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DANIEL BALSAM, Plaintiff and Appellant, v. DSG DIRECT, INC., et al, Defendants; TROPICINKS, LLC, et al., Objectors and Respondents.

A126680

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION THREE

2010 Cal. App. Unpub. LEXIS 4439

June 14, 2010, Filed

PRIOR HISTORY: [*1]
City and County of San Francisco Super. Ct. No. CGC-05-441630.

JUDGES: Pollak, Acting P. J.; Siggins, J., Jenkins, J. concurred.

OPINION BY: Pollak

OPINION

Daniel Balsam appeals from an order denying his motion to amend his judgment against DSG Direct, Inc. (DSG Direct) and Your-Info, Inc. (Your-Info) to add TropicInks, LLC (TropicInks), Datastream Group Inc. (Datastream) and Leigh-Ann Colquhoun as additional judgment debtors. Balsam argues that TropicInks is liable for the judgment based on the concept of successor liability, Colquhoun is liable for the judgment based on theories of alter ego and corporate officer liability, and that Datastream is liable for the judgment on the alter ego theory. We find that the undisputed evidence establishes TropicInks's successor liability. Balsam, however, failed to establish the liability of Colquhoun or Datastream. Accordingly, we shall reverse the order insofar as it denies Balsam's motion to add TropicInks as an additional party to the judgment and affirm the order in all other respects.

Factual and Procedural History

On May 26, 2005, Balsam filed a complaint against DSG Direct and Your-Info for repeatedly sending him unsolicited commercial emails in violation of *Business and Professions Code section 17529.5* [*2] and *Civil Code section 1750 et seq.* The complaint alleged that DSG Direct and Your-Info were corporations "duly organized and recognized under the laws of the State of Florida with a principal place of business in Bonita Springs, Florida" and that "the president of defendant DSG Direct Inc., Leigh-Ann Colquhoun, is also the officer/registered agent for defendant Your-Info Inc." DSG Direct and Your-Info filed an answer to the complaint, verified by Colquhoun, and a case management statement, but thereafter did not participate in the litigation. On February 28, 2008, when DSG Direct and Your-Info failed to appear for trial, the court entered judgment in favor of Balsam in the amount of $ 199,167.

Balsam recovered $ 2,083.72 on his judgment from DSG Direct but has been unable to collect the remainder of the judgment. On September 26, 2008, the corporate status of DSG Direct and Your-Info were administratively dissolved in Florida as a result of their failure to file a mandatory annual report. On October 8, 2008, Colquhoun and her son Jonathan Reinertsen incorporated TropicInks.

On July 27, 2009, Balsam filed a motion to amend the judgment pursuant to *Code of Civil Procedure [1] section 187* [*3] to add TropicInks, Colquhoun and Data-

stream to the judgment on successor, alter ego and corporate officer theories of liability. The following evidence was offered in support of the motion.

1 All statutory references are to the Code of Civil Procedure unless otherwise noted.

According to records of the Division of Corporations for the State of Florida, Colquhoun was an officer/director of DSG Direct, the principal place of business of which was on Bonita Beach Road in Bonita Springs, Florida. Colquhoun was an officer/director of Your-Info; its principal address was on High Seas Lane in Bonita Springs, Florida. Colquhoun and Reinertsen are TropicInk's managers and its principal address is the same High Seas Lane address in Bonita Springs as Your-Info. Colquhoun is the officer/director of Datastream and its principal address is also the same High Seas Lane address in Bonita Springs.

Although TropicInks was incorporated in October 2008, the website "tropicinks.com" was operational well before the date of incorporation. Beginning in at least 2004, the website "tropicinks.com" was registered to a company named "TropicInks." The domain name registration shows the registrant's address to be in [*4] Sarasota, Florida. In March 2008, before DSG Direct dissolved, the tropicInks.com website indicated that as of 2006 DSG Direct held the copyright. In August 2009, after DSG Direct dissolved, the same website indicated that the copyright was held by TropicInks. The date of the copyright remained 2006.

Balsam submitted a declaration relating his experiences with the websites operated by the various companies. In March 2008, when he began the checkout process on the tropicinks.com website, he was redirected to a webpage at DSGDirect.com that advised, "Your credit card will be billed by DSG Direct, Inc. Checks will be payable to DSG Direct, Inc." When he began the checkout process on the tropicInks.com website in July 2009, he was again redirected to the DSGDirect.com website, but now the page advised, "Your credit card will be billed by TropicInks, LLC. Checks will be payable to TropicInks, LLC." Balsam also submitted evidence showing that the domain name DSGDirect.com is registered to Datastream.

Colquhoun submitted a declaration in opposition to Balsam's motion that stated that Datastream and TropicInks are "separate legal entities from the Florida defendants. Each entity has its own [*5] bank accounts separate from the Florida defendants and has observed requisite corporate formalities such as annual filings with the Florida Secretary of State. [P] DSG Direct is an e-commerce company selling ink products found in 2003 in Gainesville, Florida. . . . [P] . . . [P] Datastream is not an e-commerce company such as DSG Direct or [TropicInks] but rather is an internet services company. Datastream has provided services to DSG Direct, such as domain name management, but never comingled any assets with DSG Direct and was compensated for its services. Datastream is based in Bonita Springs, Florida . . . ." Colquhoun claims that the business of DSG Direct gradually declined after the death of her son Daniel, who was DSG Direct's "key employee." TropicInks, which operates out of Sarasota, Florida, was formed two years after Daniel's death by Colquhoun and her other son Jonathan. Colquhoun's declaration was signed under penalty of perjury under Florida law. Balsam objected to Colquhoun's declaration on the ground that it was untimely and not signed under penalty of perjury under the laws of California, in violation of section 2015.5. Without ruling on Balsam's evidentiary objections, [*6] the court denied the motion to add the additional parties to the judgment. Balsam filed a timely notice of appeal.

Discussion

"Under *section 187*, the court has the authority to amend a judgment to add additional judgment debtors." [2] *(NEC Electronics Inc. v. Hurt (1989) 208 Cal.App.3d 772, 778*.) Judgments may be amended to add additional judgment debtors on the ground that a person or entity is the alter ego of the original judgment debtor *(id. at pp. 778-779*) or that the person or entity is a successor corporation *(McClellan v. Northridge Park Townhome Owners Assn. (2001) 89 Cal.App.4th 746, 753)*. "This is an equitable procedure based on the theory that the court is not amending the judgment to add a new defendant but is merely inserting the correct name of the real defendant." *(NEC Electronics v. Hurt, supra, at p. 778*.)

2 *Section 187* reads in full: "When jurisdiction is, by the constitution or this code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or [*7] mode of proceeding may be adopted which may appear most conformable to the spirit of this code ."

As the moving party, Balsam had the burden of proving the essential facts by a preponderance of the evidence. *(Wollersheim v. Church of Scientology (1999) 69 Cal.App.4th 1012, 1017*; *Maloney v. American Pharmaceutical Co. (1988) 207 Cal.App.3d 282, 288* & fn. 3.) We review the findings underlying the trial court's order denying the motion to amend the judgment to name an additional judgment debtor under the substantial evi-

dence standard. *(McClellan v. Northridge Park Townhome Owners Assn., supra, 89 Cal.App.4th at p. 752.*)

Before considering the merits of Balsam's appeal, it is necessary to resolve a number of evidentiary issues. First, Balsam contends that the court erred in failing to rule on his objection to Colquhoun's declaration. Balsam objected on the ground that the declaration was not properly signed under penalty of perjury under the laws of the State of California. Section 2015.5 provides in relevant part: "Whenever, under any law of this state or under any rule, regulation, order or requirement made pursuant to the law of this state, any matter is required or permitted to be supported, [*8] evidenced, established, or proved by the sworn statement, declaration, verification, certificate, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may with like force and effect be supported, evidenced, established or proved by the unsworn statement, declaration, verification, or certificate, in writing of such person which recites that it is certified or declared by him or her to be true under penalty of perjury, is subscribed by him or her, and (1), if executed within this state, states the date and place of execution, or (2), if executed at any place, within or without this state, states the date of execution and that it is so certified or declared under the laws of the State of California." An "out-of-state declaration which materially deviates from section 2015.5 . . . cannot be used as evidence." *(Kulshrestha v. First Union Commercial Corp. (2004) 33 Cal.4th 601, 618* [out-of-state declaration that did not state that it was made under the laws of the State of California is inadmissible].) Since Colquhoun did not sign her [*9] declaration under penalty of perjury under the law of the State of California, it was not admissible over Balsam's objection. Hence, its contents are entitled to no consideration in determining whether substantial evidence supports the court's ruling.

Next, we consider three requests for judicial notice. Balsam's first request for judicial notice seeks to supplement the record with Datastream's articles of incorporation, as well as a complaint against Datastream filed by the Michigan Attorney General and a consent judgment filed in that action. He argues that these documents are relevant because "they demonstrate the falsity of Colquhoun's claim to the trial court below that Datastream is not an 'e-commerce company' but rather an 'internet services company.' " Having concluded that Colquhoun's declaration is inadmissible, we deny Balsam's first request for judicial notice.

Balsam also requests that we take judicial notice of annual reports submitted by DSG Direct to the Florida Department of State in 2006 and 2007, two annual reports submitted by Your-Info to the Florida Department of State in 2006 and 2007, and three media reports that allegedly demonstrate that Colquhoun's husband [*10] has a reputation as a "spammer." Balsam contends the annual reports are relevant to dispute respondents' claim in their opening brief that the last filing with the Secretary of State by DSG Direct and Your-Info was in 2005. We grant Balsam's motion with respect to the annual reports, but deny the request with respect to the additional documents, which are both irrelevant and not the proper subject of judicial notice.

Finally, Colquhoun requests that we take judicial notice of a newspaper article that references the date of her son's death. She argues that the fact of her son's death is the proper subject of judicial notice because it is not reasonably subject to dispute. (*Evid. Code, § 452, subd. (h).*) We need not pass on this questionable assertion since Balsam does not dispute the fact of the son's death, so that the article is not relevant to any matter in dispute and is denied on that basis.

1. **The trial court erred in failing to add TropicInks as an additional judgment debtor.**

Balsam sought to add TropicInks as a judgment debtor on the ground it is a successor corporation and essentially the same entity as DSG Direct. "As typically formulated," the rule is that "a corporation purchasing [*11] the principal assets of another corporation . . . does not assume the seller's liabilities unless (1) there is an express or implied agreement of assumption, (2) the transaction amounts to a consolidation or merger of the two corporations, (3) the purchasing corporation is a mere continuation of the seller, or (4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts." *(Ray v. Alad Corp. (1977) 19 Cal.3d 22, 28.*) Balsam contends that TropicInks is a "mere continuation" of DSG Direct. [3]

> 3 TropicInks argues that under *Corporations Code section 17450, subdivision (a)* this court is required to apply Florida law to determine whether it is liable for the judgment as the successor to DSG Direct. However, *section 17450, subdivision (a)*, which provides that "[t]he laws of the state or foreign country under which a foreign limited liability company is organized shall govern its organization and internal affairs and the liability and authority of its managers and members," has no application to the present dispute.

In *Ray v. Alad Corp., supra, 19 Cal.3d at page 29*, the court explained that "a corporation acquiring the assets of another [*12] corporation is the latter's mere continuation and therefore liable for its debts . . . only upon a showing of one or both of the following factual elements:

(1) no adequate consideration was given for the predecessor corporation's assets and made available for meeting the claims of its unsecured creditors; (2) one or more persons were officers, directors, or stockholders of both corporations." In *McClellan v. Northridge Park Townhome Owners Assn., supra, 89 Cal.App.4th 746*, the court reaffirmed the rule that "corporations cannot escape liability by a mere change of name or a shift of assets when and where it is shown that the new corporation is, in reality, but a continuation of the old." (See 9 Witkin, Summary of Cal. Law (10th ed. 2005) *Corporations, § 16*, p. 794 ["If a corporation organizes another corporation with practically the same shareholders and directors, transfers all the assets but does not pay all the first corporation's debts, and continues to carry on the same business, the separate entities may be disregarded and the new corporation held liable for the obligations of the old"]; *Blank v. Olcovich Shoe Corp. (1937) 20 Cal.App.2d 456, 461* [rule is "well settled when actual [*13] fraud or the rights of creditors are involved, under which circumstances the courts uniformly hold the new corporation liable for the debts of the former corporation"].)

Here, the evidence is undisputed that Colquhoun was an officer of DSG Direct and is an officer of TropicInks and that TropicInks conducts essentially the same type of business that was conducted by DSG Direct, through many of the same websites that were used by DSG Direct. The evidence shows that DSG Direct originally held the copyright to tropicinks.com and that the copyright was transferred to TropicInks when DSG Direct dissolved and TropicIncks was incorporated. As Balsam suggests, this change "evidences the transfer of assets (the website itself) from DSG Direct to TropicInks." Balsam acknowledges that he is "unaware how much, if anything, TropicInks paid (now defunct) DSG Direct for its assets (the website, customer database, and physical inventory of products)." He argues, however, that if any consideration was paid to DSG Direct, none of it was made available to satisfy his judgment. The record establishes that DSG Direct was dissolved and TropicInks was incorporated just a few months after Balsam obtained a [*14] writ of execution and levied incoming payments to DSG Direct. Even on the premise that successor liability cannot be imposed under the "mere continuation" of the business theory unless there was a lack of consideration for the transferred assets (e.g., *Franklin v. USX Corp. (2001) 87 Cal.App.4th 615, 625-627*; *Maloney v. American Pharmaceutical Co., supra, 207 Cal.App.3d at pp. 286-290*), the totality of circumstances here compel such an inference, especially in the absence of any contrary evidence. Colquhoun does not dispute any of the facts on which Balsam relies and offered no evidence suggesting that TropicInks was anything other than a mere continuation of the business of DSG Direct. Nothing in Colquhoun's declaration, even if it were admissible, would have altered this conclusion. Her claim that her son Daniel was the "key employee" of DSG Direct does not lessen the fact that she was a shareholder of both and identified on filings with the state as the officer/manager of both companies. Thus, the evidence establishes that TropicInks is merely the continuation of DSG Direct and subject to its liabilities. [4]

> 4 In light of this conclusion, we need not reach Balsam's alternate theory [*15] of successor liability--that TropicInks was created and the assets of DSG Direct transferred to it for the fraudulent purpose of avoiding Balsam's judgment.

TropicInks contends that amending the judgment to add it as an additional judgment debtor would violate its right to due process. (See *Motores De Mexicali v. Superior Court (1958) 51 Cal.2d 172, 175-176* [As a matter of due process, an amendment adding an *alter ego defendant* will not be permitted absent a showing that the nonparty participated in the defense of the underlying litigation]; *NEC Electronics, Inc. v. Hurt, supra, 208 Cal.App.3d at p. 778* [amendment is " 'an appropriate and complete method by which to bind new individual defendants where it can be demonstrated that in their capacity as *alter ego of the corporation* they in fact had control of the previous litigation, and thus were virtually represented in the lawsuit' " (italics added)].) TropicInks argues that it was not afforded an opportunity to present a defense to Balsam's claim because it was not formed until after the judgment was entered and because the judgment was entered following an uncontested prove-up hearing.

However, TropicInks is not being added to the [*16] judgment as the alter ego of DSG Direct but as its successor. In *McClellan v. Northridge Park Townhome Owners Ass'n, Inc., supra, 89 Cal.App.4th at page 457*, the court explained that where the new entity is a mere continuation of defendant under a different name, the successor corporation "cannot be heard to complain that because it did not exist at the time the arbitration award was entered, its interests were not represented in the underlying action." Likewise, although the judgment was entered after DSG Direct failed to appear at trial, it is not a default judgment. DSG Direct appeared in the action, represented by counsel. It was given ample notice of the claims against it and a sufficient opportunity to defend against those claims. TropicInks has not presented any evidence that suggests that its interests in or potential defenses to the litigation would have been different from those of DSG Direct.

TropicInks also argues that "the balance of equities" weighs against amendment because "the underlying

judgment is inconsistent with the law." No appeal was taken from the judgment against DSG Direct, which is now final. The motion under *section 187* presents no occasion to reconsider [*17] the merits of the judgment. (See *Mason & Associates, Inc. v. Guarantee Sav. & Loan Assn. (1969) 269 Cal.App.2d 132, 133-134* ["when a judgment becomes final by lapse of the time for appeal, the court has no further jurisdiction of the subject matter, except in those special situations not here applicable where continuing jurisdiction exists"].)

Accordingly, the trial court's order must be reversed insofar as it denies Balsam's motion to amend the judgment to add TropicInks as an additional judgment debtor.

2. **The trial court did not err in refusing to add Colquhoun as an additional judgment debtor.**

Balsam sought to add Colquhoun as an additional judgment debtor on the ground that DSG Direct was her alter ego. "Ordinarily, a corporation is regarded as a legal entity, separate and distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations. [Citations.] A corporate identity may be disregarded-the 'corporate veil' pierced-where an abuse of the corporate privilege justifies holding the equitable ownership of a corporation liable for the actions of the corporation. [Citation.] Under the alter ego doctrine, then, when the corporate form is used [*18] to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, the courts will ignore the corporate entity and deem the corporation's acts to be those of the persons or organizations actually controlling the corporation, in most instances the equitable owners. [Citations.] The alter ego doctrine prevents individuals or other corporations from misusing the corporate laws by the device of a sham corporate entity formed for the purpose of committing fraud or other misdeeds. [Citation.] [P] In California, two conditions must be met before the alter ego doctrine will be invoked. First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone. [Citations.] 'Among the factors to be considered in applying the doctrine are commingling of funds and other assets of the two entities, the holding out by one entity that it is liable for the debts of the other, identical equitable ownership in the two entities, [*19] use of the same offices and employees, and use of one as a mere shell or conduit for the affairs of the other.' [Citations.] Other factors which have been described in the case law include inadequate capitalization, disregard of corporate formalities, lack of segregation of corporate records, and identical directors and officers. [Citations.] No one characteristic governs, but the courts must look at all the circumstances to determine whether the doctrine should be applied. [Citation.] Alter ego is an extreme remedy, sparingly used." [5] *(Sonora Diamond Corp. v. Superior Court (2000) 83 Cal.App.4th 523, 538-539*.)

> 5 Again respondents contend that this court should apply Florida law, which they characterize as more restrictive, to determine whether DSG Direct is the alter ego of Colquhoun and Datastream. Balsam disagrees. We need not resolve this choice of law question because we conclude that neither Colquhoun nor Datastream are liable under California law, the arguably less restrictive of the two choices.

In *Katzir's Floor and Home Design v. M-MLS.com (9th Cir. 2004) 394 F.3d 1143, 1149*, the court emphasized that " '[a]lter ego is a limited doctrine, invoked only where recognition of the [*20] corporate form would work an *injustice* to a third person.' [Citation.] The injustice that allows a corporate veil to be pierced is not a general notion of injustice; rather, it is the injustice that results only when corporate separateness is illusory." In *Sonora Diamond Corp. v. Superior Court, supra, 83 Cal.App.4th at page 539*, the court held that "injustice was not proved by [the corporation's] apparent inability to meet the balance of its endowment obligation to the District. The alter ego doctrine does not guard every unsatisfied creditor of a corporation but instead affords protection where some conduct amounting to bad faith makes it inequitable for the corporate owner to hide behind the corporate form. Difficulty in enforcing a judgment or collecting a debt does not satisfy this standard." (See also *Katzir's Floor and Home Design, Inc. v. M-MLS.com, supra, at p. 1149* [factual finding that new corporation was formed to "continue conducting the same business . . . and to escape the judgment" does not demonstrate injustice sufficient to apply alter ego doctrine].)

Balsam argues that DSG Direct is but an alter ego of Colquhoun based on the following evidence: "[T]he companies are [*21] owned and controlled by one person, the companies have less than arms-length associations, the companies claim the same physical address and telephone numbers, and Datastream owns DSGDirect.com website [and] the businesses all pursue the same line of business: spamming." The fact that Colquhoun was the sole or primary shareholder and officer of DSG Direct and of the other companies is insufficient to establish her personal liability. Balsam has offered absolutely no evidence regarding the finances of either DSG Direct or Colquhoun, while the record demonstrates that until 2008 DSG Direct complied with the requisite corporate

formalities by filing all necessary documents with the state of Florida.

The lack of evidence presented by Balsam renders *Jack Farenbaugh & Son v. Belmont Construction, Inc. (1987) 194 Cal.App.3d 1023* distinguishable. In that case, the court held that sufficient evidence supported the trial court's finding that the defendant corporation, Belmont Construction, Inc., was the alter ego of its primary shareholder based on evidence that the corporation "had no money and had not done business within the previous two to five years, that the corporation had no bank accounts, [*22] no equipment or even small tools, and that the last monies [it] received was in 1980, or prior thereto." *(Id. at p. 1033*.) Plaintiff also presented evidence that during the same time period, the shareholder was operating a sole proprietorship under the name "Belmont Construction Company" and both the sole proprietorship and the defendant corporation shared the same mailing addresses. *(Id. at pp. 1033-1034*.) [6]

> 6 *Gottlieb v. Kest (2006) 141 Cal.App.4th 110, 150-151*, also cited by Balsam, is inapposite. The question in that case was whether a sole shareholder was in privity with a corporation for purposes of collateral estoppel. While that holding may have some applicability to the due process concerns triggered by adding an additional judgment debtor under *section 187*, we need not reach that issue since Balsam did not sustain his burden of proving that Colquhoun should be held liable on an alter ego theory.

Thus, Balsam has failed to establish a sufficient basis on which to hold Colquhoun personally liable for the debts of DSG Direct on an alter ego theory.

Balsam also contends that Colquhoun was liable for the debts of DSG Direct as its corporate officer. "Directors and officers of a corporation [*23] are not rendered personally liable for its torts merely because of their official positions, but may become liable if they directly ordered, authorized or participated in the tortious conduct." *(Wyatt v. Union Mortgage Co. (1979) 24 Cal.3d 773, 785*; see also *Corp. Code, §§ 17101*, *17158*.) Balsam argues that Colquhoun was the mastermind behind DSG Direct's business. As explained above, however, *section 187* authorizes the insertion in the judgment of an additional defendant on the "theory that the court is not amending the judgment to add a new defendant but is merely inserting the correct name of the real defendant." To the extent that Balsam seeks to add Colquhoun to the judgment based on her own conduct rather than that of DSG Direct, the application exceeds the scope of *section 187*. Colquhoun's alleged commission of a tort was not an issue at trial and does not provide a proper basis on which to add her as an additional judgment debtor.

3. **The trial court did not err in refusing to add Datastream as a judgment debtor.**

Balsam contends that Datastream should be held liable for the judgment because it is DSG Direct's alter ego. He argues that DSG Direct was merely a shell for the conduct [*24] of Datastream's business. He relies on evidence that Colquhoun was the sole officer of DSG Direct and is the sole officer of Datastream and that Datastream was the registered owner of the website used by DSG Direct, "DSGDirect.com." As in the case of Colquhoun, the relationship between the entities alone is insufficient to establish that DSG Direct was the alter ego of Datastream. Balsam presented no evidence regarding the finances of the two companies, nor any evidence that there was any impropriety in Datastream providing the website domain name to DSG Direct. Balsam did not meet his burden of establishing Datastream's liability for the judgment.

Disposition

The order denying Balsam's motion to amend is reversed with respect to TropicInks and remanded with instructions to amend the judgment to add TropicInks as an additional judgment debtor. The order is affirmed in all other respects. The parties are to bear their own costs on appeal.

Pollak, Acting P. J.

We concur:

Siggins, J.

Jenkins, J.