

rel: June 25, 2021

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

1190876

Shorter Brothers, Inc., Joseph Shorter, and Jason Shorter

v.

Vectus 3, Inc.

1190903

Vectus 3, Inc.

v.

Shorter Brothers, Inc., Joseph Shorter, and Jason Shorter

**Appeals from Jefferson Circuit Court
(CV-19-903870)**

MITCHELL, Justice.

Vectus 3, Inc., sued Shorter Brothers, Inc., and its owners for breaching an asset-purchase agreement and related claims. In doing so, Vectus asked the trial court to pierce Shorter Brothers' corporate veil -- that is, hold Shorter Brothers' owners personally liable for the company's actions. The trial court granted complete relief to Vectus and awarded it damages, leading the defendants to appeal to this Court. Vectus cross-appealed, arguing that the damages awarded were insufficient. We affirm the trial court's judgment.

Facts and Procedural History

Vectus operated FedEx Ground delivery routes for several years before its owner decided to sell its assets. Brothers Joseph Shorter and Jason Shorter expressed interest in purchasing those assets. In March 2018, Joseph and Jason filed a certificate of formation in the Jefferson Probate Court to form Shorter Brothers.

Shorter Brothers entered into an asset purchase agreement ("the Agreement") with Vectus in October 2018. In the Agreement, Shorter

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Brothers agreed to purchase the rights to Vectus's contract with FedEx Ground and nine delivery trucks for \$400,000 at the closing scheduled for October 31, 2018. The Agreement obligated Shorter Brothers to wire the funds to Vectus at closing, which Shorter Brothers planned to finance with a loan. Because of concerns that Shorter Brothers would not obtain financing by closing, the parties provided the following financing contingency in the Agreement:

"[Shorter Brothers] anticipates securing bank financing to provide the \$400,000 for closing. From November 3, 2018 until the \$400,000 (plus accrued interest) is received by [Vectus], [Shorter Brothers] agrees to pay a rental fee for the 9 trucks in Schedule B of \$1,350 per week If funds have not been received by [Vectus] by January 1, 2019: [Shorter Brothers] agrees to transfer \$40,000 by January 2, 2019 to [Vectus;] [Shorter Brothers] agrees to make monthly payments of \$4,200 to [Vectus] (1st payment due on January 2nd, 2019 ... and due the 1st of the month after that)[.] [Shorter Brothers] will diligently seek to secure financing to pay-off the remaining balance (including accrued interest - which will accrue monthly @ a 7% annual rate) of the \$400,000 taking into account the \$40,000 transfer and any monthly payments received."

Shorter Brothers failed to obtain financing. As a result, it then paid:

- The \$1,350 weekly rental fees from November 2018 until January 2019;

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- The \$40,000 payment in January 2019; and
- The \$4,200 monthly payments from January 2019 through June 2019.

It ceased making any payments after June 2019.

Vectus sued Shorter Brothers, Joseph, and Jason ("the defendants") in August 2019 in the Jefferson Circuit Court. Vectus asserted claims of breach of contract, unjust enrichment, and conversion. It also alleged that Shorter Brothers was the alter ego of Joseph and Jason, and it urged the trial court to hold them personally liable for Shorter Brothers' actions.

Vectus moved for summary judgment on January 31, 2020. At that point, Vectus had served written discovery on the defendants but had encountered difficulty getting them to respond -- even though the trial court had granted two motions to compel and one motion for sanctions, all filed by Vectus. The defendants, who had not served any discovery of their own or conducted any depositions, submitted a general opposition to Vectus's summary-judgment motion, but they did not attach any affidavits or other evidence to their filing. The defendants also filed a motion under Rule 56(f), Ala. R. Civ. P., in which they asked the trial court to deny

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Vectus's motion for summary judgment and allow them the "opportunity to finish discovery."

The trial court postponed the hearing on Vectus's summary-judgment motion from March 3, 2020, until April 29, 2020, "[t]o give all Parties time to provide more information to the Court" The defendants did not serve or conduct any discovery during the extra time. Despite the defendants' failure to act, the trial court went forward with the summary-judgment hearing on April 29. Several weeks later, the defendants hired new counsel. Not long thereafter, the defendants filed an affidavit from Joseph contesting some of the factual matters at issue and attaching various financial documents from Shorter Brothers. Within a few weeks, while Vectus's summary-judgment motion remained under consideration, the defendants served their first discovery requests.

The trial court then entered summary judgment and awarded \$400,000 to Vectus -- an amount equal to the purchase price under the Agreement. Shorter Brothers filed for bankruptcy relief under Chapter 11 of the Bankruptcy Code shortly after the trial court denied the

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defendants relief from its judgment. The defendants then appealed to this Court. Vectus cross-appealed.

Analysis

The defendants contend that the trial court erred by (1) failing to allow further discovery and consider certain documents before entering summary judgment and (2) piercing Shorter Brothers' corporate veil. In its cross-appeal, Vectus argues that the trial court properly entered summary judgment but that the trial court erred by awarding damages of only \$400,000. Vectus argues that its true damages are \$597,566. We address these arguments below.

A. The Defendants' Appeal

1. The Trial Court Did Not Exceed its Discretion by Disregarding Certain Documents or Precluding Further Discovery

The defendants argue that the trial court erred by not allowing further discovery and by not considering documents they submitted in response to Vectus's summary-judgment motion, including Joseph's affidavit. Concerning their first argument, Rule 56(f), Ala. R. Civ. P., allows a party opposing a summary-judgment motion to file an affidavit

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notifying the trial court that it is presently unable to present "facts essential to justify the party's opposition." If the trial court agrees, it "may deny the motion for summary judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had" Id. Whether to grant a continuance under Rule 56(f) is "'within the sound discretion of the trial court'" Rosser v. AAMCO Transmissions, Inc., 923 So. 2d 294, 300 (Ala. 2005) (citation omitted). If the party opposing summary judgment "properly establishes before the trial court that unresponded-to discovery is crucial to the party's case, it is error for the trial judge to enter a summary judgment before the discovery has been supplied." Id. But "[o]nly rarely will an appellate court find that the trial court has exceeded its discretion in not allowing a requested continuance for the purpose of conducting further discovery." Id. at 301.

The defendants filed a motion under Rule 56(f) at the same time they submitted their general opposition to Vectus's summary-judgment motion. At that time -- more than five months after the lawsuit began -- the defendants had not served any written discovery or taken any

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depositions, so there was no "unresponded-to discovery." Id. at 300. And by that point, the defendants already had a history of failing to adequately respond to Vectus's discovery. Despite these deficiencies, the trial court granted the defendants nearly two more months to conduct additional discovery. There is no indication that the defendants objected on the basis that this amount of extra time was insufficient.

The summary-judgment hearing came and went without any affirmative discovery from the defendants. In fact, the defendants did not serve any discovery until over a month after the summary-judgment hearing had occurred. And it does not appear that the defendants filed a second Rule 56(f) motion. Under these circumstances, it is clear that the trial court did not exceed its discretion by refusing to delay consideration of Vectus's summary-judgment motion any further. See id. at 302 ("[W]e cannot find that the trial judge exceeded his discretion in denying a continuance, given the multiple opportunities available to [the plaintiff] over the long course of the pendency of this action"); McGhee v. Martin, 892 So. 2d 398, 406 (Ala. Civ. App. 2004) (affirming denial of Rule 56(f) continuance when "the lengthy discovery period and McGhee's apparent

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delay in moving ahead with the case mitigate[d] against allowing a continuance").

The defendants also argue that it was "incomprehensible" for the trial court to "ignore" Joseph's affidavit. Rule 56(c)(2) states: "Subject to [Rule 56(f)], any statement or affidavit in opposition shall be served at least two (2) days prior to the hearing." The defendants failed to submit an affidavit or other evidence until one month after the summary-judgment hearing. Although the trial court did not mention the affidavit in its order granting Vectus's summary-judgment motion, it clarified in a later order that it considered Joseph's affidavit "untimely filed." Given the plain language of Rule 56(c)(2), the trial court did not err by refusing to consider Joseph's affidavit.¹ See Speer v. Pin Palace Bowling Alley, 599 So. 2d 1140, 1142 (Ala. 1992) (holding that trial court did not abuse its

¹The defendants fault their previous counsel for these issues and highlight the efforts that their new counsel undertook once he was hired. Regardless of whether the defendants are right to fault their prior counsel, the propriety of their counsel's actions is not at issue in this appeal.

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discretion in refusing to consider affidavit in opposition to summary-judgment motion filed after the summary-judgment hearing).

2. The Trial Court Did Not Err by Piercing the Corporate Veil

The defendants contend that the trial court erred by entering summary judgment in favor of Vectus and holding Joseph and Jason personally liable for Shorter Brothers' actions. We disagree.

Our review of the trial court's summary judgment is de novo, and we apply the same standard that the trial court applied -- that is, we must determine " 'whether the movant has made a prima facie showing that no genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law.' " Shoals Extrusion, LLC v. Beal, 288 So. 3d 448, 450 (Ala. 2019) (citation omitted). In conducting our review, " 'we must review the evidence in the light most favorable to the nonmovant.' " Id. (citation omitted). " 'Once the movant makes a prima facie showing that there is no genuine issue of material fact, the burden then shifts to the nonmovant to produce "substantial evidence" as to the existence of a genuine issue of material fact.' " Id. at 450-51 (citation omitted). And "[w]hen a motion for summary judgment is made and supported as

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provided in" Rule 56, Ala. R. Civ. P., "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Rule 56(e). If not, "summary judgment, if appropriate, shall be entered against [that party]." Id.

The defendants do not contest the trial court's summary judgment on the breach-of-contract, conversion, or unjust-enrichment claims. Rather, they argue that the trial court should not have pierced Shorter Brothers' corporate veil. It is well established that "a corporation is a legal entity existing separately from its shareholders." First Health, Inc. v. Blanton, 585 So. 2d 1331, 1334 (Ala. 1991). Thus, "[p]iercing the corporate veil is not a power that is lightly exercised." Id. It may be appropriate when the corporate entity is (1) undercapitalized, (2) formed or operated with a fraudulent purpose, or (3) operated "as an instrumentality or alter ego" of its shareholders. Id.

Vectus advanced an alter-ego theory. To establish that an entity is the alter ego of its owners, "[t]he dominant party must have complete

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control and domination of the subservient corporation's finances, policy and business practices so that at the time of the attacked transaction the subservient corporation had no separate mind, will, or existence of its own.' " Id. (citation omitted). The defendants concede this element. But "mere domination cannot be enough for piercing the corporate veil." Simmons v. Clark Equip. Credit Corp., 554 So. 2d 398, 400 (Ala. 1989). Rather, "[t]here must be the added elements of misuse of control and harm or loss resulting from it." Id. Thus, we have held that an alter-ego theory of piercing the corporate veil is viable where

" "a corporation is set up as a subterfuge, where shareholders do not observe the corporate form, where the legal requirements of corporate law are not complied with, where the corporation maintains no corporate records, where the corporation maintains no corporate bank account, where the corporation has no employees, where corporate and personal funds are intermingled and corporate funds are used for personal purposes, or where an individual drains funds from the corporation." "

Econ Mktg., Inc. v. Leisure Am. Resorts, Inc., 664 So. 2d 869, 870 (Ala. 1994) (citations omitted).

The evidence submitted with Vectus's summary-judgment motion shows that Shorter Brothers' shareholders -- Joseph and Jason -- did not

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observe the corporate form and that their misuse of the corporate form left Vectus with little recourse. As the trial court noted, in response to Vectus's request for "corporate documents," the defendants failed to produce copies of any bylaws, operating agreement, shareholder agreement, corporate minutes, or other documents to support that Shorter Brothers had a separate corporate existence and was not the mere "instrumentality or alter ego" of Joseph and Jason. Blanton, 585 So. 2d at 1134. Further, the defendants' discovery responses indicate that Shorter Brothers had little, if any, financial records at that time. The defendants likewise said in discovery responses that Shorter Brothers had employees; yet they produced no information about employee numbers, roles, or duties. See Econ Mktg., 664 So. 2d at 870-71 (holding that trial court erred by not piercing corporate veil when entity "failed to keep complete and correct records of all transactions of the corporation and minutes of the proceedings of its shareholders and board of directors" and where "the financial records, books, or minutes of the meetings" of directors could not be located, among other issues).

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The defendants did not timely produce any admissible evidence to refute the assertions in Vectus's summary-judgment motion. Instead, they "rest[ed] upon the mere allegations or denials of [their] pleading" Rule 56(e). And even then, the defendants devoted only a handful of sentences to rebutting the alter-ego theory in their general opposition to Vectus's summary-judgment motion.

On appeal, the defendants point to documents attached to Vectus's summary-judgment motion. Specifically, they cite Shorter Brothers' certificate of formation, the Agreement, and Shorter Brothers' Form 1099-MISC from 2018 to refute Vectus's alter-ego theory. But those documents fail to provide "substantial evidence" that Shorter Brothers had a corporate existence separate from Joseph and Jason. Beal, 288 So. 3d at 450. The certificate of formation merely shows that Shorter Brothers exists as a legal entity -- a fact no one disputes. And while entering into contracts may, in some circumstances, indicate that an entity has a separate corporate existence, the Agreement is the only contract to which the defendants point.

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Like contracts, corporate tax records may support a finding of a separate corporate existence. But the defendants pointed to only a single Form 1099-MISC that Shorter Brothers filed in 2018. That form reveals Shorter Brothers' income, salary expenses (without specifying whose salaries it covered), and minor tax and repair expenses over a two-month period. The fact that Shorter Brothers filed one tax document identifying income and unspecified purported expenses for two months of its existence does not, standing alone, constitute "substantial evidence."²

In sum, Vectus made a prima facie showing that Joseph and Jason operated Shorter Brothers as their instrumentality or alter ego.³ The

²On appeal, the defendants also rely on Joseph's affidavit and the other documents they submitted. But, as discussed above, the trial court properly disregarded those submissions as untimely. We therefore limit our review to the material that the trial court considered. See Mathis v. Jim Skinner Ford, Inc., 361 So. 2d 113, 116 (Ala. 1978) ("The propriety of granting motions for summary judgment must be tested by reviewing what the trial court had before it when it granted the motion.").

³Although Vectus asserted an alter-ego theory in its complaint seeking to pierce the corporate veil, we note that the record also contains evidence that Shorter Brothers was undercapitalized. See Blanton, 585 So. 2d at 1134 (noting that it may be appropriate to pierce the corporate veil if the corporation is undercapitalized); see also Smith v. Mark Dodge, Inc., 934 So. 2d 375, 380 (Ala. 2006) ("[T]his Court will affirm a judgment for any reason supported by the record that satisfies the requirements of

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defendants failed to timely produce substantial evidence -- or any evidence, for that matter -- revealing the existence of a genuine issue of material fact. Thus, the trial court did not err by piercing Shorter Brothers' corporate veil.

B. Vectus's Cross-Appeal

In its summary-judgment order, the trial court awarded \$400,000 -- an amount equal to the purchase price under the Agreement -- to Vectus. But the trial court did not explain why it awarded that amount. Vectus contends that the trial court erred and that its true damages are \$597,566.

Damages for a breach of contract "should return the injured party to the position he would have been in had the contract been fully performed." Garrett v. Sun Plaza Dev. Co., 580 So. 2d 1317, 1320 (Ala.

due process, even where the ground upon which we affirm was not argued before the trial court or this Court." (internal citation omitted)). Shorter Brothers did not have -- and could not obtain -- funds sufficient to purchase the assets required to run the business. It also ceased making the weekly rental payments after about two months, in part because of that failure; ceased making monthly payments by June 2019; and then filed for bankruptcy protection when the trial court denied relief from its judgment.

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1991). That determination "is within the discretion of the fact-finder and is presumed to be correct." Tri-Tube, Inc. v. OEM Components, Inc., 672 So. 2d 1303, 1306 (Ala. Civ. App. 1995) (citing IMAC Energy, Inc. v. Tittle, 590 So. 2d 163 (Ala.1991)).

At the time Vectus filed its summary-judgment motion, it argued -- based primarily on the Agreement's terms -- that it had incurred damages of \$562,102.44. It appears that Vectus calculated that amount in the following manner:

- Unpaid balance of the purchase price = \$408,904.44.⁴
- Fifty-six weeks of unpaid \$1,350 weekly rental fees = \$75,600.
- Seven unpaid \$4,200 monthly payments = \$29,400.

⁴Vectus arrived at this number in the manner outlined in Exhibit B to its complaint. That is, Vectus began with the unpaid purchase price of \$400,000 and added the weekly interest amounts. Vectus then deducted the initial \$40,000 payment from the balance. From there, Vectus included unpaid weekly vehicle rental fees in the total unpaid balance to which interest applied. Relatedly, Vectus also reduced the unpaid balance based on Shorter Brothers' monthly payments, but did not reduce the balance by \$4,200 -- instead, it appears Vectus reduced each monthly payment by one week's rental fee.

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- Interest expenses incurred = \$48,200.⁵

Before the summary-judgment hearing, Vectus supplemented its motion, arguing that it was entitled to an additional 3 months of unpaid monthly payments, 12 more weeks of rental fees, and additional accrued interest, bringing the alleged total damages to \$597,566.

This calculation is questionable for several reasons. First, the calculation includes at least some of the unpaid \$1,350 weekly rental fees in the unpaid balance of the purchase price. The Agreement states that Shorter Brothers "will diligently seek to secure financing to pay-off the remaining balance (including accrued interest - which will accrue monthly @ a 7% annual rate) of the \$400,000 taking into account the \$40,000 transfer and any monthly payments received." That is, it contemplates interest accruing on the "remaining balance ... of the \$400,000" -- not the unpaid weekly rental fees. See Garrett, 580 So. 2d at 1320 (declining to award damages that "would place on the developers a burden not provided

⁵Vectus supported this assertion with an affidavit of its owner stating that Vectus had incurred these interest expenses for credit obligations owed to Stearns Bank and other unspecified creditors.

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for in the contract"). Second, for the six monthly payments that Shorter Brothers made, Vectus applied a credit of only \$2,850 to the balance of the unpaid purchase price. That is, it appears that Vectus considered the first \$1,350 of the monthly payment as one week's rental fee, resulting in a higher unpaid balance of the purchase price. There is nothing in the Agreement, and Vectus cites no authority in its briefs or in the record, that permits this practice. Third, it appears that some of the unpaid 56 weeks of rental fees were also included in Vectus's calculation of the unpaid balance of the purchase price, meaning that at least some of the missing rental payments were double-counted. Finally, Vectus seeks 10 months of unpaid monthly payments, or \$42,000. But as discussed above, those monthly payments should be credited to the balance of the unpaid purchase price -- not added to it. See id. ("[T]he injured party is not to be put in a better position by a recovery of damages for the breach than he would have been in if there had been performance.").

Vectus's damages calculation is the same on appeal as it was before the trial court. Given the apparent defects in that calculation, we cannot say that the trial court exceeded its discretion in ignoring it or that Vectus

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has overcome the presumption that the trial court's damages award is correct. See Tri-Tube, 672 So. 2d at 1306. We thus decline to reverse the trial court's judgment as to damages.

Conclusion

The defendants have not established that the trial court exceeded its discretion by precluding further discovery before entering summary judgment or by disregarding untimely submissions in response to Vectus's summary-judgment motion. Nor have the defendants established that the trial court erred by piercing Shorter Brothers' corporate veil and holding Joseph and Jason liable. Finally, because Vectus's calculation of total damages is apparently flawed, we cannot say that the trial court erred in rejecting it.

1190876 -- AFFIRMED.

1190903 -- AFFIRMED.

Parker, C.J., and Shaw and Bryan, JJ., concur.

Mendheim, J., concurs in the result.