NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

JAMES T. WALMSLEY AND CHRISTOPHER W. SULLIVAN,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellants	:	
vs.	:	
FREDERICK H. EHMANN STEVEN FISHMAN, ET AL.	:	
Appellees	:	No. 1845 EDA 2009

Appeal from the Judgment entered July 15, 2009
In the Court of Common Pleas of Philadelphia County
Civil, No. 003511, December Term, 2005

BEFORE: GANTMAN, SHOGAN, AND MUNDY, JJ.

MEMORANDUM BY GANTMAN, J.: **FILED FEBRUARY 28, 2012**

Appellants, James T. Walmsley and Christopher W. Sullivan, appeal from the judgment entered in the Philadelphia County Court of Common Pleas, in favor of Appellee, Frederick H. Ehmann, in this action to enforce two judgments through the equitable remedy of piercing the corporate veil of FELD LLC ("FELD"), a limited liability corporation. After review, we affirm.

The relevant facts and procedural history of this case are as follows. Appellee and Steven Fishman[1] formed FELD as a limited liability corporation in 1998, to pursue business opportunities in the nursing home industry;

[1] Mr. Fishman was a co-defendant in this case, but he settled with Appellants prior to trial and is not a party to this appeal.

each held a 50 percent interest in FELD. Appellee is a retired attorney and former shareholder of the law firm Ehmann VanDenbergh & Trainor ("EVT"); Mr. Fishman is an accountant who was a director of ZA Consulting, a company that provided healthcare consulting services to the nursing home industry. At the time of its formation, FELD had no assets and no business. It developed a business shortly after its organization when it acquired the stock of 22 Acquisition Corporation ("22 Acquisition") and became that corporation's sole shareholder. For the remainder of its existence, FELD's only business purpose was to hold the stock of 22 Acquisition. The limited nature of FELD's business meant it did not have any employees, took no minutes of meetings, had no bank account, and its expenses were handled through the individual shareholders. Nevertheless, FELD observed the formalities required to form an LLC in Pennsylvania: it filed articles of organization, received a certificate from the Commonwealth, obtained a federal employee identification number, and filed federal tax returns for 1998 and 1999.

22 Acquisition was a Pennsylvania corporation organized in 1998. The circumstances behind its creation are complex, but highly relevant to the current litigation. In short, Healthcare Financial Partners ("Healthcare Financial") and Complete Care Services ("CCS") proposed the creation of 22

Acquisition.[2] They created 22 Acquisition to act as a vehicle to acquire leasehold interests in nursing homes and to save an otherwise sinking investment made by Healthcare Financial.

Healthcare Financial was a partner in Mr. Fishman's company, ZA Consulting. Healthcare Financial was also a lender to Chartwell Enterprises, an entity that held operating leases for fifteen nursing homes in Florida and Texas. The nursing homes under Chartwell's control were operating at a loss, and Healthcare Financial feared it would lose its investment in Chartwell if the financial problems continued. Healthcare Financial was familiar with CCS as a management company, and felt CCS should replace Chartwell as the entity responsible for managing the nursing homes.[3] After 22 Acquisition was formed, FELD appointed its board of directors. The officers of 22 Acquisition included George Walmsley (brother of Appellant Walmsley) and Robert Scott, an attorney from EVT. In October 1998, FELD entered into an agency agreement with 22 Acquisition. The agreement made 22 Acquisition the agent for FELD in all business affairs and provided 22 Acquisition would act solely at FELD's direction. The agency agreement also provided tangible tax benefits for Appellee and Mr. Fishman, in that it

[2] Ethan Leder of Healthcare Financial and Peter Licari of CCS proposed to Appellee and Mr. Fishman the idea of creating the entity that eventually became 22 Acquisition.

[3] CCS was the biggest client of ZA Consulting and was also a client of EVT, Appellee's law firm.

allowed them, as FELD shareholders, to take any operating losses incurred by 22 Acquisition.[4]

Sometime in 1998, 22 Acquisition obtained the leasehold interests to the nursing homes formerly run by Chartwell. Healthcare Financial provided 22 Acquisition with the funding to acquire the nursing homes through secured and unsecured loans. Appellee and Mr. Fishman did not invest any money to acquire the nursing homes or receive funds directly from FELD, CCS, or the individual nursing homes. Moreover, Appellee and Mr. Fishman did not exercise control over the day-to-day operations of 22 Acquisition, although Appellee's law firm (EVT) represented 22 Acquisition on several transactions and one of 22 Acquisition's registered offices was at the EVT firm.

Meanwhile, 22 Acquisition delegated responsibility for managing the nursing homes to CCS *via* a comprehensive management agreement. The agreement obligated CCS to use its best efforts to comply in all respects with any statutes, ordinances, laws, rules, regulations, orders, accreditation or other standards and determinations which applied to each facility, including any regulatory provisions established by the Medicare and Medical Assistance Programs and the State health department. CCS handled all receivables and controlled payments to vendors of the nursing homes.

[4] As a FELD shareholder, Appellee was able to claim a loss of $1,422,667 on his federal income tax in 1998, and $1,469,000 in 1999. Appellee testified that he saved approximately $350,000.00 on his personal federal income taxes, due to the losses claimed.

In its capacity of the manager of the nursing homes, CCS retained NovaCare Operating Company ("NovaCare") to provide physical, occupational and speech therapy services to the nursing homes. The arrangement was formalized pursuant to NovaCare's form contract, which covered every aspect of the delivery of services and payment, including Medicare reimbursement procedures. NovaCare looked only to the actual "facility" for payments required under the contract. In the event of non-payment, the contract provided for interest and legal fees associated with collection efforts. Appellee had no input on the decision of CCS to hire NovaCare as the therapy provider for the nursing homes. Neither Appellee nor Mr. Fishman personally guaranteed any of the therapy contracts between CCS (on behalf of 22 Acquisition) and NovaCare.

By 1999, rising health care costs had caused financial problems for 22 Acquisition and jeopardized its ability to meet its outstanding obligations.[5] Payments to vendors on behalf of 22 Acquisition were slow, delayed, or delinquent. CCS managed all payments and made the decisions as to which vendors would be paid and which would not. NovaCare was among the vendors that did not receive payments during this period. As a result, NovaCare stopped providing therapy services to the nursing homes and terminated its contract with CCS. At the time of termination in May 1999,

[5] Specifically, a decision by Medicare to reduce patient payment rates by approximately $30.00 per day cut down 22 Acquisition's receivables and eventually led to its bankruptcy. Increased insurance expenses also negatively affected the financial health of 22 Acquisition.

the nursing home facilities owed NovaCare $752,232.61. NovaCare subsequently filed suit against 22 Acquisition and FELD in the Montgomery County Court of Common Pleas to collect on the unpaid therapy services. In November 2001, 22 Acquisition filed for bankruptcy protection, and the Montgomery County Court stayed all proceedings pending resolution of the bankruptcy case. Once 22 Acquisition emerged from bankruptcy, the Montgomery County action resumed and, in 2005, NovaCare obtained two separate judgments against 22 Acquisition and FELD for $1,960,781.39.[6] On December 8, 2005, NovaCare Holdings, Inc., through its successor, J.L. Halsey Corporation, assigned the judgments to Appellants.

That same month, Appellants filed a complaint against Appellee and Mr. Fishman to pierce the corporate veil of FELD and enforce the judgments against Appellee and Mr. Fishman personally. Mr. Fishman settled out of court in 2008, and the case proceeded to a bench trial against Appellee in January 2009. After the trial concluded, the court issued an order, with supporting opinion containing findings of fact and conclusions of law, and refused to pierce the corporate veil of FELD. In support of its decision, the court in relevant part stated:

> 17. Any disregard for corporate formalities does not necessarily justify piercing the corporate veil. ***Advanced Telephone [Systems, Inc. v. Com-Net Professional Mobile Radio, LLC]***, 846 A.2d [1264,] 1279 [(Pa.Super. 2004), *appeal denied*, 580

[6] The judgment covered unpaid services rendered by NovaCare, plus contractual interest, attorneys' fees, and costs.

Pa. 687, 859 A.2d 767 (2004)] (relying on ***Zubik v. Zubik***, 384 F.2d 267 (3rd Cir. 1967)).

18. Following corporate formalities is not as necessary in a closely-held corporation. [***Id.***]

19. Limited liability companies are required to [adhere only] to a few corporate formalities. ***Advanced Telephone [Systems, Inc., supra***] at 1272. They are not required, at all times, to possess their own exclusive office space, hold financial statements or bank accounts if unnecessary, file tax returns if unnecessary, retain employees, or be capitalized if unnecessary. ***Id.***

20. Pursuant to 15 Pa.C.S. § 8922(a), members of a limited liability company shall not be liable for a debt, obligation, liability of another, solely on account of their membership, as liability shall be determined by 15 Pa.C.S. § 8904(b) (Basis for determining liability of members, managers and employees).

21. The allocation of losses shall not affect member liability under 15 Pa.C.S. § 8922. ***See*** 15 Pa.C.S. 8932 (Distribution and allocation of profit and losses to members).

22. In deciding whether to pierce the corporate veil, "absolute control over the management and financial affairs" is not determinative in holding an individual liable. ***City of Philadelphia v. Human Services Consultants, II, Inc.***, [2004 WL 717240 (Pa.Com.Pl. 2004)].

23. Reliance on the creditworthiness of a corporation by a creditor is a factor to examine when considering to pierce the corporate veil. ***Connors v. Peles***, 724 F. Supp. 1538, 1558 (W.D.Pa. 1989).

* * *

27. The corporate veil should not be pierced where injustice would be created in that [Appellants] would

be able to impose upon [Appellee] liability different than what was bargained for. ***Advanced Telephone [Systems, Inc., supra]*** (relying on 15 Pa.C.S. § 8904, Committee Comment, 1994).

28. As for claims of creditors and any "illegality" arguments under Federal Medicare regulations, those would have been more appropriately resolved in 22 Acquisition's bankruptcy proceeding and need not be addressed by this court.

* * *

31. As an LLC, [FELD] was not required to slavishly adhere to corporate formalities, but adhered to several formalities. In fact, it registered its articles of organization, received its certificate from the state, maintained an operating agreement, entered into written agreements, held all of the stock of 22 Acquisition, possessed a bank account when needed, had members that communicated primarily by telephone, filed tax returns, and possessed a federal employer identification number.

* * *

34. As [Appellee] and [Mr.] Fishman did not bargain to personally guarantee any of the therapy contracts between 22 Acquisition and NovaCare Operating Company, it would create an injustice to require them now to do so. Additionally, there is no evidence NovaCare Operating Company relied upon the creditworthiness of [22 Acquisition], [Appellee], [Mr.] Fishman or [FELD].

35. NovaCare Operating Company did not deal with [FELD] and did not rely on FELD to satisfy 22 Acquisition's liabilities. Likewise, NovaCare Holdings did not rely on [FELD], [Appellee], or [Mr.] Fishman for financial stability. J.L. Halsey, successor to NovaCare Holdings, did not rely on [FELD], [Appellee] or [Mr.] Fishman. [Appellants], assignees of a successor to an assignee of NovaCare Operating Company, also did not rely on [FELD] or [Appellee].

> 36. NovaCare Operating Company was not harmed by the legally permissible pass-through tax benefits to [Appellee] or [Mr.] Fishman or through the agency agreement between [FELD] and [22 Acquisition], *i.e.*, [FELD] was not improperly manipulated to harm [Appellants] or their predecessor judgment assignors. The utilization of [FELD's] tax losses and the execution of the agency agreement with [22 Acquisition] do not render [Appellee] liable for judgments against [FELD].
>
> 37. No evidence was presented that [Appellee] commingled personal funds with funds of [FELD] or 22 Acquisition, siphoned off any funds or assets from either organization, or engaged in any fraudulent activities through [FELD] or 22 Acquisition.
>
> 38. EVT and ZA entity services to 22 Acquisition were provided in an ordinary arms-length fashion at fair value.
>
> 39. The evidence presented is insufficient in this matter to hold [Appellee] personally liable for the judgment[s]….

(Trial Court Opinion, filed March 16, 2009, at 9-13). Appellants timely filed post-trial motions on March 26, 2009, which the court denied by order entered May 28, 2009. On June 11, 2009, Appellants filed their notice of appeal.[7] On July 15, 2009, the court entered final judgment on the docket.

[7] Ordinarily, an appeal properly lies from the entry of judgment, not from the order denying post-trial motions. ***See generally Johnston the Florist, Inc. v. TEDCO Const. Corp.***, 657 A.2d 511, 516 (Pa. Super. 1995). Nevertheless, a final judgment entered during pendency of an appeal is sufficient to perfect appellate jurisdiction. ***Drum v. Shaull Equipment and Supply, Co.***, 787 A.2d 1050 (Pa. Super. 2001), *appeal denied*, 569 Pa. 693, 803 A.2d 735 (2002). Here, Appellants filed the notice of appeal on June 11, 2009, prior to the entry of judgment. Final judgment was entered on July 15, 2009. Thus, Appellants' notice of appeal relates forward to July 15,

Appellants raise three issues for review:

> DID THE TRIAL COURT APPLY THE WRONG STANDARD FOR PIERCING THE CORPORATE VEIL AND, THEREFORE, ERR AS A MATTER OF LAW BY INCLUDING RELIANCE ON THE CREDITWORTHINESS OF A CORPORATION AMONG THE FACTORS IT SHOULD CONSIDER AND IN FOCUSING ON NOVACARE'S (AND APPELLANTS') LACK OF RELIANCE ON THE CREDITWORTHINESS OF 22 ACQUISITION OR FELD?
>
> DID THE TRIAL COURT ERR AS A MATTER OF LAW BY REFUSING TO CONSIDER 22 ACQUISITION/FELD'S VIOLATION OF MEDICARE RULES AND REGULATIONS AND PUBLIC POLICY, WHICH ARE RELEVANT CONSIDERATIONS AS TO WHETHER TO PIERCE THE CORPORATE VEIL, AND BY HOLDING THAT THE CLAIMS OF "ILLEGALITY" SHOULD HAVE BEEN RAISED IN 22 ACQUISITION'S BANKRUPTCY PROCEEDING?
>
> IN LIGHT OF THE TRIAL COURT'S LEGAL ERRORS IN APPLYING THE WRONG LEGAL STANDARD TO PIERCING THE CORPORATE VEIL, INCLUDING ITS ERROR IN REFUSING TO CONSIDER EVIDENCE OF 22 ACQUISITION/FELD'S VIOLATION OF PUBLIC POLICY, AND IN LIGHT OF [APPELLEE] EHMANN'S UNDERCAPITALIZATION OF FELD, USE OF FELD TO FURTHER HIS OWN PERSONAL INTERESTS, THE LACK OF CORPORATE FORMALITIES AND NON-FUNCTIONING OF FELD'S OTHER MEMBER [MR.] FISHMAN AS A CORPORATE OFFICER, DID THE TRIAL COURT ERR IN FINDING THAT FELD'S CORPORATE VEIL SHOULD NOT BE PIERCED, AND SHOULD THIS COURT REVERSE AND ENTER JUDGMENT FOR [APPELLANTS]?

2009, the date judgment was entered. ***See*** Pa.R.A.P. 905(a) (stating notice of appeal filed after court's determination but before entry of appealable order shall be treated as filed after such entry and on day of entry). Hence, there are no procedural/jurisdictional impediments to our review of this appeal.

(Appellants' Brief at 2-3).

The relevant standard of review following a non-jury trial is as follows:

> Our appellate role in cases arising from non-jury trial verdicts is to determine whether the findings of the trial court are supported by competent evidence and whether the trial court committed error in any application of law. The findings of the trial judge in a non-jury case must be given the same weight and effect on appeal as the verdict of a jury, and the findings will not be disturbed on appeal unless predicated upon errors of law or unsupported by competent evidence in the record. Furthermore, our standard of review demands that we consider the evidence in a light most favorable to the verdict winner.

Levitt v. Patrick, 976 A.2d 581, 588-89 (Pa.Super. 2009). Further,

> The standard by which we review the denial of a post-trial motion for JNOV and/or a new trial is well established:
>
> > A JNOV can be entered upon two bases: (1) where the movant is entitled to judgment as a matter of law; and/or, (2) the evidence was such that no two reasonable minds could disagree that the verdict should have been rendered for the movant. When reviewing a trial court's denial of a motion for JNOV, we must consider all of the evidence admitted to decide if there was sufficient competent evidence to sustain the verdict…. Concerning any questions of law, our scope of review is plenary. Concerning questions of credibility and weight accorded the evidence at trial, we will not substitute our judgment for that of the finder of fact…. A JNOV should be entered only in a clear case.
> >
> > Our review of the trial court's denial of a new trial is limited to determining whether the trial court acted capriciously, abused its discretion, or committed an error of law that controlled the outcome of the case. In making this determination, we must consider whether, viewing the evidence in the light most

> favorable to the verdict winner, a new trial would produce a different verdict. Consequently, if there is any support in the record for the trial court's decision to deny a new trial, that decision must be affirmed.

Braun v. Target Corp., 983 A.2d 752, 759-60 (Pa.Super. 2009), *appeal denied*, 604 Pa. 701, 987 A.2d 158 (2009).

In their issues combined, Appellants maintain they were entitled to pierce the corporate veil of FELD to enforce their judgments against Appellee personally. Appellants first complain NovaCare's lack of reliance on the FELD's creditworthiness is essentially irrelevant to a decision to pierce the corporate veil of FELD. Appellants contend no Pennsylvania appellate cases identify reliance on the creditworthiness of a corporation as a factor to consider in this context. Instead, the focus should be on the *bona fides* of the corporation, and whether there was a failure to adhere to corporate formalities, undercapitalization, and intermingling of corporate and personal affairs. While conceding the list of inquiries appearing in current case law is not exhaustive, Appellants insist reliance on creditworthiness is simply not a relevant part of the test under Pennsylvania law. Appellants further complain the court's concern that Appellee would suffer greater liability than bargained for if FELD's corporate veil was pierced is irrelevant because corporate veil-piercing by its very nature imposes greater liability on individual shareholders. According to Appellants, the court condoned a real injustice by allowing Appellee to escape personal liability after enjoying personal benefits and protection behind the corporate structure.

Appellants also state the court's decision effectively reverses the earlier judgments against FELD, which Appellants legitimately obtained by assignment but are essentially unable to enforce. The judgments arose from FELD's and 22 Acquisition's failure to pay NovaCare for services rendered. Appellants maintain FELD and 22 Acquisition misused Medicare reimbursements to pay legal and accounting expenses before paying for the therapy services that earned the reimbursements. Appellants contend Medicare paid for the therapy costs but NovaCare was not paid nor were the payments returned to the federal government. In essence, Appellants argue it is inequitable and contrary to public policy to allow FELD to retain Medicare reimbursements belonging to NovaCare.

Appellants further direct our attention to other pertinent proof to support Appellee's personal liability for the judgments entered against FELD. Specifically, Appellants contend we should disregard the corporate form and allow them to seek a judgment against Appellee personally because: (1) FELD was undercapitalized when formed; (2) FELD's balance sheet, already undercapitalized, became especially debt-laden when FELD acquired ownership of the Chartwell nursing homes by assuming the substantial debts of Chartwell; (3) CCS decided whom to pay and chose to pay bills from Appellee's law firm while it paid NovaCare nothing for services rendered; and (4) Appellee unfairly benefitted at the expense of NovaCare in the form of income tax losses as well as compensation and a bonus from his law firm.

Appellants additionally insist the court ignored the significance of the agency agreement between 22 Acquisition and FELD. Appellants submit the court's finding of an "arms-length" relationship among all of the entities ignores the agency agreement and the functional reality of this corporate composition. Based upon the foregoing, Appellants conclude they are entitled to piece the corporate veil of FELD and pursue Appellee personally to satisfy the judgments at issue. For the following reasons, we disagree.

Piercing the corporate veil is a "means of assessing liability for the acts of a corporation against an equity holder in the corporation." ***Village at Camelback Property Owners Assn. Inc. v. Carr***, 538 A.2d 528, 532 (Pa.Super. 1988), *affirmed without opinion at* 524 Pa. 330, 572 A.2d 1 (1990). Pennsylvania law has a strong presumption against piercing the corporate veil. ***Lumax Industries, Inc. v. Aultman***, 543 Pa. 39, 41-42, 669 A.2d 893, 895 (1995). Any inquiry involving corporate veil-piercing must "start from the general rule that the corporate entity should be recognized and upheld, unless specific, unusual circumstances call for an exception." ***Wedner v. Unemployment Compensation Bd. of Review***, 449 Pa. 460, 464, 296 A.2d 792, 794 (1972) (citing ***Zubik, supra*** at 273). A corporation will be regarded as an independent entity, even if its stock is owned entirely by one person. ***College Watercolor Group, Inc. v. William H. Newbauer, Inc.***, 468 Pa. 103, 117, 360 A.2d 200, 207 (1976). These veil-piercing principles apply to limited liability corporations. 15

Pa.C.S.A. § 8904, Committee Comment, 1994 (stating doctrine of "piercing the corporate veil will be applied to a limited liability company" in appropriate case); ***Advanced Telephone Systems, Inc., supra*** at 1281 n.11 (citing to comment to Section 8904 and recognizing LLC veil can be pierced in same manner as corporate veil).

Historically, this Court has commented on the lack of a single, well-settled rule on when to pierce the corporate veil. ***Fletcher-Harlee Corp. v. Szymanski***, 936 A.2d 87, 95 (Pa.Super. 2007), *appeal denied*, 598 Pa. 768, 956 A.2d 435 (2008), *cert. denied*, ___ U.S. ___, 129 S. Ct. 1581, 173 L.Ed.2d 675 (2009) (remarking on lack of well-defined rule for piercing corporate veil by stating "courts of this Commonwealth have mentioned the unsettled nature of Pennsylvania's law with regard to piercing the corporate veil since at least 1954"); ***Advanced Telephone Systems, Inc., supra*** at 1278 (stating same); ***Good v. Holstein***, 787 A.2d 426, 430 (Pa.Super. 2001), *appeal denied*, 568 Pa. 738, 798 A.2d 1290 (2002) (stating same). Instead, Pennsylvania courts look to a multitude of factors to determine when it is appropriate to disregard the corporate form and pierce the corporate veil. ***Lumax Industries, Inc., supra*** at 42, 699 A.2d at 895. These factors include but are not limited to: (1) undercapitalization; (2) failure to adhere to corporate formalities; (3) substantial intermingling of corporate and personal affairs; and (4) use of the corporate form to perpetrate fraud. ***Village at Camelback Property Owners Assn. Inc.,***

supra at 533. ***See also Fletcher-Harlee Corp., supra*** at 95 (noting factors are not exhaustive but repeatedly arise as important considerations in Pennsylvania cases dealing with veil piercing).

In essence, the factors focus on conduct or actions which might justify disregarding the corporate form and the traditional insulation it provides from personal liability. ***Village at Camelback Property Owners Assn. Inc., supra*** at 533. The party seeking to establish personal liability through piercing the corporate veil must show the person "in control of a corporation [used] that control, or [used] the corporate assets, to further his…own personal interests…." ***Ashley v. Ashley****,* 482 Pa. 228, 237, 393 A.2d 637, 641 (1978). In such cases, the offending shareholder or controlling officer will have disregarded the notion that the corporation is an entity separate and distinct from himself, and comingled his personal interests with those of the corporation. ***Id.*** at 237-38, 393 A.2d at 641 (concluding that, in such circumstances, controlling officer or shareholder actually "pierces the corporate veil by intermingling his personal interests with the corporation's interests"). Nevertheless, these factors are neither exhaustive nor a rigid test for piercing the corporate veil. ***Fletcher-Harlee Corp., supra*** at 95 (observing factor-based approach to veil-piercing does not establish exhaustive or inflexible list of items to consider).

Certain corporate formalities may be relaxed or inapplicable to limited liability corporations and closely held companies. ***Advanced Telephone***

Systems, Inc., supra at 1272. An LLC does not need to adhere to the same type of formalities as a corporation. ***Id.*** (finding lack of financial statements, bank accounts, exclusive office space, and tax returns was not evidence of failure to adhere to corporate formalities because entity was LLC with limited scope). In fact, the appropriate formalities for an LLC "are few" and, depending on the purpose of the LLC, it may not need to be capitalized at all.[8] ***Id.*** Moreover, not all corporate formalities are created equal. ***Id.*** at 1279. To justify piercing the corporate veil, the lack of formalities must lead to some serious misuse of the corporate form. ***Id.***

The capitalization of a corporation is an additional factor pertinent in a corporate veil-piercing inquiry. ***Fletcher-Harlee Corp., supra*** at 100. Corporate capitalization is primarily relevant "for the inference it provides into whether the corporation was established to defraud its creditors or other improper purpose such as avoiding the risks known to be attendant to a type of business." ***Trustees of Nat. Elevator Industry Pension, Health Benefit and Educational Funds v. Lutyk***, 332 F.3d 188, 197 (3rd Cir. 2003).[9] Any inquiry into capitalization must take into account the nature of

[8] The ***Advanced Telephone Systems, Inc.*** Court concluded the LLC at issue was not required to be capitalized because it was in the startup stage and needed no capital for the type of business it conducted. ***Id.*** at 1272.

[9] Pennsylvania case law does not provide substantial guidance as to what exactly constitutes undercapitalization. ***Fletcher-Harlee Corp., supra*** at 100 n.17. Federal cases on this issue, while not binding, can inform our analysis. ***See Campbell v. Eitak, Inc.***, 893 A.2d 749, 751 (Pa.Super.

the business practiced by the corporation. ***Id.*** at 197. For capitalization to be a significant factor in piercing the corporate veil, the corporation must be "so undercapitalized that it is unable to meet the debts that may reasonably be expected to arise in the normal course of business." ***Arch v. American Tobacco Company, Inc.***, 984 F.Supp. 830, 840 (E.D.Pa. 1997). A shortage of capital is not a *per se* reason to pierce the corporate veil. ***Trustees of Nat. Elevator Industry Pension, Health Benefit and Educational Funds, supra*** at 197 (citing 18 Am.Jur.2d, § 49). Companies commonly become insolvent and even bankrupt. ***Id.*** Courts, therefore, examine whether a corporation had adequate capital **at the time of formation**; the capitalization of a corporation after a period of financial losses is not relevant to corporate veil piercing. ***Id.*** (emphasis added). ***See also*** William Meade Fletcher, ***Fletcher Cyclopedia of the Law of Private Corporations*** § 41.33 (providing "[t]he adequacy of capital is to be measured as of the time of formation of the corporation. A corporation that was adequately capitalized when formed, but which subsequently suffers financial reverses is not undercapitalized").

In the present case, Appellee helped to form FELD as a limited liability corporation in 1998, to pursue business opportunities in the nursing home industry. Shortly after its organization, FELD acquired the stock of the 22

2006) (decisions from other jurisdictions may provide guidance but are not binding on this Court).

Acquisition Corporation. FELD's only purpose was to hold that stock, which meant FELD had no need for employees or many of the ordinary corporate formalities. FELD, however, did observe the basic formalities required of an LLC in Pennsylvania: it filed articles of organization, received a certificate from the Commonwealth, obtained a federal employee identification number, and filed federal tax returns for 1998 and 1999.

Healthcare Financial and CCS proposed the creation of 22 Acquisition as a vehicle to acquire numerous nursing home leaseholds to save Healthcare Financial's sinking investment in another enterprise that had been operating numerous nursing homes at a loss. FELD and 22 Acquisition entered into an agency agreement that made 22 Acquisition the agent for FELD in all business affairs. The agency agreement gave FELD shareholders pass-through tax losses. At Healthcare Financial's recommendation, 22 Acquisition delegated responsibility for managing the nursing homes to CCS *via* a comprehensive management agreement.

CCS entered into multi-therapy service contracts with NovaCare, a provider of therapy services to nursing homes throughout the country. When CCS entered into the service contracts with NovaCare on behalf of 22 Acquisition, CCS had a global relationship with NovaCare and utilized its services in 30 to 50 nursing homes. NovaCare created the form contract with CCS. The contract provided for payment by each nursing home facility, and covered all facets of service delivery to the facility, and payments

including Medicare reimbursements. It required the facility to pay interest for late payment and the cost of collection. NovaCare's contract with CCS placed no reliance upon any individual or entity other than the nursing home, and CCS as the contracting party. There is no evidence of record that NovaCare, a sophisticated, nationwide provider of therapy services intended to look to any party other than CCS or the nursing facilities for payments required under their contracts. The trial court's consideration of evidence, or lack thereof, regarding NovaCare's reliance on the creditworthiness of FELD **is** relevant here for the insight it provides into whether FELD was established to defraud its creditors. The record evidence in this case permits no reasonable inference that FELD's lack of capital arose from an intent to defraud creditors. NovaCare was not a creditor of FELD and did not look to FELD for payment for the therapy services rendered.

Appellants' remaining contentions regarding undercapitalization fail to consider the limited nature of FELD's business. Quite simply, FELD held the stock of 22 Acquisition and did not engage in any other business. FELD did not directly contract with any entity other than 22 Acquisition or hold itself out as engaging in business other than merely holding 22 Acquisition's stock. The trial court determined "no further capital was required for this LLC" because FELD's business had such a narrow scope. (***See*** Trial Court Opinion, filed March 16, 2009 at 3). We agree. The mere fact that losses 22 Acquisition incurred then flowed through to FELD's balance sheet, and

FELD shareholders obtained a tax benefit from those pass-through losses, does not lead to the conclusion that FELD was undercapitalized. FELD was an extremely limited business that did not require it to maintain capital reserves. FELD did not expect to incur any debts or liabilities (and in fact incurred no debts directly) and needed no capital to cover debt.[10] As a result, the trial court correctly concluded FELD was adequately capitalized for its purpose.

With respect to FELD's alleged lack of corporate formalities, Appellants fail to recognize the impact of FELD's status as an LLC. As an LLC, FELD was not required to adhere strictly to corporate formalities. ***See Advanced Telephone Systems, Inc., supra*** at 1272. FELD had no bank account, did not employ officers, or hold regular meetings because the limited nature of its business and its legal status as an LLC did not require such formalities.[11] ***See id.*** Because FELD was an LLC, it could operate in a more informal manner and avoid the rigid formalities required of a C corporation, as demanded by Appellants. Moreover, FELD's lack of formalities was not a misuse of the corporate form, and Appellants failed to show the absence of

[10] Any debts or losses that appeared on FELD's financials and tax returns arrived there as pass-through losses from 22 Acquisition. While FELD did incur losses in the tax years 1998 and 1999, those losses were indirect and arose from the agency relationship between FELD and 22 Acquisition.

[11] Nevertheless, FELD did observe certain formalities inherent in the formation of an LLC in Pennsylvania—it filed its articles of organization, received a certificate from the Commonwealth, and obtained a federal employee identification number.

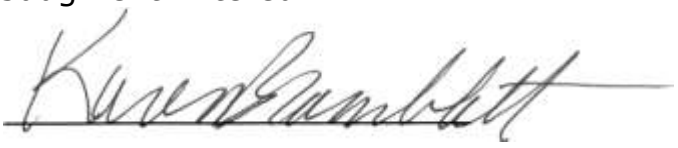
certain formalities caused harm to creditors. On this record, the trial court properly found FELD's lack of selective corporate formalities did not justify the drastic remedy of piercing the corporate veil on the grounds alleged.

Appellants additionally failed to show Appellee controlled FELD to further his own interests, or comingled corporate assets with his personal funds. ***See Ashley, supra*** at 641 (discussing alter ego theory of piercing corporate veil). In fact, the record shows just the opposite. Appellee received no funds directly from either 22 Acquisition or FELD. He had no input on CCS' decision to contract with NovaCare as the therapy provider for the nursing homes, and at no time did he ever personally guarantee any of the therapy contracts between CCS and NovaCare. Therefore, the record supports the court's finding that Appellee did not abuse the corporate form to further his personal interests. Based on the foregoing, we conclude Appellants failed to overcome the strong presumption against piercing the corporate veil.[12] ***See Lumax Industries, Inc., supra***. Accordingly, we affirm.

Judgment affirmed.

[12] We additionally reject Appellants claims of illegality and public policy violations arising out of alleged misuse of Medicare reimbursement funds. Based on the evidence presented at trial, the court determined that CCS, not Appellee, was responsible for deciding which vendors were paid. Therefore, we decline to consider allegations of public policy violations with respect to Medicare regulations. When 22 Acquisition emerged from bankruptcy, without an appeal from NovaCare, all issues regarding 22 Acquisition's failure to pay creditors were settled.

Judgment Entered.



Date: 2/28/2012