State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: February 9, 2012 510965

In the Matter of the Estate of
GLADYS JOHNSON MOAK,
Deceased.

DIANE JOHNSON WARD, as Executor
of the Estate of GLADYS
JOHNSON MOAK, Deceased,
Respondent;

MEMORANDUM AND ORDER

JAMES R. MOAK et al.,
Respondents,
and

RALPH H. DRAKE et al.,
Appellants.

Calendar Date: November 21, 2011

Before: Peters, J.P., Rose, McCarthy, Garry and Egan Jr., JJ.

Waite & Associates, P.C., Guilderland (Stephen J. Waite of counsel), for appellants.

McNamee, Lochner, Titus & Williams, P.C., Albany (G. Kimball Williams of counsel), for Diane Johnson Ward, respondent.

Egan Jr., J.

Appeal from a decree of the Surrogate's Court of Albany County (Doyle, S.), entered January 28, 2010, which partially granted petitioner's application, in a proceeding pursuant to SCPA 2103, to direct respondent Ralph H. Drake to deliver certain property to decedent's estate.

In 1994, respondent Woodfield Development Corporation, then owned in equal shares by Pasquale Ferracane and respondent Ralph H. Drake, acquired certain real property located in the Town of Malta, Saratoga County with the intention of subdividing the land and constructing residential housing. The initial plan called for respondent RHD Construction Corporation, an excavation company owned solely by Drake, to prepare the site and for Ferracane to construct the actual residences. By early 1995, however, Woodfield had fallen behind on both the property taxes and the mortgage payments, and Drake began searching for additional investors. Around this same time, Drake and respondent James R. Moak (hereinafter Moak), the latter of whom recently had filed for bankruptcy, met through a mutual acquaintance, and the two thereafter reached an agreement whereby Moak, also a builder, would purchase lots in the subdivision and construct homes thereon.[1] Drake thereafter bought out Ferracane and became the sole owner of Woodfield.

Drake's finances continued to unravel and, by September 1995, he was – by his own admission – "running by hook or by crook . . . to get the subdivision done." According to Moak, it was at this point that Drake, who already had borrowed funds from various family members, approached him and inquired as to the possibility of Moak borrowing money from his father, respondent Roger J. Moak, and his stepmother, Gladys Johnson Moak (hereinafter decedent). To that end, a check from decedent in the amount of $110,000 was deposited into an escrow account maintained by Moak's attorney and, shortly thereafter, three checks in the amounts of $45,000, $30,000 and $17,000 were

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[1] In conjunction therewith, there was some discussion of Moak and Drake forming a company called D&M Builders to construct homes on the project and, additionally, of Moak purchasing Ferracane's interest in Woodfield. Neither of these proposals, however, subsequently came to fruition. Further, although Drake would later testify that his agreement with Moak was reduced to writing, he was unable to produce a copy of the contract.

deposited into RHD's checking account.[2] An additional $9,000 was deposited into RHD's checking account in a similar fashion in October 1995. Although each of these deposits, in turn, was recorded as "Notes Payable – Officer" in RHD's cash receipts journal, Drake insisted that these transactions did not reflect a loan from decedent to either himself, RHD or Woodfield. Rather, according to Drake, this simply represented money that Moak had elected to invest in the project and was entitled to recoup at some later date. Thereafter, in January 1996 and April 1996, decedent wrote two checks payable directly to RHD in the amounts of $25,000 and $36,000, respectively, which were deposited into RHD's bank account.[3] All told, $162,000 of decedent's funds were deposited into one or more bank accounts maintained by RHD.

Despite insisting that none of the foregoing tenders constituted a loan from decedent to either himself or any of his corporate entities, Drake thereafter wrote a series of checks from RHD's account payable to decedent and totaling $147,745.73. Specifically, Drake issued a check in the amount of $5,500 in September 1995 (bearing the notation "Debt Repayment"), a check in the amount of $115,495.73 in November 1995 (bearing the notation "Loan/Interest Repayment"), a check in the amount of $25,250 in January 1996 (bearing the notation "Woodfield Loan") and, finally, a check in the amount of $1,500 in March 1996. Of these various tenders, only the final check for $1,500 ultimately cleared.

Decedent died in June 1996, and petitioner thereafter commenced this proceeding alleging, among other things, that the moneys advanced by decedent constituted a loan that Drake, RHD

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[2] Due to their various and respective financial woes, neither Drake nor Moak maintained a personal checking account during this time period. Further, although not entirely clear from the record, it appears that Moak pocketed the difference between the $110,000 tendered by decedent and the $92,000 ultimately deposited into RHD's bank account.

[3] The $25,000 check bore the notation "LOAN WOODFIELD," and the $36,000 check bore the notation "WOODFIELD."

and Woodfield (hereinafter collectively referred to as respondents), in turn, failed to repay.[4] Respondents answered and cross-claimed against Moak for contribution and/or indemnification.[5] Following a trial, Surrogate's Court partially granted petitioner's application and ordered Drake to reimburse decedent's estate in the amount of $160,500, together with interest thereon. This appeal by respondents ensued.[6]

Initially, we have no quarrel with Surrogate's Court's decision to pierce the corporate veil and hold Drake personally liable for the corporate debts incurred by RHD and/or Woodfield. Contrary to respondents' assertion, "an attempt . . . to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners" (Matter of Morris v New York State Dept. of Taxation & Fin., 82 NY2d 135, 141 [1993]; see Sugar Foods De Mexico v Scientific Scents, LLC, 79 AD3d 1551, 1552 [2010]). As our review of the underlying petition reveals facts sufficient "to give the court and parties

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[4] The petition sought damages in the amount of $185,832.36, which apparently represented the $162,000 deposited into RHD's bank account and certain additional funds allegedly appropriated by either respondents, Moak or his father.

[5] Although respondents asserted that the cross claim was filed against Moak and his father, it is clear from a review of respondents' answer that the cross claim pertained solely to Moak.

[6] RHD and Woodfield were dissolved by the Secretary of State in June 2001 and, although not entirely clear from the record, it appears that Moak and his father settled with decedent's estate prior to trial, which presumably explains why the decree issued by Surrogate's Court imposes liability upon Drake alone. Further, we note that although Moak was called as a witness by petitioner and indeed testified, neither he nor his father otherwise appeared at trial and have not appealed from the underlying decree.

notice of the transactions [or] occurrences . . . intended to be proved" (CPLR 3013), respondents' argument on this point must fail.

Further, the record before us contains ample evidence that Drake "exercised complete domination over [RHD and/or Woodfield] in the transaction[s] at issue and, in doing so, abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that resulted in injury to [decedent]" (East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc., 66 AD3d 122, 126 [2009], affd 16 NY3d 775 [2011]; see Matter of Morris v New York State Dept. of Taxation & Fin., 82 NY2d at 141-142). In this regard, Drake's own testimony, together with the related documentary evidence, reveals a pervasive pattern of "commingling of assets . . . and use of corporate funds for personal use" (East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc., 66 AD3d at 127 [internal quotation marks and citation omitted]). Under these circumstances, we cannot say that Surrogate's Court erred in piercing the corporate veil and imposing personal liability upon Drake for RHD and/or Woodfield's indebtedness to decedent.

Before addressing the particular causes of action upon which petitioner prevailed, we note that although this Court indeed is vested with "broad authority in a nonjury trial to independently weigh the evidence and render [the] determination warranted by the record, we will defer to the trial court's assessment of credibility issues given [its] ability to observe the witnesses' demeanor during testimony" (Matter of Curtis, 83 AD3d 1182, 1183 [2011] [internal quotation marks and citation omitted]). Here, Drake and Moak presented divergent accounts of the circumstances under which decedent's funds ultimately found their way into RHD's checking account. Moak, believing that he and Drake had an "understanding" that they "would be building the houses together," insisted that he prevailed upon decedent to extend a loan to RHD/Woodfield at Drake's behest and based upon Drake's representation that such loan would be repaid in short order. Drake, on the other hand, steadfastly maintained that Moak – and Moak alone – borrowed money from decedent that he thereafter elected – of his own volition – to invest in the subdivision project. Surrogate's Court discounted Drake's

version of the underlying transactions and, based upon our review of the record as a whole, we discern no basis upon which to disturb that credibility determination on appeal.

Turning to the specific causes of action at issue, although we agree with respondents that there is insufficient evidence to sustain Surrogate's Court's finding of fraud,[7] the record is replete with evidence to support petitioner's remaining causes of

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[7] Surrogate's Court found that Drake, by executing certain checks in favor of decedent and instructing Moak not to cash them, "engaged in a scheme that fraudulently induced [decedent] into loaning him additional [moneys]." In this regard, we have no quarrel with the proposition that Drake's repeated execution of checks in favor of decedent at a point in time when he knew (or should have known by virtue of his status as the sole corporate officer) that there were insufficient funds to cover the tenders in question evidenced a material representation and knowledge of its falsity, and it is equally clear that decedent sustained damages as a result thereof (see generally Maki v Bassett Healthcare, 85 AD3d 1366, 1369 [2011] [elements of fraud] appeal dismissed 17 NY3d 855 [2011], lv denied and dismissed ___ NY3d ___ [Jan. 10, 2012]; Societe Generale Alsacienne De Banque, Zurich v Flemingdon Dev. Corp., 118 AD2d 769, 773 [1986] [drawing of checks with the knowledge that there were insufficient funds to cover them constitutes "actionable fraud"]; A. Sam & Sons Produce Co. v Campese, 14 AD2d 487, 487 [1961] ["drawing of checks without funds to meet them, when unexplained, is a badge of fraud"]). Where petitioner's proof – and the court's findings – fall short, in our view, is with respect to the element of reliance. Both Moak and Drake testified that Drake never had any contact – either orally or in writing – with decedent. And while petitioner points to the transaction history between decedent and respondents – as delineated by the checks deposited into and drawn on RHD's bank account – as evidence of fraudulent inducement, i.e., tendering partial payments to decedent in an effort to procure additional funds, we find such proof to be inconclusive – particularly in view of the fact that decedent continued to write checks to RHD long after it became (or should have become) apparent that RHD's checks to her were not clearing.

action for constructive trust, unjust enrichment, implied contract and restitution – all of which essentially distill to a cause of action for moneys had and received (see Matter of Witbeck, 245 AD2d 848, 850 [1997]). In this regard, a cause of action for moneys had and received is established when "(1) the defendant receive[s] money belonging to [the] plaintiff, (2) the defendant benefit[s] from receipt of the money, and (3) under principles of equity and good conscience, the defendant should not be permitted to keep the money" (id. at 850 [internal quotation marks and citation omitted]; see State of New York v International Asset Recovery Corp., 56 AD3d 849, 852 [2008]).

Here, it is uncontroverted that funds originating from decedent and totaling $162,000 were deposited into RHD's checking account between September 1995 and April 1996, and it is equally clear that Drake and his corporate entities benefitted from the receipt of these funds, which were used, at least in part, to cover outstanding insurance bills, payroll taxes and the costs associated with getting the infrastructure in place for the subdivision. Additionally, despite Drake's protestations to the contrary, there is ample proof in the record – including the notations contained on the checks from RHD to decedent, the manner in which decedent's funds were recorded in RHD's books and the assignment made by Drake to Moak in 1998 conveying his share of the profits on the project "until such time as the [moneys] invested by [decedent] have been repaid" – to establish that the funds received from decedent and deposited into RHD's bank account were in fact a loan to respondents and, more to the point, that Drake, by his conduct, acknowledged as much. The record further reflects that, with the exception of $1,500, respondents thereafter failed to repay decedent. Under these circumstances, we agree that equity dictates that decedent's estate be reimbursed for the remaining funds due.

As a final matter, respondents correctly note that Surrogate's Court erred in failing to address both their motion for a default judgment, which was made at the start of trial, and the merits of their cross claim against Moak for contribution and/or indemnification and, accordingly, we remit this matter to Surrogate's Court for this purpose. Respondents' remaining contentions, to the extent not specifically addressed, have been

examined and found to be lacking in merit.

Peters, J.P., Rose, McCarthy and Garry, JJ., concur.

ORDERED that the decree is affirmed, with costs, and matter remitted to the Surrogate's Court of Albany County for further proceedings not inconsistent with this Court's decision.

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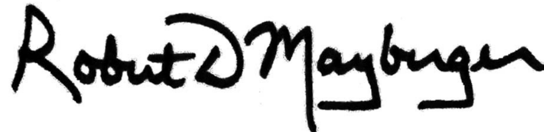

Robert D. Mayberger
Clerk of the Court