notify

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. | SUPERIOR COURT CIVIL ACTION NO. 03-5642-BLS2

TRANS NATIONAL COMMUNICATIONS INTERNATIONAL, INC.,
Plaintiff

vs.

BANNISTER CONSULTING, INC. and NSF RESOURCES, INC.,
Defendants

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT

For all practical purposes, this is a collection action regarding a telephone bill, albeit a very large telephone bill. The plaintiff, Trans National Communications International, Inc. ("Trans National"), is in the business of reselling telecommunications services to small- and medium-sized businesses. In a nutshell, Trans National, through sales agents who are independent contractors, sells telephone services to various businesses, and then Trans National contracts with its telecommunications providers to provide those services. The defendant Bannister Consulting, Inc. ("Bannister Consulting"), solely owned by William Bannister ("Bannister"), began to purchase telephone services from Trans National on November 30, 2001 and by September 2003 had run up an unpaid bill of more than $145,000. Trans National has filed this action against Bannister Consulting and another company for which Bannister served as president, the defendant NSF Resources, Inc. ("NSF Resources"), seeking to collect this unpaid balance. The parties waived their right to a jury trial, and this Court conducted a bench trial over two days on April 4 and 5, 2006, at which a single witness testified, Edward Ariel, the Director of Risk Management at Trans National. Bannister's September 8, 2005 deposition was offered into evidence, as were thirteen other exhibits, including the exhibits that were used during

Bannister's deposition. Based on the testimony at trial and the exhibits admitted into evidence, viewed in light of the governing law, this Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Bannister was the President, sole shareholder, and sole employee of Bannister Consulting, whose business was to make unsolicited telephone calls seeking to sell travel tour packages. This business depended on what were known as T-1 telephone lines to make these "cold" calls, with each T-1 line capable of making simultaneous telephone calls on 24 local lines. On November 30, 2001, after discussions with a sales agent of Trans National, Bannister Consulting executed a Letter of Authorization - Service Order in which Trans National agreed to provide Bannister Consulting with a single T-1 line, long distance service on all local lines, and switching services until the T-1 line could be set up. Through subsequent Letters of Authorization on June 11, 2002, August 1, 2002, November 26, 2002, January 9, 2003, January 31, 2003, and March 31, 2003, all of which were executed by Bannister, Bannister Consulting agreed to purchase five additional T-1 lines, twelve more local lines with long distance service, and nine toll-free lines.

During roughly this same period of time, Bannister was also the President of NSF Resources, which shared offices with Bannister Consulting. NSF Resources apparently would contract with various retail stores which had received bounced checks to resubmit those bounced checks for payment to the bank that had bounced them.[1] NSF Resources at times had a few

---

[1] In view of the business of this corporation, although there was no evidence to this effect, this Court infers that NSF stands for Non-Sufficient Funds.

employees and some independent contractors, but it produced virtually no corporate records to document Bannister's testimony in this regard. On August 1, 2002, Bannister, on behalf of NSF Resources, executed a Letter of Authorization with Trans National to switch its long distance service on ten telephone lines to Trans National. While NSF Resources had obtained no toll-free service from Trans National, it was using five toll-free lines that had been ordered by Bannister Consulting and were being billed to Bannister Consulting.

On July 7, 2003, after the Bannister Consulting balance due had grown to $134,235.82, Ariel and Trans National's Vice President for Finance spoke by telephone with Bannister and told him that the account exceeded the credit limit and was past due. They asked him if he was going to make payment on this overdue balance and, if so, when. Bannister told them that he could not make payment on the bill. They informed him that they would shut off the service on his Bannister Consulting lines the next morning, which they did.

After the shut off of the Bannister Consulting lines, Bannister realized that the five toll-free lines that had been used by NSF Resources were also shut off. On July 17, 2003, Bannister wrote an email to Ariel telling him that these five toll-free lines, which he described as "the main telephone numbers that I used for NSF Resources when I gave out a contact number for proposals, on the internet and day to day activities," should be released because they were NSF Resource lines and not Bannister Consulting lines. In fact, from a review of the actual Letters of Authorization, it is plain that these lines had been ordered by Bannister Consulting, not NSF Resources. Trans National did not release these lines from the shut off.

In August or September 2003, Ariel traveled to Arizona in an attempt to meet with Bannister, since Bannister would not return his telephone calls. Ariel went to Bannister

Consulting's offices, and found no one there. When he finally reached Bannister by cellphone, Bannister refused to meet with him, and said that Trans National would have to release NSF Resources' toll-free lines before he would even discuss with Ariel the overdue balance. Since Trans National refused to release these lines, those discussions never took place.

The total amount due to Trans National for telephone services ordered by Bannister Consulting reached $146,603.45 by September 3, 2003, and have remained unpaid to this day. There is no evidence that the far smaller amounts billed to NSF Resources were not timely paid in full.

CONCLUSIONS OF LAW

Trans National has brought various claims in an attempt to recover this unpaid balance. First, it has brought a breach of contract claim against Bannister Consulting for the amount due. This Court finds that Bannister Consulting entered into a binding contract with Trans National to pay for various telephone services, that Trans National provided these services, and that Bannister Consulting breached its agreement to pay for these services in the amount due of $146,603.45.[2] In addition, since the Terms and Conditions to that contract make Bannister Consulting "liable to [Trans National] for all legal expenses reasonable incurred by [Trans

---

[2] Trans National, in the alternative, has also brought a *quantum meruit* claim against Bannister Consulting in the event that the Court were to find that there was no enforceable contract. While this alternative need not be pursued, since the Court finds that there was an enforceable contract, this Court also finds that Trans National would also be entitled to recover the same $146,603.45 from Bannister Consulting under a *quantum meruit* theory, since it received reasonably priced telephone services worth this amount of money in reliance on its promise to pay and under the reasonable expectation that it would pay for these services. This Court notes that Bannister admitted in an answer to interrogatories that Trans National's prices were fair and reasonable.

National], including, but not limited to, attorney's fees ... [and], court costs ....' this Court further finds that Bannister Consulting is responsible to pay the legal expenses Trans National incurred, including its attorney's fees and court costs, to prosecute this action.[3]

The more difficult question is whether defendant NSF Resources is jointly and severally liable to Trans National for the amount due from Bannister Consulting. Generally, the law respects the corporate form and will not impose liability on one corporation for the contractual obligations of another. My Bread Baking Co. v. Cumberland Farms, Inc., 353 Mass. 614, 618 (1968). Yet, there are circumstances in which the law will "look beyond the corporate form for the purpose of defeating fraud or wrong." Id., quoting M. McDonough Corp. v. Connolly, 313 Mass. 62, 65-66 (1943). "[C]ommon ownership of the stock of two or more corporations together with common management, standing alone, will not give rise to liability on the part of one corporation for the acts of another corporation or its employees." My Bread Baking Co., 353 Mass. at 619. Yet, one corporation may be liable for the obligations of another:

> (a) when there is active and direct participation by the representatives of one corporation, apparently exercising some form of pervasive control, in the activities of another and there is some fraudulent or injurious consequence of the intercorporate relationship, or (b)

---

[3]At trial, both Bannister Consulting and NSF Resources challenged whether this Court has personal jurisdiction over them. Their challenge must be rejected for three independent and sufficient reasons. First, they have waived any objection to personal jurisdiction by waiting to bring it until the first day of trial. See Colley v. Benson, Young & Downs Ins. Agency, Inc., 42 Mass. App. Ct. 527, 533 (1997). Second, in paragraph 7 of the Terms and Conditions that both Bannister Consulting and NSF Resources agreed to as part of their Letter of Authorization agreement with Trans National, both defendants consented to jurisdiction in Massachusetts courts as to any matter concerning the performance and enforcement of that agreement. Third, even without this agreement, by obtaining telephone services from a corporation based in Massachusetts, both defendants have sufficient contacts with Massachusetts to satisfy both the long-arm statute and the constitutional requirements for personal jurisdiction. See Good Hope Indus., Inc. v. Ryder Scott Co., 378 Mass. 1, 5-6 (1979); Sonesta Intl. Hotels Corp. v. Central Fla. Invs. Inc., 47 Mass. App. Ct. 154, 160-163 (1999).

> when there is a confused intermingling of activity of two or more corporations engaged in a common enterprise with substantial disregard of the separate nature of the corporate entities, or serious ambiguity about the manner and capacity in which the various corporations and their respective representatives are acting. In such circumstances, in imposing liability upon one or more of a group of 'closely identified' corporations, a court 'need not consider with nicety which of them' ought to be held liable for the act of one corporation 'for which the plaintiff deserves payment.'"

Id., quoting W. W. Britton, Inc. v. S. M. Hill Co., 327 Mass. 335, 338-339 (1951). Phrased differently, "[w]here there is common control of a group of separate corporations engaged in a single enterprise, failure (a) to make clear which corporation is taking action in a particular situation and the nature and extent of that action, or (b) to observe with care the formal barriers between the corporations with a proper segregation of their separate businesses ...., records, and finances, may warrant some disregard of the separate entitles in rare particular situations in order to prevent gross inequity." My Bread Baking Co., 353 Mass. at 620.

The Appeals Court, citing Pepsi-Cola Metropolitan Bottling Co. v. Checkers, Inc., 754 F.2d 10, 14-16 (1st Cir.1985), has identified "twelve factors which should be considered in deciding whether to penetrate the corporate form: (1) common ownership; (2) pervasive control; (3) confused intermingling of business activity assets, or management; (4) thin capitalization; (5) nonobservance of corporate formalities; (6) absence of corporate records; (7) no payment of dividends; (8) insolvency at the time of the litigated transaction; (9) siphoning away of corporate assets by the dominant shareholders; (10) nonfunctioning of officers and directors; (11) use of the corporation for transactions of the dominant shareholders; (12) use of the corporation in promoting fraud." Evans v. Multicon Construction Corp., 30 Mass. App. Ct. 728, 733 (1991). The linchpin that connects each of these different approaches to the determination of whether the corporate form should be honored is equity – while the law respects the corporate

form and the limited liability it provides, it will not permit the corporate form to be abused so that it becomes a vehicle to defraud or otherwise unfairly deprive those who do business with the corporation. See My Bread Baking Co., 353 Mass. at 620 (holding disregard of separate entities is sometimes warranted in order to "prevent gross inequity").

Here, there are abundant reasons to conclude that equity demands that the separate corporate identities of Bannister Consulting and NSF Resources not be respected in this case. Bannister's own deposition makes clear that he did not open a personal banking account during the relevant time period because he feared that any such bank account would be levied upon by his various creditors, including the Internal Revenue Services for back taxes. Instead, he used the corporate bank accounts of Bannister Consulting and, to a lesser degree, NSF Resources as if they were his personal bank accounts, writing checks on those corporate accounts to pay child support, his credit card debts, his personal attorney, his personal tax obligations, his automobile downpayments and monthly payments (for his Corvette and BMW), his family members, his patio furniture, and other personal expenses. He also routinely paid himself substantial sums of money and would transfer money between Bannister Consulting and NSF Resources, all without any corporate records reflecting what he was doing or why he was doing it. While he paid thousands of dollars to himself and his family from Bannister Consulting in 2002, and testified that it was treated as salary, the federal S Corporation Income Tax Return for 2002 listed no monies paid by the corporation for salaries, compensation of officers, or loan repayments, and no asset of "loans to shareholders." Indeed, on November 18, 2002, when Bannister Consulting owed Trans National roughly $70,000, he wrote a Bannister Consulting check to Brown and Brown Chevrolet for $13,000 for the downpayment on a Corvette that he was buying for himself.

Moreover. Bannister Consulting and NSF Resources produced only a *fraction* of the records that were requested and that legitimate corporations would routinely keep in the ordinary course of business. There were no minutes of board meetings. no ledgers. no stock certificates, no sales agreements. and virtually no correspondence. He even testified that he had no computer records because the hard drive on his desktop computer "fried" and was thrown out without any documents being retrieved. and he could not recall the password for his laptop which would have given him access to his Quicken tax records. This Court does not believe his testimony regarding the failure to produce computer records. He also had virtually no memory as to any of the details involved in operating a corporation. He testified that he believed there were other shareholders in NSF Resources but his testimony differed as to who they were and how much they owned; later. he testified, in a rare moment of candor, that "I own both companies." This Court cannot determine whether anyone other than Bannister actually owned any equity in NSF Resources. but this Court finds that Bannister treated NSF Resources as if he was the one hundred percent owner.

It is also plain that the finances of Bannister Consulting and NSF Resources were substantially intermingled. without any records being kept that would permit anyone accurately to distinguish between the assets and liabilities of one company versus the other. Indeed, as noted earlier. Bannister Consulting ordered five toll-free telephone lines that were being used solely by NSF Resources. Bannister Consulting was being billed for those lines and. at least initially. was paying for those lines, but there was no effort to obtain reimbursement from NSF Resources for the use of these lines. Moreover. Bannister Consulting paid substantial sums to

NSF Resources, either directly or by writing a check to Bannister, who then deposited the check into the NSF account. During the period in question, based on just the partial document production of the defendants. Bannister Consulting paid at least $9,300 directly or indirectly to NSF Resources without any records explaining or justifying the cash transfer at the same time that Bannister Consulting's balance due to Trans National was ballooning in size.

If one considers the so-called twelve "Pepsi-Cola" factors identified by the Appeals Court, it is equally plain that the corporate form here equitably should not be respected:

(1) common ownership:	Bannister is the 100 percent owner of Bannister Consulting and acts as if he were the 100 percent owner of NSF Resources.
(2) pervasive control:	Bannister controlled everything that happened at both Bannister Consulting and NSF Resources.
(3) confused intermingling of business activity assets or management:	Such "confused intermingling" has already been identified and discussed above.
(4) thin capitalization:	Both Bannister Consulting and NSF Resources appear, at best, to be "thinly capitalized."
(5) nonobservance of corporate formalities:	Based on Bannister's deposition testimony, there is no indication that any corporate formalities were followed, apart from the filing of income tax forms.
(6) absence of corporate records:	As discussed, Bannister Consulting and NSF Resources produced pitifully few corporate documents, far fewer than would expect from a legitimately operated corporation.
(7) no payment of dividends:	The evidence reflects that no dividends were paid by either Bannister Consulting or NSF Resources.
(8) insolvency at the time of the litigated transaction:	It is impossible to tell whether Bannister Consulting or NSF Resources were insolvent when they entered into their agreements with Trans National because of the absence of corporate documents.

(9) siphoning away of corporate assets by the dominant shareholders:	There is plain evidence of such siphoning by Bannister, as already discussed.
(10) nonfunctioning of officers and directors:	Here, the only officer or director (if there were any) who appeared to do anything at either Bannister Consulting or NSF Resources was Bannister himself.
(11) use of the corporation for transactions of the dominant shareholders:	As noted earlier, Bannister treated the bank accounts of Bannister Consulting and NSF Resources as if they were his personal accounts, since he maintained no personal account for fear of a levy by judgment creditors.
(12) use of the corporation in promoting fraud:	Here, while the evidence is not clear whether Bannister initially ordered telephone services from Trans National knowing that he would not pay the balance due, it is clear that, by the early summer of 2003 (at the latest), he continued to use those telephone services knowing that he would never be able to pay for them.

This Court recognizes that the Appeals Court in Evans made it clear that the decision whether or not to lift the corporate veil is not decided simply by counting the number of applicable factors but by determining "whether the over-all structure and operation misleads." 30 Mass. App. Ct. at 736. However, it is noteworthy that all, or virtually all, of these twelve factors apply to Bannister's misuse of the corporate form here.

The defendants submit that an analysis of whether the corporate veil between Bannister Consulting and NSF Resources should be pierced must be accomplished by application of Arizona law, the law of the state where both entities are incorporated. It is true that in Massachusetts the law of the state of incorporation governs controversies involving a corporation's internal affairs. Beacon Wool Corp. v. Johnson, 331 Mass. 274, 279 (1954). Here, however, the controversy before the Court is not an internal dispute within these corporations, but an unpaid debt to a Massachusetts corporation, so a ruling based solely on Massachusetts law is appropriate.

Even so, the relevant Arizona law reveals few, if any, substantial differences in the legal standard applied in either state. Like Massachusetts, the Arizona courts will not disregard the corporate form based on the mere fact that ownership and control is vested in one person, as long as the "corporation is operated and maintained for the purpose for which it was incorporated." Cooper v. Industrial Commission, 74 Ariz. 351, 354 (1952). However, also like Massachusetts, Arizona law permits disregard of the corporate form if "employed for fraudulent purposes" or "when the corporation is the alter ego or business conduit of a person, and when to observe the corporation would work an injustice." Dietel v. Day, 16 Ariz. App. 206, 208 (1972).[4] Thus, even if this Court were to rely on Arizona law to determine whether the corporate form should be honored, that linchpin of equity still remains and this Court's conclusion would remain the same.

Based on these considerations, considered as a totality, this Court finds that justice would not be served by respecting the corporate form in this case and therefore finds that NSF Resources is jointly liable with Bannister Consulting to Trans National for the breach of contract damages in this case, including the payment of reasonable attorney's fees and court costs. In view of this relief, this Court need not address the other claims brought by Trans National. Specifically, this Court cannot resolve Trans National's fraudulent conveyance claim because the money at issue was allegedly fraudulently conveyed mostly to Bannister personally, so he would be a necessary party to such a fraudulent conveyance claim, since he would be the person who

---

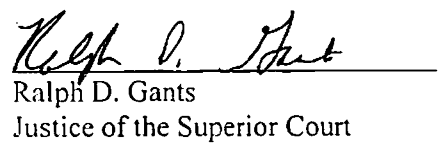
[4] The alter-ego status is said to exist when there is such unity of interest and ownership that the separate personalities of the corporation and owners cease to exist. Employers' Liability Assurance Corp. v. Lunt, 82 Ariz. 320 (1957). Where there is an intermingling of personal and corporate funds and activities, so that the corporation loses its separate identity, then disregard of the corporate form is warranted. Dietel, 16 Ariz. App. at 208. As discussed earlier, Bannister's use of the corporate accounts to pay his personal expenses would satisfy this condition for disregarding the corporate form, even under Arizona law.

potentially would be ordered to return that money to Bannister Consulting and/or NSF Resources.

ORDER

For the reasons stated above, it is hereby **ORDERED** that:

1. This Court finds in favor of the plaintiff as to both defendants on the breach of contract claim.
2. The defendants, jointly and severally, are ordered to pay the damages arising from the breach of contract claim in the amount of $146,603.45.
3. The defendants, jointly and severally, are also ordered to pay the reasonable attorney's fees and expenses incurred by the plaintiff in prosecuting its breach of contract claim. No later than April 28, 2006. Trans National shall serve upon the defendants its application for reasonable attorney's fees and expenses. The defendants may file any objection no later than May 19, 2006. A hearing shall be heard on this issue, unless there is no objection to the amount claimed, on May 24, 2006 at 2:00 p.m.
4. When judgment is entered, the plaintiff shall be awarded its statutory costs.



Ralph D. Gants
Justice of the Superior Court

DATED: April 11, 2006