

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CARPENTER'S HEALTH AND : CIVIL ACTION
WELFARE FUND OF PHILADELPHIA :
AND VICINITY, et al., :
 :
 :
v. :
 :
 :
DE MICA, INC., DENNIS ATWELL :
SUZANNE ATWELL : NO: 98-5452

Norma L. Shapiro, J.

October 4, 1999

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs seek damages pursuant to 29 U.S.C. § 1145 for fringe benefits and contributions arising from a collective bargaining agreement ("CBA") and an Installment Judgment Note ("Note") entered into by Plaintiffs and defendant Suzanne Atwell.¹ The court held a non-jury trial on Plaintiffs' claims. In accordance with Federal Rule of Civil Procedure 52(a), the court enters the following findings of fact and conclusions of law.

¹Defendants De Mica, Inc. and Dennis Atwell filed separate voluntary petitions for Chapter 7 bankruptcy on July 30, 1999. On August 19, 1999, the action against Defendants De Mica, Inc. and Dennis Atwell was severed and placed in administrative suspense pending the outcome of the bankruptcies. Suzanne Atwell is the only defendant whose liability is now adjudicated.

Findings of Fact

1. Plaintiffs are the Plaintiffs, Carpenters Health and Welfare Fund of Philadelphia and Vicinity, Carpenters Pension and Annuity Fund of Philadelphia and Vicinity, Carpenters Joint Apprentice Committee, National Apprenticeship and Health and Safety Fund, Carpenters Political Action Committee of Philadelphia and Vicinity, General Building Contractors Association Industry Advancement Program, Metropolitan Regional Council, United Brotherhood of Carpenters and Joiners of America, Edward Coryell and Walter P. Palmer, Jr. ("Welfare Fund", "Pension Fund", "Apprentice Committee", "NAHS", "PAC", "IAP", "Union", "Coryell" and "Palmer" and jointly, "Funds" or "Plaintiffs")

2. Defendants De Mica, Inc. ("De Mica") and Dennis Atwell filed separate voluntary petitions for Chapter 7 bankruptcy on July 30, 1999. On August 19, 1999, the action against Defendants De Mica and Dennis Atwell was severed and placed in administrative suspense pending the outcome of the bankruptcies.

3. Defendant Suzanne Atwell, wife of Defendant Dennis Atwell, is the only Defendant whose liability is now adjudicated.

4. De Mica, a Pennsylvania corporation, is party to the CBA with the Union. Under the terms of the CBA, De Mica is required to pay wages to its employees in accordance with the terms set forth in the CBA and to submit monthly remittance reports and

fringe benefit contribution payments to the Funds.

5. Dennis Atwell is a signatory to the CBA; Suzanne Atwell is not a signatory to the CBA.

6. De Mica failed to make the contribution payments to the Funds for March, 1998. The Funds and De Mica attempted to resolve this delinquency. It was agreed that De Mica would pay the March, 1998 contributions, interest, and liquidated damages due under the CBA over a six month period and that De Mica would submit future remittance reports and contributions on a timely basis as required by the CBA. The Funds required that Dennis Atwell and his wife Suzanne Atwell sign a note for the delinquent fringe benefit contributions, interest and liquidated damages due.

7. On May 27, 1998, Suzanne Atwell signed a Note in which De Mica, Dennis and Suzanne Atwell, jointly and severally promised to pay Plaintiffs the delinquent fringe benefit contributions due under the CBA.

8. The Note was in the principal amount of \$36,612.75. The terms of the Note were as follows:

(a) Payment on the Note would be in six successive monthly installments of \$6,245.30, to commence on June 15, 1998.

(b) The interest rate on the Note would be 8% per annum, the then current rate under 29 U.S.C. § 1132(g)(2) and 26 U.S.C. § 1126. Interest would accrue beginning May 27, 1998.

(c) A default on the Note would occur upon the non-payment of an installment, failure of the Defendants to file contribution reports or failure to file promptly and remit fully all contributions becoming due after the date of the Note.

9. After Defendants made three payments totalling \$18,735, the balance due on the Note was \$17,877.75.

10. Defendants failed to make the remaining payments due under the Note, and De Mica and Dennis Atwell failed to make additional fringe benefit contribution payments to the Funds for the months of August, September, and October, 1998. Defendants De Mica and Dennis Atwell also failed to submit timely the contractually required remittance reports for the months of September and October, 1998.

11. Piotr Tonia, Collections Supervisor, testified on behalf of the Funds; his testimony was credible and persuasive.

Discussion

Plaintiffs, Carpenter's Health and Welfare Fund of Philadelphia and Vicinity, et al., filed suit against Defendants, De Mica, Dennis Atwell and Suzanne Atwell on October 14, 1998 pursuant to 29 U.S.C. § 1145. In their five count complaint, Plaintiffs demanded relief for damages arising out of contract and for an audit of Defendants' records. The action was dismissed with prejudice on May 25, 1999 under Local Rule 41(b)

because a settlement agreement had been reached; however, on July 15, 1999, the Order was vacated because Defendants had not signed the settlement agreement; the action was listed for trial.

But on July 30, 1999, defendants De Mica and Dennis Atwell filed for protection under Chapter 7 of the U.S. Bankruptcy Code; the action against them was severed and stayed. Plaintiffs, having elected to proceed against Suzanne Atwell, allege that Suzanne Atwell is liable for the balance owing on the Note and for the unpaid contributions, liquidated damages and interest due under the CBA.

A. Collective Bargaining Agreement

The Plaintiffs allege that Suzanne Atwell is liable for payments due under the CBA, even though she is not a signatory to the agreement, because the parties intended her to be jointly and severally liable along with De Mica and Dennis Atwell.

Unless a CBA otherwise provides, an individual not a party cannot be held directly liable under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq. See Solomon v. Klein, 770 F.2d 352, 353 (3d Cir. 1985). Accord International Brotherhood of Painters & Allied Trades Union v. George A. Kracher, Inc., 856 F.2d 1546, 1548 (D.C. Cir. 1988) ("Kracher"). Suzanne Atwell is immune from personal liability under the CBA unless De Mica's corporate veil can be pierced. See Solomon, 770 F.2d at 353; Kracher, 856 F.2d at 1547-48.

Plaintiffs attempted to show that Suzanne Atwell is a party to the CBA by introducing evidence of intent of the parties. Plaintiffs argue that the agreement states "all parties" are bound by its terms. Plaintiffs claim that "all parties" includes Suzanne Atwell even though she did not sign the CBA.

Evidence of intent of the parties may not be utilized to interpret an agreement unless the agreement is ambiguous. The terms of the CBA are not ambiguous. Plaintiffs cannot introduce evidence that the parties intended that Suzanne Atwell would be liable under the CBA. Suzanne Atwell is not a signatory to the CBA, and Plaintiffs have not shown that she is an alter ego² for De Mica; there was no evidence that she was the dominant shareholder and there was no attempt to pierce the corporate veil. Suzanne Atwell is not liable under the terms of the CBA.

B. Installment Judgment Note

Plaintiffs allege that Suzanne Atwell is liable for the remaining balance, \$17,877.75, due and owing under the terms of the Note to which she is a signatory and for interest, liquidated damages, attorney's fees and costs. Defendant argues that she is

² The factors to determine whether an individual is an alter ego for a signatory to a CBA are the : (1) failure to observe corporate formalities; (2) nonpayment of dividends; (3) insolvency of the debtor corporation at the time; (4) siphoning of funds of the corporation from the dominant shareholder; (5) nonfunctioning of other officers and directors; (6) absence of corporate records; (7) fact that the corporation is merely a facade for the operation of the dominant shareholders. Solomon, 770 F.2d at 353-54.

not liable under the Note because the word "spouse" (referring to her) was crossed out on her copy, and there is no authentication of her signature. However, on the original note Suzanne Atwell's signature appears with the word "spouse" untouched. The original Note was admitted as a record in the ordinary course of business without objection, and there was no dispute as to the authenticity of the signature.³ Suzanne Atwell was a party to the Note and liable for the unpaid balance according to its terms.

The Union claims that Suzanne Atwell is liable for the additional fringe benefits and contributions that became due after the Note was executed because of an Acceleration clause contained in the Note:

On non-payment of any installment when due, the failure of Obligors to file contribution reports as required by a Collective Bargaining Agreement to which DE MICA INC is bound, the failure to promptly and fully remit all contributions becoming due after the date of this Note to the Funds as required by a Collective Bargaining Agreement to which DE MICA INC is bound, all remaining installments plus interest and all of the unpaid contributions and liquidated damages as provided by the collective bargaining agreement shall at the option of the holder become immediately due and payable.

Installment Judgment Note of 5/27/98 at 1.

As signatories to the Note, it is clear that De Mica, Dennis

³Suzanne Atwell did not appear at trial to contest the authenticity of her signature on the Note.

Atwell and Suzanne Atwell are liable for the unpaid installments due on the Note. The language of the Acceleration clause referring to contributions becoming due after the date of the Note refers to a "Collective Bargaining Agreement to which DE MICA INC is bound." The language does not refer to Suzanne Atwell. In the event of any act of default described in the Acceleration Clause: (1) non-payment of an installment when due; (2) failure of Obligors to file contribution reports as required by a Collective Bargaining Agreement; and (3) failure to promptly and fully remit all contributions becoming due to the Funds after the date of this Note, at the option of the holder, (a) all remaining installments on the Note plus interest are immediately due and payable by all three signatories to the Note and (b) all unpaid contributions and liquidated damages as provided by the CBA are immediately due and payable by those bound by the CBA. As signatories to the CBA, De Mica and Dennis Atwell are liable for contributions due under the Acceleration clause. Suzanne Atwell is liable for all unpaid installments on the Note, but not for subsequent contributions due under the CBA because she is not bound by the CBA.

Plaintiffs also request interest, attorney's fees and costs as provided for in the Note. Plaintiffs waived these amounts at trial because they were not calculated in the amount plaintiffs claimed was due on the Note despite express inquiry by the court.

There was no evidence of the amount of interest due on the unpaid balance nor any evidence of attorney's fees attributed to default on the Note as compared to failure to pay contributions after the Note was signed. While Plaintiffs' counsel submitted post-trial findings of fact requesting these sums, there is no evidence of record to support this request.

Any facts in the Discussion section not found in the Facts section are incorporated by reference therein.

Conclusions of Law

1. This court has jurisdiction over the subject matter and the parties.

2. Suzanne Atwell is not a party to the CBA because she is not a signatory. Unless the CBA provides otherwise, individuals not a party to a CBA cannot be held directly liable under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq. There was no evidence piercing the De Mica corporate veil to impose personal liability on Suzanne Atwell.

3. Suzanne Atwell is signatory to the Note and bound by its terms.

4. Suzanne Atwell owes \$17,877.75, the balance remaining on the Note, to the Plaintiffs.

5. Plaintiffs waived interest, attorney's fees and costs by not claiming these amounts at trial.

6. Judgment will be entered in favor of Plaintiffs and

against defendant Suzanne Atwell for \$17,877.75, the balance due under the Note.

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SUZANNE ATWELL	:	NO: 98-5452

Judgment and Order

AND NOW, on this ___ day of October, it is **Ordered** that **Judgment** is entered in favor of Plaintiffs and against defendant Suzanne Atwell in the amount of \$17,877.75.

J.

