has suffered no damage at the hands of Cowin, 3-H Mining's counterclaims fail to state a claim, 3-H Mining has failed to mitigate its damages, the claims are barred by the doctrines of waiver and estoppel, that any and all damages alleged in the counterclaims are caused in whole or in part by Defendants' own breach of contract, and that Cowin did not receive the equipment that it is entitled to receive under the terms of the contract.

on count two (breach of warranty) because those entities were not real parties-in-interest to the contract from which the alleged warranties arise.

Cowin resists Defendants' Motion for Partial Summary Judgment. Cowin asserts that Defendants misrepresented and concealed material facts about themselves and the nature of their corporate structure, Cowin had no knowledge of the true corporate structure of Defendants, Defendants induced Cowin to act by misrepresenting the corporate structure to Cowin, and Cowin relied on these representations which were both oral and in writing. Cowin urges the Court to pierce the corporate veil of the subsidiary corporation 3-H Mining, asserting that substantial evidence exists that the Defendant corporations regularly intermingled their employees and assets, that some of the corporations were undercapitalized, and that corporate formalities were disregarded.

APPLICABLE LAW AND DISCUSSION

A. Standard of Review

Summary judgment is a drastic remedy, and the Eighth Circuit has recognized that it "must be exercised with extreme care to prevent taking genuine issues of fact away from juries." Wabun-Inini v. Sessions, 900 F.2d 1234, 1238 (8th Cir. 1990).

"The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). See also Celotex Corp. v. Catrett,

477 U.S. 317, 322-23 (1986); Herring v. Canada Life Ins. Co., 207 F.3d 1026, 1029 (8th Cir. 2000).

The party moving for summary judgment bears the initial burden of “informing the district court of the basis for its motion and identifying those portions of the record which show a lack of a genuine issue.” Hartnagel v. Norman, 953 F.2d 394, 395 (8th Cir. 1992) (citing Celotex, 477 U.S. at 323); see also Shelter Ins. Co. v. Hildreth, 255 F.3d 921, 924 (8th Cir. 2001); McGee v. Broz, 251 F.3d 750, 752 (8th Cir. 2001).

Once the moving party has carried its burden, the opponent must show that a genuine issue of material facts exists. Nat’l Bank of Commerce of El Dorado, Ark. v. Dow Chem. Co., 165 F.3d 602, 607 (8th Cir. 1999). The Court gives the nonmoving party the benefit of all reasonable inferences and views the facts in the light most favorable to that party. de Llano v. Berglund, 282 F.3d 1031, 1034 (8th Cir. 2002); Pace v. City of Des Moines, 201 F.3d 1050, 1052 (8th Cir. 2000); Prudential Ins. Co. v. Hinkel, 121 F.3d 364, 366 (8th Cir. 1997).

“Summary judgment is proper if the evidence, viewed in the light most favorable to the nonmoving party, demonstrates that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law.” Shelton v. Conti Group Companies, Inc., 285 F.3d 640, 642 (8th Cir. 2002) (citing Henerey v. City of St. Charles, 200 F.3d 1128, 1131 (8th Cir. 1999)). Summary judgment should not be granted if the Court can conclude that a reasonable trier of fact could return a verdict

for the nonmoving party. Andersen v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Burk v. Beene, 948 F.2d 489, 492 (8th Cir. 1991). In light of these standards, the Court considers the present motion.

B. Piercing the Corporate Veil

Defendant argues that the contract at issue in this lawsuit was exclusively between Cowin and 3-H Mining, and therefore the remaining Defendants, Fox Chase, Irwin Car, Inc., and Phillips, are entitled to judgment as a matter of Iowa law on Cowin's breach of contract claim because those entities were not real parties in interest to the contract at issue. Defendants assert that the record shows that Cowin had a course of dealing with 3-H Mining that alerted it to the fact that the contract at issue in this action was with 3-H Mining only, that the offer and acceptance forming the basis of the contract at issue were exchanged between Protheroe and Harper, who was acting solely and exclusively as general manager of 3-H Mining, and that Cowin acknowledged that it was dealing with 3-H Mining by rendering payment to that entity.

Defendants also argue that Fox Chase, Irwin Car, Inc., and Phillips are entitled to judgment as a matter of Iowa law on Cowin's breach of warranty claim because those entities were not real parties in interest to the contract from which the alleged warranties arise, asserting that Cowin may only recover on its breach of warranty claim against 3-H Mining as the seller with whom Cowin was in contractual privity.

Cowin urges the Court to pierce 3-H Mining's corporate veil to impose liability on Fox Chase, Irwin Car, Inc., and Phillips. Cowin asserts that in addition, Fox Chase should be held liable on a theory of promissory estoppel, equitable estoppel, and/or agency by estoppel, asserting that Cowin was misled by the representations of Baker and Harper and by the correspondence and communication from Defendants to Cowin, asserting that such statements induced Cowin to enter into a contract with Defendants. Cowin argues that it would work a substantial injustice on Cowin if Defendant Fox Chase was dismissed from the instant lawsuit given the fact that all of the assets of SOI Holding have been sold and the majority of the proceeds from that sale have been transferred to Fox Chase.

“A corporate veil may be pierced only under exceptional circumstances, such as when a corporation is a mere shell, serving no legitimate business purpose, and used primarily as an intermediary to perpetuate fraud or promote injustice.” Midwest Fuels, Inc. v. JP & K, Inc., 680 N.W.2d 378, 2004 WL 358291, *2 (Iowa App. 2004) (table); see also Briggs Transp. Co., Inc. v. Starr Sales Co., Inc., 262 N.W.2d 805, 810 (Iowa 1978). “The burden is on the party seeking to pierce the corporate veil to show the exceptional circumstances required.” In re Marriage of Ballstaedt, 606 N.W.2d 345, 349 (Iowa 2000). Cowin seeks to pierce the corporate veil of the subsidiary corporation, 3-H Mining, in order to impose liability on its parent corporations, Fox Chase and Irwin Car, Inc., and its sister subsidiary, Phillips.

A subsidiary corporation is one in which another corporation, a parent corporation, owns the majority of shares of its stock. Ownership by a parent corporation of the stock of another corporation does not create an identity of corporate interest between the two corporations so as to render acts by one to be the acts of another. Under ordinary circumstances, a subsidiary corporation is treated as an entity separate from its stockholders or in this case the parent corporation.

Schnoor v. Deitchler, 482 N.W.2d 913, 915 (Iowa 1992) (citations omitted).

Exceptions to the general rule of limited stockholder liability do exist which allow piercing of the corporate veil to impose liability on stockholders in certain circumstances. Courts have disregarded the separate corporate personalities of parent and subsidiary corporations in certain circumstances to prevent the parent corporation from perpetuating a fraud, evading just responsibility, or defeating public convenience.

Id. at 915-916; see also Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Mgmt., Inc., 519 F.2d 634, 637 (8th Cir. 1975) (“[T]he fiction of corporate entity may be disregarded, where one corporation is so organized and controlled and its affairs are so conducted that it is, in fact, a mere instrumentality or adjunct of another corporation.”); Darling Stores Corp. v. Young Realty Co., 121 F.2d 112, 116 (8th Cir. 1941) (“[C]ourts will ignore the fiction of corporate legal entity when the circumstances justify it, and when it is used as a subterfuge to defeat public convenience, justify wrong, or perpetrate a fraud.”) A corporation’s existence is presumed to be separate but can be disregarded if,

(1) the corporation is undercapitalized, (2) without separate books, (3) its finances are not kept separate from individual finances, individual obligations are paid by the corporation, (4) the corporation is used to promote

fraud or illegality, (5) corporate formalities are not followed or (6) the corporation is merely a sham.

Lakota, 519 F.2d at 638; see also Briggs, 262 N.W.2d at 810; Boyd v. Boyd & Boyd, Inc., 386 N.W.2d 540, 544 (Iowa App. 1986). These factors may be considered “in determining if a corporation is merely the alter ego of its dominant shareholder.”

Lakota, 519 F.2d at 638.

Cowin asserts that Defendants failed to observe and follow corporate formalities, that Fox Chase dominated the financial operations of 3-H Mining, and that the separate entity status of 3-H Mining was disregarded. Cowin further asserts that substantial evidence exists that the Defendant corporations regularly intermingled their employees and assets.

Defendants claim that each of the corporations has its own employees, its own bank account, conducted its own separate board meetings, tracked its finances separately, had its own profit and loss responsibility, and filed separate tax returns. Defendants state that pursuant to a series of Consents of Directors, Irwin Car, Inc., Phillips, and 3-H Mining pay Fox Chase monthly fees for office rent, miscellaneous expenses, direct factory labor hours, insurance, payroll and related payroll taxes, and a monthly management fee for the services of any/all salaried Fox Chase employees who performed work from time to time for the subsidiaries.

All of the employees of the four corporations are paid from a common payroll fund operated by Fox Chase. Defendants claim that this common payroll fund is

reimbursed by Phillips, 3-H Mining, and Irwin Car, Inc., on a dollar-for-dollar basis for the actual amount paid to their employees each month. Defendants admit that from time to time, Fox Chase loans operating capital to 3-H Mining, Phillips, and Irwin Car, Inc., so that they can pursue and complete larger projects; Defendants state that these loans are documented by notes and paid off as funds become available. The record demonstrates that the four corporate Defendants have the same Board of Directors, the same officers, conduct consolidated board meetings, record consolidated board minutes, and file a consolidated financial statement and accounting report in the name of Fox Chase Management, Inc. & Subsidiaries.

While these facts do not establish that Defendants failed to follow corporate formalities in such an extreme manner as to warrant piercing the corporate veil, viewing the facts in the light most favorable to Cowin ,they do generate a factual issue regarding the extent to which 3-H Mining functioned as an entity separate from its parent corporation.

Cowin also asserts that 3-H Mining was undercapitalized.

If a corporation is organized and carries on business without substantial capital in such a way that the corporation is likely to have no sufficient assets available to meet its debts, it is inequitable that shareholders should set up such a flimsy organization to escape personal liability. The attempt to do corporate business without providing any sufficient basis of financial responsibility to creditors is an abuse of the separate entity and will be ineffectual to exempt the shareholders from corporate debts. It is coming to be recognized as the policy of the law that shareholders should in good faith put at the risk of the business unencumbered capital reasonably

adequate for its prospective liabilities. If capital is illusory or trifling compared with the business to be done and the risks of loss, this is a ground for denying the separate entity privilege.

Briggs, 262 N.W.2d at 810 (quoting Ballantine, Corporations, § 129, pp. 302-303 (rev. ed. 1946)). Defendants assert that each corporation is solvent, adequately capitalized, and pays all of its financial obligations as they become due.

William Baker is the President and CEO of all four of the corporations named as Defendants in this case. Baker testified during his deposition that Irwin Car & Equipment essentially operated as a bank, and 3-H Mining still owes a considerable amount of money to Irwin Car on outstanding loans made to 3-H Mining.⁶ The record shows that Fox Chase loaned over \$550,000 to 3-H Mining between 1999 and 2003. After the filing of this suit, 3-H Mining was sold by parent corporation Fox Chase, and a portion of the proceeds from that sale, \$50,000, was used to pay off debts 3-H Mining owed to outside vendors. Baker testified that the majority of the proceeds, \$175,000, was used to pay off debt 3-H Mining owed to Fox Chase. There is no indication in the record that prior to its sale on December 29, 2004, 3-H Mining paid off any portion of the debt it incurred from Fox Chase.

Defendant claims that 3-H Mining was not undercapitalized and that there is no evidence that at any time 3-H Mining was unable to meet its financial obligations when

⁶ During this deposition testimony, Baker referred to Irwin Car and Equipment, Irwin Car, and Fox Chase Management interchangeably.

they became due. This assertion could be viewed as contrary to the deposition testimony of Baker, who testified that Irwin Car & Equipment functioned as a bank, lending money to its subsidiaries, including 3-H Mining, and that when 3-H Mining was sold, the proceeds were used to pay off debts owed to outside vendors and to Fox Chase, indicating that to this day, SOI (d/b/a 3-H Mining) has outstanding debts owed to Fox Chase. In addition, the 1998, 1999, and 2000 SOI balance sheets show that in each year the liabilities of SOI exceeded the assets of that company.

Harper testified during his deposition that all the paperwork, profits and loss, and operation information had to be submitted to Irwin Car because many of the projects were too large for 3-H Mining and the company would have to borrow capital from Irwin Car.⁷ During his deposition, Harper engaged in the following exchange:

Q. But I think you testified and I think the witness yesterday testified that the company 3H was undercapitalized a lot, it had to get capital from Irwin Car.

A. Well, yes. I guess you would say that.

While Defendant is correct that this deposition testimony from Harper alone is insufficient to establish that 3-H Mining was in fact undercapitalized, this testimony, in combination with the deposition testimony of Baker and the financial information contained in the record, creates a factual issue regarding whether 3-H Mining carried on business with sufficient capital available to meet its debts.

⁷ Harper did not indicate whether he was referring to Irwin Car & Equipment or Irwin Car, Inc.

Cowin disputes Defendants' claim that 3-H Mining is a fictitious trade name of SOI given the numerous contrary representations it claims to have received from the Defendants' directors, officers, agents, and employees, maintaining that Defendant SOI Holding Company was represented to the public and to Cowin as "3-H Mining Division of Irwin Car & Equipment", "Irwin Car & Equipment", and "a subsidiary of Irwin Car & Equipment."

Protheroe indicated in a sworn affidavit that in October of 2000, he was told by Harper that 3-H Mining had been bought out by Irwin Car & Equipment, that Harper was the general manager of the 3-H Mining Division of Irwin Car & Equipment, and that Bill Baker was Harper's boss. Protheroe further attested that Harper told him that with the resources of Irwin Car, he could handle bigger jobs and that Bill Baker had moved the entire 3-H Mining operation to the Irwin Car plant located in Irwin, Pennsylvania. Harper told Protheroe that if he needed anything he should contact him at Irwin Car & Equipment. Finally, Protheroe indicated that when he met Baker, Baker told him that Irwin Car had purchased 3-H Mining and that 3-H Mining had the full financial backing of Irwin Car & Equipment.⁸ Protheroe swore in his affidavit that he relied on these representations in entering into the contract at issue.

Baker denies he ever gave Protheroe any indication there was any connection between 3-H Mining and Irwin Car and Equipment. It is clear that at some point

⁸ Protheroe used both "Irwin Car" and "Irwin Car and Equipment" in his affidavit.

Protheroe was given an indication by someone that 3-H Mining had been acquired by Irwin Car and Equipment because Protheroe knew to contact Harper at Irwin Car and Equipment, and, acting on behalf of Cowin, Protheroe addressed the September 28, 2001, acceptance letter to Irwin Car and Equipment, Attention Darrell Harper. A disputed issue of fact exists regarding what was represented to Protheroe by Baker or Harper about 3-H Mining and its relationship to Irwin Car and Equipment.

The record shows that the Irwin Car & Equipment website itself referred to 3-H Mining as “the 3-H Mining Division of Irwin Car & Equipment”. 3-H Mining has also been represented as a subsidiary of Irwin Car & Equipment. The documents provided in Cowin’s Appendix show that the correspondence and communication from Harper to Protheroe concerning the contract at issue was on stationery with the letterhead “Irwin Car and Equipment”. 3-H Mining’s own corporate checks state “3H Mining Subsidiary of Irwin Car and Equipment”, and the Combined Financial Statements of Fox Chase refer to SOI (d/b/a 3-H Mining) as a subsidiary of Fox Chase.

Baker’s own deposition testimony confuses the issue regarding the corporate structure of the Defendant corporations. Baker testified that there was no relationship between SOI and Fox Chase. Baker then submitted a correction to his deposition testimony and indicated that SOI was a subsidiary of Irwin Car, Inc., which was a subsidiary of Fox Chase. Baker also testified that there was no relationship between Phillips and Fox Chase, testifying that Phillips was completely separate from Fox Chase and was not

a subsidiary. Baker then submitted a correction to his deposition testimony and indicated that Phillips was in fact a Fox Chase subsidiary, a fact which finds support in the record via the numerous financial documents indicating Phillips was in fact a subsidiary of Fox Chase.

At hearing, Defendants claimed that after January 1, 2000, Irwin Car, Inc., was absorbed by Fox Chase and that SOI was no longer a subsidiary of Irwin Car, Inc., which Defendants claim ceased to exist, but rather became a subsidiary only of Fox Chase. This assertion finds marginal support in only one document contained in the appendices filed with this Court, namely, the Plan of Exchange by and Between Irwin Car and Equipment, Inc., and Fox Chase Management, Inc. This document shows that on December 17, 1999, the shares of common stock of Irwin Car were exchanged for shares of common stock of Fox Chase. There is no absolute indication in the record that Irwin Car, Inc., actually ceased existence after this exchange. Further, the assertion that Irwin Car, Inc., ceased to exist is in direct conflict with the factual assertions contained in Defendants' pleadings and Baker's corrected deposition testimony which indicates that Irwin Car, Inc., is a subsidiary of Fox Chase.

Defendants argue that the present case is on point with S & S Elec., Ltd. v. St. Francis Manor, Inc., an unpublished opinion of the Iowa Court of Appeals which found that piercing the corporate veil was not warranted. S & S Elec., Ltd. v. St. Francis

Manor, Inc., 669 N.W.2d 262, 2003 WL 21464606, at *5-6 (Iowa App. 2003) (table).

The appellate court found that although the two organizations at issue were closely intertwined, they were in fact two distinct bodies, there was no direct proof of undercapitalization, and allegations that corporate formalities were not observed were largely unsupported. Id. at **5. The genuine issues of material fact relevant to piercing the corporate veil that exist in this case were not present in S & S Electric, and the facts in S & S Electric, while somewhat similar to the present case, are not on point; therefore, the conclusion of the Iowa Court of Appeals is not dispositive of the outcome in the present case.

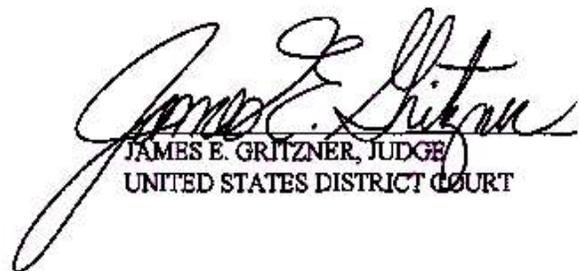
Although “those not a party to a contract cannot be bound by its terms,” see Anderson v. City Dev. Bd. of State, 631 N.W.2d 671, 674 (Iowa 2001) (citing Herington Livestock Auction Co. v. Verschoor, 179 N.W.2d 491, 494 (Iowa 1970)), due to the various ways 3-H Mining’s relationship to Irwin Car and Equipment has been represented, it is unclear whether Irwin Car and Equipment was represented to Cowin as being a party to the contract. Viewing the facts in the light most favorable to Cowin and giving it the benefit of all reasonable inferences, the Court finds a genuine issue of material fact exists regarding how Defendants represented 3-H Mining to Cowin, specifically, how it represented 3-H Mining’s relationship with Irwin Car & Equipment; and genuine issues of material fact underlie the legal determination on piercing the corporate veil.

CONCLUSION

Defendants have argued that Cowin has failed to raise any material issues of fact that, if decided in Cowin's favor at trial, would support a finding of "exceptional circumstances" required under Iowa law in order to pierce the corporate veil of 3-H Mining. Whether to pierce a corporate veil is a finding that is extremely fact sensitive, and determinations are to be made on a case-by-case basis. See Hawkeye Bank and Trust, Nat. Ass'n v. Baugh, 463 N.W.2d 22, 24 (Iowa 1990). Given the standard of review applicable to a motion for summary judgment, the record reflects that genuine issues of material fact exist regarding how 3-H Mining was represented to Cowin, the sufficiency of the capitalization of 3-H Mining, and the extent to which the 3-H Mining was treated as an entity separate from its parent company. Defendants' Motion for Partial Summary Judgment (Clerk's No. 24) must be **denied**.

IT IS SO ORDERED.

Dated this 20th day of September, 2004.



JAMES E. GRITZNER, JUDGE
UNITED STATES DISTRICT COURT