Benjamin Plumbing, Inc. v. Barnes

Supreme Court of Wisconsin
Decided June 20, 1991.

HEFFERNAN, CHIEF JUSTICE.

* * * In 1987 [William K.] Whitcomb contacted Benjamin Plumbing, Inc., an incorporated family plumbing business located in Madison, about the possibility of doing some plumbing work on a canning project for the "Response to Hunger Network" on the Mendota State Hospital grounds.

In a letter dated May 5, 1987, to Donald Knapp, the general manager of Benjamin Plumbing, Whitcomb requested a "rock bottom" price for the plumbing work. The letter stated that a minimum subsistence rate would be appreciated because "we have to search for donations to pay for this work and in the end we do not even have a product that will bring us any income." Under Whitcomb's signature were the typed words, "William K. Whitcomb, For Response to Hunger Network." In the letterhead, however, were the words, "National Council of the Churches of Christ in the United States of America, CHURCH WORLD SERVICE," with Whitcomb listed as its regional director.

In a letter dated June 20, 1987, and addressed to "Response to Hunger, To Whom It May Concern," Knapp set forth Benjamin Plumbing's price quotations for work on the cannery project. The letterhead used by Knapp set forth the words, "Benjamin Plumbing, Inc."

In a letter to Knapp dated July 9, 1987, Whitcomb accepted Benjamin Plumbing's rates and authorized Knapp to start the work. Whitcomb advised Knapp that he could be reached at his Church World Service address and phone number. Under Whitcomb's signature were the typed words, "William K. Whitcomb, Canning Committee—RHN." The letterhead was captioned, "RESPONSE TO HUNGER NETWORK."

Benjamin Plumbing completed the work but was subsequently paid only $5,000 of the final bill, which amounted to $10,603.66. The appropriateness of the total bill is not disputed. On October 30, 1987, Benjamin Plumbing filed an "Application and Certificate for Payment," asking for payment of the balance. On December 6, 1988, Benjamin Plumbing, not having received payment, filed an action against Whitcomb and two other members of RHN individually and RHN as an unincorporated association. The complaint alleged that all the defendants were jointly and severally liable for the unpaid balance of the plumbing contract. In their answer, the defendants denied contractual liability and affirmatively asserted that "Response to Hunger Network, Inc., is a Wisconsin corporation formed pursuant to Chapter 181 of the Wisconsin statutes."

Thereafter, Benjamin Plumbing brought a motion for summary judgment supported by an affidavit of its corporate president, David Benjamin, and copies of the various letters exchanged by the parties. The circuit court found that there were no material facts in dispute and considered the dispositive issue of law to be whether RHN's failure to expressly identify itself as a corporation in the contract and other correspondence destroyed the "personal liability protection under Wisconsin statutes." Focusing on sec. 181.06, Stats., and case law from other jurisdictions interpreting similar "corporate name" statutes, the circuit court concluded that the defendants should not be stripped of their personal liability protection unless Benjamin Plumbing could prove that it was "injured or misled by such misdescription" (citing 19 C.J.S., *Corporations,* sec. 1136 (1940)).

Examining the exhibits submitted in support and opposition to summary judgment, the circuit court held that, while there was no specific reference to RHN's incorporated status anywhere in the correspondence, Benjamin Plumbing, "itself a corporate entity, should have been placed on notice that it was not dealing with private individuals." The letters clearly indicated that the plumbing work was for RHN. Thus, because Benjamin Plumbing did not affirmatively allege any special harm or that the corporate status was purposefully concealed, the circuit court declined to "pierce the corporate veil" and hold the defendants personally liable.

Because Whitcomb individually contracted with Benjamin Plumbing without disclosing RHN's corporate status, the court of appeals reversed the circuit court's judgment dismissing the action against Whitcomb but affirmed it as to the other defendants. Believing it was faced with an issue of first impression, the court of appeals adopted various "black letter" agency principles setting forth that a person making a contract for a "partially disclosed principal" is a party to the contract and liable for its breach and that a principal is partially disclosed when the other party has notice that the agent is acting for a principal but has no notice of the principal's (corporate) "identity." (citing Restatement (Second) of Agency, secs. 4(2), 321 (1958)). As applied to corporate contracts, the court of appeals stated the general rule that an agent has a duty to disclose the corporate identity of the principal to avoid personal liability. (citing 3A W. Fletcher, *Cyclopedia of the Law of Private Corporations,* sec. 1120, at 237-38 (rev. ed. 1986), and case law from other jurisdictions).

The court of appeals concluded that Whitcomb was personally liable because he was the contracting party and there was no evidence that the corporate status of RHN was disclosed to Benjamin Plumbing.

We granted Whitcomb's petition for review to determine . . . whether an agent is personally liable on a contract where the other party did not have notice of the corporate status of the principal at the time of contracting . . . .

Under common law agency principles, an agent will be considered a party to the contract and held liable for its breach where the principal is only partially disclosed. A principal is considered partially disclosed where, at the time of contracting, the other party has notice that the agent is acting for a principal but has no notice of the principal's corporate or other business organization identity. *See Estate of Kaiser,* 217 Wis. 4, 8, 258 N.W. 177 (1935). *See also* Restatement (Second) of Agency, secs. 4(2), 321 (1958).

Where the principal is a business entity and not a natural person, a unique set of problems arises. Varying legal rights and liabilities attach to different types of business organizations, *e.g.,* sole proprietor, partnership, voluntary association, and corporation. Under well accepted legal principles, for example, all partners, as owners of the partnership, are jointly and severally liable for the contractual debts incurred by the partnership.

Similarly, when an entity is considered a voluntary association, all members of the association are jointly and severally liable for the association's contractual obligations. "A voluntary association is defined as individuals who join together for a certain object and are called for convenience by a common name." *Hafenbraedl v. LeTendre for Congress Committee,* 61 Wis. 2d 665, 666, 213 N.W.2d 353 (1974) (quoting *Herman v. United Automobile Aircraft & Agricultural Implement Workers,* 264 Wis. 562, 567, 59 N.W.2d 475 (1953)). It is generally recognized, furthermore, that numerous charitable and religious organizations are unincorporated associations consisting of a large and changing membership. *See* 2 *Williston on Contracts,* sec. 307, pp. 433-34 (3rd ed. 1959).

Where a business entity is a corporation, however, the shareholders, as owners of the corporation, are generally not personally liable for the contractual obligations of the corporation. *See Sprecher v. Weston's Bar, Inc.,* 78 Wis. 2d 26, 37, 253 N.W.2d 493 (1977). A corporation, be it for profit or not for profit, enters into contracts and incurs liability as a separate legal entity. The limited liability attribute of corporations is in fact what makes this business organization so significant. *See generally* R. Hamilton, *The Law of Corporations,* secs. 2.1, 2.5 (1980).

Where a party is contracting with a business entity, therefore, it makes a considerable difference whether or not it is a corporation on the other side of the bargaining table. If the agent with whom the party contracts is a partner, sole proprietor, or member of a voluntary association, the party may expect that agent to be personally liable on the contract. If the party knows the agent is contracting for a corporation, however, the agent would not be liable on the contract unless he or she expressly assumed such liability. The fact that the agent might also be a director or officer of the corporation is generally irrelevant under agency principles. *See Kiel v. Frank Shoe Mfg. Co.,* 245 Wis. 292, 298-99, 14 N.W.2d 164 (1944).

The general rule that agents are contractually liable where the principal is partially disclosed has produced the rule that an agent is liable where the contracting party is not aware of the corporate status of the principal. *See* 18B Am. Jur. 2d, *Corporations,* sec. 1833 (1985); 3A *Fletcher Cyc. Corp,* sec. 1120 (rev. ed. 1986).

In applying this rule to cases factually similar to the one before us, numerous courts from other jurisdictions have agreed on the following ancillary principles. It is the agent who seeks to escape liability who has the burden of proving that the principal's corporate status was disclosed. *See Jensen v. Alaska Valuation Service, Inc.,* 688 P.2d 161, 163 (Alaska 1984). Such a duty of disclosure creates no hardship on agents, for it is within their power to relieve themselves of liability. *Howell v. Smith,* 261 N.C. 256, 262, 134 S.E.2d 381 (1964). Conversely, the contracting party does not have any duty to inquire into the corporate status of the principal even when it is within that party's capability of doing so. *Detroit Pure Milk Co. v. Patterson,* 138 Mich. App. 475, 480, 360 N.W.2d 221 (1984). As a matter of fairness, the contracting party should not be saddled with the burden of "ferret[ing] out the record ownership" of the principal's business. *See Van D. Costas, Inc. v. Rosenberg,* 432 So. 2d 656, 659 (Fla. App. 1983).

Because the contracting party needs notice of the principal's corporate status, the use of a trade name is normally not sufficient disclosure. *G.W. Andersen Construction Co. v. Mars Sales,* 210 Cal. Rptr. 409, 412, 164 Cal. App. 3d 326 (1985); *see generally* Annotation, 150 A.L.R. 1303 (1944). The failure to use the "Inc." notation in correspondence between the agent and third party or in the contract itself is often critical in the determination of whether there was adequate disclosure of corporate status. *See, e.g., Delaware Valley Equipment Co., Inc. v. Granahan,* 409 F. Supp. 1011, 1014 (E.D. Pa. 1976); *Lagniappe of New Orleans, Ltd. v. Denmark,* 330 So. 2d 626, 626-27 (La. App. 1976).

In the case before us the circuit court incorrectly held that Benjamin Plumbing had constructive notice of RHN's corporate status. The error arises from the court's erroneous conception of the law that the burden was on Benjamin. It was on Whitcomb.

Based on the record before us, we conclude that the only reasonable inference that can be drawn from the undisputed facts is that Benjamin Plumbing had neither actual nor constructive notice of the corporate identity of the principal, RHN, at the time of contracting with Whitcomb.

First, the trial court found, and Whitcomb concedes, that there was no express disclosure of RHN's corporate status in the contract or correspondence between the parties. The first time Benjamin Plumbing had actual notice that RHN was a Wisconsin corporation was upon receipt of the defendants' answer to its complaint.

Second, the fact that Benjamin Plumbing was aware that Whitcomb was acting on behalf of an entity called RHN reveals nothing of Benjamin's awareness of the type of business organization it was dealing with. All business entities are not corporations. In fact, being an incorporated business itself, Benjamin Plumbing could have reasonably concluded that RHN would have used its corporate name in its firm letterhead, as did Benjamin, if it were in fact a corporation. As previously noted, Benjamin had no affirmative duty to investigate the business ownership record of the principal, RHN. Whitcomb, as an agent, had the obligation to disclose RHN's corporate status in order to prevent incurring liability on the contract. RHN was essentially using a trade name.

Third, the fact that RHN was manifestly a charitable, nonprofit organization does not lead to the inference that it was a corporation. As noted above, RHN might just as well have been an unincorporated association. While there are admittedly only a limited number of types of business organizations, identifying RHN as a corporation as opposed to an unincorporated association without some evidence of that fact would be mere conjecture. The fact that Benjamin Plumbing actually did bring suit against RHN as an unincorporated association and against Whitcomb and the others as its members was certainly reasonable given the lack of corporate identification.

Finally, the fact that Whitcomb did not in so many words expressly assume contractual liability is not dispositive. Clearly, the opposite is also true. Whitcomb did not expressly disavow personal liability on the contract as he so easily could have. It is exactly because there is a lack of express intentions to the contrary that courts have found an implied intention to hold the agent personally liable where the corporate identity of the principal is not disclosed. Whitcomb is liable because he is the contracting party. Had Benjamin Plumbing known RHN was a corporation with limited liability, it might well have taken precautionary measures to protect its interests.

Whitcomb . . . states that it is well accepted that corporations need not contract in their legal corporate name. Whitcomb reasons, therefore, as did the circuit court on summary judgment, that an agent should not incur personal liability for the principal's failure to contract in its corporate name.

The legal principles presented by Whitcomb are inapposite. These general rules only relate to the corporate principal's liability on a contract, not the agent's. Clearly, it has long been the rule in Wisconsin that a corporation can be contractually bound even where the corporate name was not used in the contract. Where the principal's corporate status has not been disclosed, however, the courts have uniformly held the agent liable on the contract as well.

In conclusion, Whitcomb's liability stems from the lack of notice to Benjamin Plumbing that the principal, RHN, was in fact a corporation. The burden of giving such notice was upon Whitcomb. . . . The undisputed facts do not support any reasonable inference that Benjamin had actual or constructive notice of RHN's corporate identity.

* * *

By the Court.—Decision affirmed.