

NOT FOR PUBLICATION

NO. 23610

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

RALPH GRAY, dba U.S. PRODUCTS, Plaintiff-Appellee,
v. KEVIN M. HIGGINS, Defendant-Appellant,
and
MICROSURGE, INC., OMIMEDICAL, RICHARD-ALLAN MEDICAL,
UROHEALTH, INC., IMAGYN MEDICAL TECHNOLOGIES, INC.,
Defendants

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT,
HONOLULU DIVISION
(CIVIL NO. 1RC98-3345)

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe and Foley, JJ.)

In this breach of contract action, Defendant-Appellant Kevin M. Higgins (Higgins) appeals from the Judgment filed June 15, 1999; the Order Denying Defendant Kevin M. Higgins' Renewed Motion for Reconsideration filed June 29, 2000; and the Findings of Fact, Conclusions of Law, and Order Granting Judgment for Plaintiff Ralph Gray, dba U.S. Products, and Against Defendants Imagyn Medical Technologies, Inc. and Kevin M. Higgins filed October 4, 2000, in the District Court of the First Circuit, Honolulu Division (district court).¹

¹The Honorable Fa'auuga L. To'oto'o presided at trial and on the Motion for Reconsideration.

On appeal, Higgins contends (1) there was a lack of evidence showing a breach of contract between Plaintiff-Appellee Ralph Gray (Gray) and Higgins; (2) there was a lack of evidence showing that Higgins was a party to the contract with Gray or that Higgins was personally liable to Gray; and (3) the district court abused its discretion in denying Higgins' Renewed Motion for Reconsideration filed May 2, 2000 (Motion for Reconsideration).

I. BACKGROUND

On October 4, 2000, the district court made the following Findings of Fact (FOF) and Conclusions of Law (COL):

FINDINGS OF FACTS

1. Mr. Gray alleged that the Business Defendants [Microsurge, Inc.; Omnimedical; Richard-Allan Medical; Urohealth, Inc.; and Imagyn Medical Technologies, Inc.] and Mr. Higgins violated the Oral Contract to purchase Mr. Higgins' [sic -- this case arises from the oral agreement to repurchase Gray's inventory] excess medical supplies inventory and samples ("Inventory").

2. On April 28, 1998, Mr. Gray filed his Complaint ("Complaint") against the Business Defendants and Mr. Higgins [Imagyn's corporate officer]. The Complaint averred claims for breach of the Oral Contract, tortious breach of the Oral Contract, breach of fiduciary duty, tortious interference with the Oral Contract, breach of the implied covenant of good faith and fair dealing, and punitive damages.

3. Imagyn and Mr. Higgins appeared, denied liability, and argued that the Oral Contract neither existed nor was an enforceable agreement.

4. There is no evidence in the Record, however, that Mr. Gray properly served the other Business Defendants with the Complaint. The other Business Defendants did not answer the Complaint, did not participate in the lawsuit, and were thus not made parties to the present lawsuit.

5. Mr. Gray's theory of the case was that: a) in late 1994 or early 1995, Microsurge orally granted him an

exclusive distributorship in Hawai'i to sell Microsurge medical supply products from which he would obtain sales commissions; b) after the distributorship was later terminated, he entered into the Oral Contract on July 20, 1997 at a luncheon meeting in the Honolulu International Airport with John D. Holden ("Mr. Holden"), a representative of Richard-Allan (supposedly the successor company to Microsurge), for Richard-Allan to buy back the Inventory; c) Richard-Allan breached the Oral Contract; d) all of the entities which acquired Richard-Allan (Omnimedical, Urohealth, and Imagyn) were liable for the breach, including Mr. Higgins as an officer of Urohealth and/or Microsurge; and e) he (Mr. Gray) sustained damages as a result of the breach because he retained Inventory that could not be resold.

6. Also attending the July 20, 1997 meeting was Matthew Guard ("Mr. Guard"), an employee of Pacific Rim Distributors, apparently another business operated by Mr. Gray or a subsidiary of U.S. Products.

7. Controverting the Oral Contract, Counsel for Imagyn and Mr. Higgins asserted that there was no such Oral Contract, no breach occurred, and no evidence linked them with the Oral Contract because Imagyn and Mr. Higgins were at any event not parties to the purported agreement.

8. Counsel for Mr. Higgins further maintained that Mr. Higgins did not assume personal liability for the performance of the Oral Contract.

9. Trial on the merits took place on April 29, 2000. Mr. Gray proceeded only on the breach of the Oral Contract and the breach of fiduciary duty claims.

10. At trial, Mr. Higgins [sic -- should read Gray] testified about his claims and the amount of damages calculated by him and his attorney. Mr. Guard also testified about the July 20, 1997 meeting, but no other witnesses testified.

11. Although the evidence about the Oral Contract was not clear, this Court found that there was an enforceable agreement between Mr. Gray and Microsurge, Microsurge was bought up by the other Business Defendants, and all [sic] Imagyn and Mr. Higgins (the only Defendants who were parties to this lawsuit) were liable to Mr. Gray for breaching the Oral Contract.

12. This Court determined that Mr. Gray and Mr. Guard were credible witnesses and believed their testimony describing the events in question.

13. This Court therefore ruled in favor of Mr. Gray and against Imagyn and Mr. Higgins for breach of the Oral Contract.

14. The Judgment awarding \$20,371.70 in damages, attorney's fees, and costs was entered on June 15, 1999 ("Judgment"). The amount of attorney's fees and costs was made pursuant to Hawai'i Revised Statutes ("HRS") §§ 607-9 (1993) and 607-14 (1997) as well as DCRCP Rule 54(d).

15. On June 24, 1999, defense counsel submitted the Notice of Filing of Bankruptcy Petition concerning the case of In re Imagyn Medical Technologies, Inc., Case No. 99-1019 (PJWP) (Bkrtcy. D. Del.) ("the Bankruptcy Action"). The Bankruptcy Action was originally a Chapter 7 proceeding filed against Imagyn on May 3, 1999 but was later converted into a Chapter 11 proceeding on May 19, 1999.

16. Also on June 24, 1999, Mr. Higgins filed his Motion for Reconsideration or New Trial ("Original Reconsideration Motion") because of impact of the automatic stay in the Bankruptcy Action on the present lawsuit.

17. Based on the possible effect of the Bankruptcy Action, this Court did not decide the Original Reconsideration Motion and stayed the lawsuit until after it became clear that the lawsuit could proceed.

18. Later in 1999, a reorganization plan was approved in the Bankruptcy Action, and the instant lawsuit could go forward.

19. On May, 2, 2000, Mr. Higgins filed his Renewed Motion for Reconsideration ("Renewed Reconsideration Motion") based on uncertainty over whether the Original Reconsideration Motion was filed in violation of the automatic stay in the Bankruptcy Action and was thus invalid.

20. At the conclusion of the May 30, 2000 hearing on the Renewed Reconsideration Motion, this Court refused to grant reconsideration and instead upheld the Judgment. Based on the statements of Mr. Gray and his attorney, this Court found that Mr. Higgins promised Mr. Gray to, inter alia, purchase the Inventory, Mr. Gray relied on the promises, and it was fair to hold Imagyn and Mr. Higgins liable for breaching the Oral Contract.

21. This Court entered the Order Denying Defendant Kevin M. Higgins' Renewed Motion for Reconsideration on June 29, 2000.

22. Mr. Higgins then appealed on June 29, 2000, but Imagyn did not appeal.

CONCLUSIONS OF LAW

1. Mr. Gray and Microsurge entered into a distributorship agreement where Mr. Gray would sell Microsurge products and receive a commission.

2. The Oral Contract to purchase Mr. Gray's Inventory was a valid, enforceable agreement entered into by Mr. Gray and Mr. Holden on behalf of Richard-Allan, as the successor business to Mircosurge [sic].

3. Omnimedical, Urohealth, and Imagyn were the successor businesses to Richard-Allan and had the legal obligation to perform the Oral Contract.

4. As a corporate office[r] of Imagyn, Mr. Higgins promised Mr. Gray to, inter alia, purchase the Inventory from Mr. Gray pursuant to the Oral Contract, Mr. Gray relied on the promises, and fairness required enforcement of the Oral Contract.

5. Imagyn and Mr. Higgins breached the Oral Contract. Because of improper service on the other Business Defendants, this Court has jurisdiction only over Imagyn and Mr. Higgins (the only Defendants who answered the Complaint), could not adjudicate the liability of the other Business Defendants (whom Mr. Gray did not properly make parties to this lawsuit), and can enter Judgment only against Imagyn and Mr. Higgins.

6. Mr. Higgins is liable to Mr. Gray based on Mr. Higgins' promises and conduct as a corporate officer of Imagyn.

7. Mr. Gray, however, did not prove his breach of fiduciary duty claim. There was no evidence that a fiduciary duty was owed to Mr. Gray and that a breach of such a fiduciary duty took place.

8. Mr. Gray was the prevailing party in this contract lawsuit and was entitled to damages, attorney's fees, and costs based on HRS §§ 607-9 and 607-14 as well as DCRCP Rule 54(d).

9. Based on fairness and the inferences drawn from the totality of the testimony of Mr. Gray and Mr. Guard, Mr. Gray had the right to recover the sum of \$20,371.70, consisting of \$20,000 in damages, \$300 in attorneys' fees, and \$71.70 in costs.

10. There were no grounds to set aside the Judgment and to grant the Renewed Reconsideration Motion. The Judgment remains in full force and effect.

II. STANDARDS OF REVIEW

A. Findings of Fact and Conclusions of Law

The applicable standard of review for findings of fact is the clearly erroneous standard. A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is

left with the definite and firm conviction that a mistake has been made.

Jones v. Phillipson, 92 Hawai'i 117, 122, 987 P.2d 1015, 1020 (App. 1999) (internal quotation marks and citation omitted).

Hawai'i appellate courts review conclusions of law *de novo*, under the right/wrong standard. Under the right/wrong standard, this court examines the facts and answers the question without being required to give any weight to the trial court's answer to it. A conclusion of law will not be overturned if supported by the trial court's findings of fact and by the application of the correct rule of law.

Robert's Hawaii School Bus, Inc. v. Laupahoehoe Transp. Co., Inc., 91 Hawai'i 224, 239, 982 P.2d 853, 868 (1999) (internal quotation marks, citations, and brackets omitted).

B. Motion For Reconsideration

[W]e review the circuit court's denial of the motion [for reconsideration] according to the abuse of discretion standard. Generally, to constitute an abuse of discretion a court must have clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant.

Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 114, 839 P.2d 10, 26 (1992) (citations omitted).

III. DISCUSSION

The evidence before the district court consisted of testimony by Gray and Mr. Guard; an invoice from Microsurge to U.S. Products (Exhibit 1); a letter indicating that Gray was a distributor for Microsurge (Exhibit 2); a list of inventory with pricing prepared by Gray (Exhibit 4); and a letter indicating that Richard-Allan Medical had acquired Microsurge and was

represented in Hawai'i by Omnimedical (Exhibit 6). No testimony or evidence was offered by Higgins.

Gray testified that he was the exclusive distributor for Microsurge in Hawai'i; the distributorship was terminated by Microsurge or its successor; John Holden of Richard-Allan Medical had agreed to buy Gray's inventory if Gray would cease all sales efforts; Gray honored his end of the bargain; and Gray's inventory was not bought by Richard-Allen or its successors.

Higgins asserts that Gray produced "no admissible evidence" that Higgins agreed to assume the responsibility for the Oral Contract between Gray and John Holden.

Gray testified that John Holden, representing Richard-Allan Medical, agreed to buy Gray's inventory and that Richard-Allan merged or was acquired by Urohealth, which was then acquired by Imagyn. Plaintiff's Exhibit 6, a letter from John Holden representing Richard-Allan Medical, indicated that Higgins, as a representative of Urohealth, received a copy of the letter; however, Exhibit 6 does not discuss the inventory buy-back agreement. The record indicates a copy of the complaint was served on each defendant by mail, and each copy was mailed to the same California address to the attention of Kevin M. Higgins. Higgins signed the postal return receipts for the complaints sent to Microsurge, Inc., Urohealth, Inc., Richard-Allan Medical, and OmniMedical.

Evidence existed that Urohealth and Imagyn were the successor businesses to Richard-Allan Medical. There was, however, no evidence showing that Higgins was a party to the Oral Contract with Gray.

Higgins contends he cannot be held personally liable for Imagyn's contractual obligations.

There is no evidence that Higgins owns the assets to Imagyn or any other successor to Richard-Allan Medical. "[U]nder the doctrine known as 'piercing the corporate veil,' the separate corporate entity is disregarded and a corporation and *the individual or individuals owning all its stocks and assets* will be treated as identical." Evanston Insurance Co. v. Luko, 7 Haw. App. 520, 525, 783 P.2d 293, 297 (1989) (internal quotation marks omitted; emphasis in original).

The district court found Higgins liable on breach of contract, but found no tortious conduct for which Higgins could be held liable (see FOF 5). "[O]fficers, directors or shareholders of a corporation are not personally liable for the tortious conduct of the corporation or its other agents, unless there can be found some active or passive participation in such wrongful conduct by such persons." Cahill v. Hawaiian Paradise Park Corp., 56 Haw. 522, 526, 543 P.2d 1356, 1360 (1975).

The district court erred in finding and concluding that Higgins was liable to Gray for breach of the Oral Contract between Gray and John Holden.

IV. CONCLUSION

The June 15, 1999 Judgment is reversed as to Higgins.

DATED: Honolulu, Hawai'i, April 25, 2003.

On the briefs:

David C. Farmer,
Keith M. Yonamine,
for defendant-appellant
Kevin M. Higgins.

Chief Judge

Roger B. McKeague
for plaintiff-appellee.

Associate Judge

Associate Judge