

DISTRICT COURT, COUNTY OF BOULDER, STATE OF COLORADO

CASE NUMBER 09 CV 1142

DIVISION 3

EFILED Document

~~CO Boulder County District Court 20th JD~~

Filing Date: Feb 14 2011 4:40PM MST

Filing ID: 35948332

Review Clerk: N/A

JUDY HEUMANN and NORMAN HEUMANN

Plaintiffs

v.

HARVEY BARNETT, individually, and INFANT SWIMMING RESOURCE, LLC, a Florida limited liability company

Defendants

RULING AND ORDER

This matter came before the Court for a three day bench trial. In light of the evidence presented, the Court finds as follows:

Infant Swimming Research, Inc (ISResearch) and Harvey Barnett, Inc. are Florida corporations. These two corporations sued Plaintiff Judy Heumann in the United States District Court for the District of Colorado in 2000 and after about seven years of trial and appellate litigation won a judgment which Ms. Heumann promptly paid.

ISResearch and Harvey Barnett, Inc. sued Plaintiffs Judy and Norman Heumann in a second lawsuit in Colorado federal district court in 2007. The second suit was dismissed by the trial court and Plaintiffs were awarded their attorneys' fees and costs. When Plaintiffs tried to collect their judgment against the two Florida corporations they learned that the corporations had no assets whatsoever and had had no assets at any time during the life of the second suit.

Plaintiffs then filed this case against Defendants Harvey Barnett individually and Infant Swimming Resource, LLC (ISResource) another Florida limited liability company. Plaintiffs allege that ISResearch was a "grossly and intentionally undercapitalized" shell corporation that Harvey Barnett used to assert claims and to protect himself from liability against any adverse

judgments. Plaintiffs seek to pierce the corporate veil and collect the judgment entered against ISResearch from Harvey Barnett and ISResource.

Dr. Harvey Barnett has a PhD in psychological foundations and has used his education to develop methods to teach infants to survive in the water. His wife JoAnn works with him and runs the business end of his enterprise. Dr. Barnett franchised and later licensed his techniques to other swimming instructors. The instructors currently pay \$15,000 to be trained in Dr. Barnett's method and also pay several hundred dollars each year for a symposium and recertification. The instructors have their clients pay a fee to Dr. Barnett or his companies and the instructors then charge their own fee to the clients for the swimming lessons. There are currently approximately 450 active instructors who have been trained in Dr. Barnett's method and he is justifiably proud of a million dollar contract through a Florida non-profit foundation to train instructors for the central Florida YMCA.

Plaintiff Judy Heumann was one of the instructors trained and certified by Dr. Barnett and she was sued when she began her own swimming program. *Harvey Barnett, Inc. v. Shidler*, 00-CV-731 (D. Colo. filed April 10, 2000). The suit was brought by ISResearch and Harvey Barnett, Inc. In January 2002 the court granted Plaintiff Judy Heumann's motion for summary judgment dismissing the claims against her and on August 12, 2002 the court granted her motion for attorneys' fees and costs.

The following month, September 25, 2002 Dr. Barnett formed ISResource in Florida. Meanwhile, ISResearch appealed the case to the Tenth Circuit Court of Appeals. The appeal was successful, the case was sent back to the district court for trial, and ultimately in 2007 a judgment was entered against and paid by, Ms. Heumann.

Five years after ISResource was formed, ISResearch filed a second suit in federal court against the Heumanns for damages alleged to have been caused by fraudulent actions by their lawyer in the first case, Mark Fischer. The district court granted the motions to dismiss filed by the Heumanns and their co-defendant, Mr. Fischer and in November of 2008 awarded defendants their costs and attorneys' fees. ISResearch appealed this case also to the Tenth Circuit Court of Appeals but in June of 2009 the Tenth Circuit affirmed both the dismissal and the award of fees and costs. This is the judgment that the Heumanns seek to collect from Dr. Barnett and ISResource in this case.

Colorado law allows courts to "pierce the corporate veil" and impose liability on a successor corporation or an individual if the corporation is the alter ego of the individual or other corporation, justice requires piercing because the corporate form was used to perpetuate a fraud or defeat a rightful claim, and an equitable result will be achieved by disregarding the corporate form. *In re Phillips*, 139 P.3d 639, 644 (Colo. 2006). In deciding whether to pierce the corporate veil there are a number of factors that the court should consider. They include whether: (1) the corporation is operated as a distinct business entity; (2) funds and assets are comingled; (3)

adequate corporate records are maintained; (4) the nature and form of the entity's ownership and control; facilitate misuse by an insider; (5) the business is thinly capitalized; (6) the corporation is used as a "mere shell"; (7) legal formalities are disregarded; (8) corporate funds or assets are used for noncorporate purposes. *Id.* at 644. Not all of the listed factors need to be shown in order to disregard the corporate form. *Great Neck Plaza, L.P. v. LePeep Restaurants, LLC*, 37 P.3d 485,490 (Colo. App. 2001). The claimant seeking to pierce the corporate veil must show by clear and convincing evidence that each consideration above has been met. *Sheffield Services Co. v. Trowbridge*, 211 P.3d 714 (Colo. App. 2009).

At trial before this Court Defendants explained their corporate structure as follows. Dr. Barnett was focused on the science of teaching infant swimming or water survival skills. He incorporated ISResearch with himself as president and sole shareholder in 1979 on advice of his father who was a lawyer. Dr. Barnett continued to own his own intellectual property and trade secrets and allowed ISResearch to use them by way of a verbal contract.

In 1994 Dr. Barnett formed Harvey Barnett, Inc. with himself as president and sole shareholder. He testified that the business of ISResearch was to train children and that the business of Harvey Barnett, Inc. was to train instructors. He later decided that Harvey Barnett, Inc. was not useful and he merged it back into ISResearch in 2000. (Ex 60)

In the fall of 2002 he incorporated ISResource. (Ex 73, 77, 78) Dr. Barnett testified that he formed ISResource because the business model for ISResearch did not work. His wife also testified that the business model for ISResearch did not work, that it was "rudimentary" in form with no standard instructor training, that ISResource's focus on information and support for parents made it different from ISResearch, and that while ISResearch had involved "manipulating" a child with about 2,000 prompts, ISResource involved "exposing, watching, and interceding with a child and the environment" by means of about seventy-five prompts. She also explained that ISResource was the product of her consolidating and filling in instructor training gaps with five levels of training for parents. She testified that even though the parent registration forms and B.U.D.S. forms (which are filled out by parents before each lesson to describe their child's bowel, urine, diet and sleep habits) look the same, they were "used very differently" under the ISResource as compared to the old ISResearch program.

In September of 2002 Dr. Barnett also formed Instructor Development, LLC for which he is the sole shareholder and president. Its corporate purpose is to train instructors. In September of 2002 he also formed Swim-Float-Swim, LLC (Ex 75, 79, A, B) as a holding company for his intellectual property and trade secrets. In February of the following year, 2003, he and his wife sold their intellectual property and trade secrets to Swim-Float-Swim. (In 2005 Swim-Float-Swim, LLC changed its name to Barnett Holdings, LLC.)

Dr. Barnett also copyrighted or trademarked new logos for ISResource and the acronym "ISR" which he testified was never used in the ISResearch program but only in the ISResource program as part of its separate identity as a corporation.

The Court heard testimony from a number of instructors trained by the Barnetts. Plaintiff Judy Heumann testified that she signed a franchise agreement with ISResearch in 1984. She testified that ISResearch was always referred to as ISR and that contrary to the testimony of Dr. Barnett, the acronym did not come into being with the creation of ISResource in 2002. The acronym "ISR" was contained in the very contract she signed (Ex. 26), in newsletters, (Ex 13, 14,15), in the Parent Resource book (Ex 27 see e.g. p. 4), on its website (Ex 34), and at each year's recertification conference (Ex 36).

She further testified that the ISResource website has the same internet address as ISResearch did, that the instructor training described on the site is the same as the instructor training of ISResearch, and that the lessons and techniques described on the site are the same lessons and techniques taught by ISResearch. ISResearch charged \$8,000 - \$10,000 to train instructors and ISResource now charges \$15,000.

She testified that ISResearch and Harvey Barnett, Inc. sued her and that after seven years of litigation she paid \$44,000 to ISResearch as the judgment owed (after certain setoffs.) ISResearch and Harvey Barnett, Inc. filed a second suit against her in 2007. That suit was dismissed and the attorney fees awarded to her are what she is seeking in this case.

Joy McGinty was an ISResearch instructor from 1992 – 2000. She testified that during that time Dr. Barnett and his wife always called their program "ISR." The lessons she taught were ten minutes long, five days a week, using Dr. Barnett's "prompts and procedures", safety protocols, and B.U.D.S. sheets for parents; all the same as are used by ISResource instructors today. A parent resource book is not new to ISResource. She provided parents with the identical book, albeit an earlier edition, through ISResearch. In fact the photo of the swimming baby on the cover is her daughter. (Ex 7)

Keri Tom paid \$10,000 for training as an ISResearch instructor in 1996. She "broke with ISR" in 2009. She testified that ISResearch and ISResource are the same and that whatever its official name, it was always called "ISR." She recalled that at one of the annual conferences Ms. Barnett gave a power point presentation explaining that ISResearch was now ISResource because the research was now complete. Other than that there was no difference in how the program was run or the role of Dr. Barnett. He never said he was retired. There were about one hundred instructors at the conference at which the name change was announced.

Ms. Tom testified that when ISResearch became ISResource there was no change in teaching methods, the use of prompts and procedures, B.U.D.S. forms, or their use. Instructors were given the identical copies of "The Science of Infant Swimming" manual (Ex 10) and Parent Resource book (Ex 27) as had been given out by ISResearch. As a teacher there was no

retraining from ISResearch to ISResource. The instructor certification forms signed by Dr. Barnett were identical but for the substitution of the word "Resource" for "Research". (Ex 160, 174, 175)

Becky Puhl paid \$10,000 for training as an ISResearch instructor in 1998 and stayed with the program until 2009. She also first heard of ISResource at the annual conference at which Ms. Barnett presented the power point and she testified that around 130 instructors attended that conference. She testified that there was no difference after ISResource was announced in teaching styles, the program, the website, Dr. Barnett's involvement, or in how money was collected from parents.

Keloly Whittemore was an ISResearch instructor from 1993 to 2000. She testified that the program was always called ISR. She said that when the name was changed to ISResource there were no changes in substance to the website or the annual conference. She said that ISResearch had the million dollar contract with the Florida YMCA (through a non-profit entity called SafeStart) and that there was no change to the contract or recertification of all of the instructors when ISResource came into existence.

Ms. Whittemore worked in the ISR office with Ms. Barnett and is her sister-in-law. She testified that her husband, Ms. Barnett's brother, was paid about \$100,000 by Instructor Development, LLC until he was fired. No testimony was offered about Ms. Barnett's brother's job description or duties.

Although the above witnesses are suing or being sued by Dr. Barnett in various courts around the country this Court found all of these instructors to be credible. This Court did not find Dr. and Ms. Barnett to be credible

The Barnetts' own testimony showed that the web of corporations that they formed were meaningless window dressing for what was in fact a kitchen table operation. In their testimony and in their deposition testimony and in their federal trial court testimony they often could not keep their own corporations straight.

Ms. Barnett ran the business with the help of her sister-in-law and her mother. Ms. Barnett said her mother took notes for Harvey Barnett, Inc. corporate meetings. Ms. Barnett also said she did not recognize typed corporate meeting notes because someone had blacked out some words. (Ex 49, 51) Ms. Barnett also said she herself had blacked out the words which were her mother's name. Ms. Barnett also said she herself kept corporate meeting notes on a computerized live journal so she did not recognize the typed minutes. Dr. Barnett said that although he was the president and sole shareholder he did not know if ISResearch maintained any corporate records. When shown the purported board of director minutes (Ex 50) at trial he said "I've never seen these." There are no corporate records for ISResource. Dr. Barnett said he does not know whether ISResource is the same as ISResearch. He is the president and sole shareholder of Instructor Development, LLC but he testified he does not know what it does as a company.

Dr. Barnett's companies ISResearch and Harvey Barnett, Inc. sued Plaintiff Judy Heumann in federal court in 2000 and sought an injunction against her for misappropriation of their trade secrets. But his testimony and his wife's testimony at trial before this Court was that neither of those entities owned any trade secrets. Dr. Barnett as an individual was the owner of all of his proprietary methods and secrets such as his "prompts and procedures" until he personally "sold" them to Swim-Float-Swim, LLC in February of 2003. That Dr. Barnett individually owned the trade secrets is further shown by the sticker on a VHS training tape from 1998 which said that the material was copyright protected to Harvey Barnett, PhD (not to any of his companies.) (Ex 24) The ISResearch business plan of 1-1-00 described the ISR techniques as the intellectual property of Harvey Barnett, not the property of any of his corporations. (Ex 31)

Ms. Barnett testified that the corporate purpose of ISResource was to provide information and support for parents and that a completely different entity, Instructor Development, LLC, trained instructors. When she was asked about a list of ISResearch instructors (Ex 45 pp 2-5) and asked to identify those who stayed on after 2002 she read off the names of several that "did not stay with ISResource – I mean Instructor Development." Then as she proceeded down the list she again reverted and said that certain instructors "did not go with Resource." The certificate signed by Dr. Barnett and given to instructors upon recertification is in the name of ISResource, not Instructor Development, LLC. (Ex 160) The ISR website as of January 2010 describes the "ISR Instructor Training Program." There is no mention anywhere of Instructor Development, LLC doing any training. (Ex 132)

The license and confidentiality agreement that instructors sign was the same whether the licensor was listed as ISResearch or Instructor Development, LLC. In fact, the exact same word processing document was used as shown by the identical footer – an identical nineteen digit number – at the bottom of the licensing agreement from ISResearch and at the bottom of the agreement from Instructor Development. (Ex 4, 86, 101)

In 2009 Dr. Barnett's attorneys wrote cease and desist letters to instructors accused of unlawfully using the confidential information and intellectual property of ISResource which was referred to as "ISR." The letters warn that

"ISR was previously successful in having more than \$300,000 worth of total damages awarded to them against three former instructors who insisted on improperly and unlawfully continuing to use ISR's confidential information and intellectual property without a license from ISR to do so. For your reference, that case was litigated in the United States District Court for the District of Colorado, Civil Action No. 00-CV-00731-PSF-MEH" (Ex 119,122, 123)

Of course it was ISResearch that brought that suit, not ISResource. Another of Dr. Barnett's attorneys wrote cease and desist letters purportedly on behalf of both ISResearch and ISResource in 2007. (Ex 110, 111) The ISResource website also conflates the two entities by informing the

public that “for over forty years” ISResource (which was formed in 2002) has been in the business of infant safety, etc.

As noted above, Dr. Barnett said he had no knowledge of the business activities of ISResearch after the year 2000. Ms. Barnett testified that it conducted no business after 2000 or 2001 and that it filed no tax returns after 2004.

Dr. Barnett testified that he retired in 2007 and has no income other than his social security check. Dr. Barnett was 58 and then 59 years old in 2007 and not eligible for social security. Dr. Barnett also testified he does not know when he retired.

This Court is persuaded by clear and convincing evidence that ISResearch and ISResource, both referred to as “ISR” are alter egos. ISResearch did not fail as a business model according to the evidence and ISResource adopted that business model in its entirety. The assets, techniques, business goodwill, and materials of the two entities were comingled. ISResource has the same officers, shareholders, website, principal place of business, mailing address, customers, instructors, training manuals, parent resource books, registration forms, conferences, and business model as did ISResearch.

“When the circumstances surrounding the transaction show that the new corporation was created for the purpose of succeeding to the business and acquiring the property of the old corporation and the manner of acquiring the business and the property and the circumstances surrounding the transaction are of such a character as to warrant the conclusion that it is a mere continuation of the former corporation, the new corporation becomes liable for the debts of the old corporation at law” *B & K Distributing, Inc. v. Drake Bldg. Corp.*, 654 P.2d 324, 326 (Colo. App. 1982)

The Court is further persuaded by clear and convincing evidence that ISResearch is the alter ego of Dr. Barnett. ISResearch apparently had some corporate records until 2000 but ISResource has none whatsoever. Nor do any corporate records exist for Instructor Development or Swim-Float-Swim or Barnett Holdings, LLC. The nature and form of the company ownership facilitates misuse. ISResearch sued Plaintiffs in 2007 years after it ceased doing any business or held any assets or filed any tax returns or even kept any corporate records. Harvey Barnett, Inc. sued plaintiffs in 2007 even though that company did not exist. Dr. Barnett extinguished that corporation in 2000 by merging it back into ISResearch.

The Court further finds by clear and convincing evidence that justice requires piercing the corporate veil. In this instance Plaintiffs were sued in 2007 by a defunct, non-existent corporation, Harvey Barnett, Inc, and by an empty shell of a corporation, ISResearch, both controlled by Defendant, Dr. Barnett. Dr. Barnett had transferred all of his business activities and assets from those two plaintiff corporations to brand new companies that he formed in 2002 one month after those two plaintiff corporations had a judgment entered against them in the first lawsuit between these parties.

The people in this case have been involved in litigation now for more than a decade. When Dr. Barnett, through his companies, ultimately won the first lawsuit, Ms. Heumann promptly paid. Because of the manipulation of the corporate forms as detailed above, an equitable result will be achieved by this Court disregarding the corporate form of ISResearch and Harvey Barnett, LLC, and ordering the Defendants to promptly pay the judgment now that Ms. Heumann has prevailed.

The Court also finds that the evidence presented at trial supports this Court finding that it has personal jurisdiction over Dr. Barnett. (March 8, 2010 Order re: Defendants' Motion to Dismiss for Lack of Personal Jurisdiction which is incorporated by reference into this Ruling and Order) Plaintiff Judy Heumann testified at trial consistent with the statements in her affidavit filed as an attachment to her response to Defendants' Motion to Dismiss.

For the reasons set forth above the Court finds it proven and appropriate by clear and convincing evidence to pierce the corporate veil and orders judgment for Plaintiffs against Harvey Barnett individually and Infant Swimming Resource, LLC.

So ordered

A handwritten signature in black ink, appearing to read "Lael Montgomery". The signature is written in a cursive, somewhat stylized font.

This 13 February 2011

Lael Montgomery
District Court Judge