

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

LEODIS HARRIS, ET AL

Plaintiffs-Appellants

-vs-

JACK AMBROZIC, ET AL

Defendants-Appellees

JUDGES:

: Hon: W. Scott Gwin, P.J.
: Hon: Julie A. Edwards, J.
: Hon: John F. Boggins, J.
:
:
:

: Case No. 2003CA00204
: 2003CA00230
:
:
:

: OPINION

CHARACTER OF PROCEEDING: Civil appeal from the Stark County Court of
Common Pleas, Case No. 2002CV3758

JUDGMENT: Affirmed in part; Reversed in part;
Remanded

DATE OF JUDGMENT ENTRY: February 9, 2004

APPEARANCES:

For Plaintiff-Appellant

For Defendant-Appellee

ROY M. KAUFMAN
LEODIS HARRIS
745 Leader Building
Cleveland, OH 44114

DIMITRIOS POUSOULIDES
931 N. Main Street, Ste 201
North Canton, OH 44720

Gwin, P.J.

{¶1} Plaintiffs-appellants Leodis Harris and Fatimah M. Harris appeal from the May 19, 2003 and the June 9, 2003, judgment entries of the Stark County Court of Common Pleas granting the motions for summary judgment filed by defendant-appellees Jack Koury, Sandra Postlewait, KCAJ Limited Partnership, and YURK Limited Partnership.

{¶2} This case had its genesis in the ownership and operation of a Canton radio station, WCER-AM. Appellant Leodis Harris owned the station as a major shareholder in Melodynamic Broadcasting, Inc.

{¶3} In March, 1992, appellant Leodis Harris and defendant Jack Ambrozic entered into a business agreement whereby defendant Ambozic became the operating and managing partner of the radio station. All net profits were to be divided equally between appellant Leodis Harris and defendant Jack Ambrozic.

{¶4} The land upon which WCER-AM is located was owned by Paul J. Wilson. Initially, a portion of the land was rented to appellant Leodis Harris for operation of the radio station. The station entered into a rental agreement to use Mortensen Broadcasting Corporation's broadcast tower which was located on land adjacent to the land owned by Paul Wilson and rented by appellant Leodis Harris. The broadcast operations of the station were carried out in a rented office trailer placed on the property.

{¶5} In May, 1992, appellant Fatimah Harris, wife of appellant Leodis Harris, and Janice Ambrozic, wife of defendant Jack Ambrozic, executed a real estate purchase agreement to purchase land from Paul J. Wilson. The agreement called for a

\$5,000.00 down-payment with each party providing one-half of that sum. Appellant Fatimah Harris indicates that she gave \$2,000.00 cash to defendant Jack Ambrozic to complete her end of the deal. (Deposition of Fatimah Harris, filed May 12, 2003 at 51). Defendant Jack Ambrozic denied that either of the appellants contributed toward the down payment. The purchase agreement and a copy of a cashier's check are attached as defendant's Exhibit "A" to the deposition of appellant Fatimah Harris. The check, in the amount of \$4,900.00, is dated May 19, 1992 and has the following "Property of Paul (James) Wilson Remitter: John J. and Janice M. Ambrozic." Defendant Jack Ambrozic alleges that because appellants were unable to submit their portion of the sales price, the land was purchased and transferred to Janice Ambrozic and her father who had contributed financially to the purchase. (Affidavit of Jack Ambrozic, filed April 14, 2003 at paragraph 3-4). Appellants claim an equitable interest in the land due to their \$2,000.00 contribution toward the down payment.

{¶6} In 1997, defendant Jack Ambrozic, defendant-appellee Jack Koury and a third party who is not named in the appellant's suit, formed Jackson Station, Inc. The corporation purchased the land in question. Defendant-appellee Jack Koury submitted his affidavit in support of his motion for summary judgment in the trial court in which he states that he purchased his one-third interest with funds unrelated to defendant Jack Ambrozic. (Affidavit of Jack Koury, filed April 14, 2003 at paragraph 9). The land was subsequently transferred to defendant 4537 22nd Street Land Trust. Defendant-appellee Sandra Postlewait, appellee Jack Koury's daughter, is the trustee of the land trust. (Id. at paragraph 11).

{¶7} Defendant Jack Ambrozic, appellee Jack Koury, and the same third-party formed a second corporation, Brinker, Inc. (Id. at paragraph 14). This corporation built a radio broadcast tower on the land in question (Id.). The tower was then sold to SBA Tower Company. The proceeds were divided between defendant Jack Ambrozic, appellee Jack Koury and the third party. (Id. at paragraph 15). Appellants allege the proceeds from the sale of the broadcast tower were approximately \$886,000.00.

{¶8} Appellee Jack Koury claims he never met appellants and never engaged in any business transactions with either of them. (Id. at paragraph 2). Appellants do not dispute this claim.

{¶9} Appellants filed a complaint in the Stark County Court of Common Pleas against Jack Ambrozic, Jack Koury and Sandra Postlewait. Appellants further named nine business entities as defendants: (1) Where Christ Ever Reigns Ministries, (2) Beacon Broadcasting, Inc. (3) Jackson Station, Inc. (4) Patomar Limited Partnership, (5) 4537 22nd Street Land Trust, (6) Brinker, Inc. (7) The Almighty Airforce, (8) YRUK Limited Partnership, and (9) KCAJ Limited Partnership. The thrust of appellant's complaint is that defendant Jack Ambrozic defrauded appellant Leodis Harris of his equitable share of the WCER-AM profits and appellant Fatima Harris out of her equitable interest in the land. Appellants allege that the other named individuals and business entities aided and abetted defendant Jack Ambrozic to defraud appellant.

{¶10} On April 14, 2003, defendants Jack Koury, Sandra Postlewait, Beacon Broadcasting, Inc., Jackson Station, Inc., Brinker, Inc., the 4537 22d Street Land Trust, KCAJ Limited Partnership and YUCK Limited Partnership filed a joint motion for summary judgment. Attached to the motion are the affidavits of defendant Jack

Ambrozic and appellee Jack Koury. On May 14, 2003, appellant filed a response together with eleven (11) exhibits.

{¶11} On May 19, 2003, the trial court granted the motion for summary judgment with respect to appellees Jack Koury and Sandra Postlewait and stated the following:

{¶12} “As it relates to the defendants, Jack Koury and Sandra Postlewait, the Court finds that there is no evidence properly within the record to indicate that any cause of action would be proper against either of these two individuals. The court therefore, grants summary judgment to Jack Koury and Sandra Postlewait and they will be dismissed from this case forthwith. As it relates to the remaining defendants, the court will give the parties until June 5, 2003, to complete any further discovery. The court will rule immediately after June 5, 2003, on the remaining defendants’ motion for summary judgment.”

{¶13} On June 9, 2003, the trial court ruled as follows:

{¶14} “The court, therefore, re-affirms its summary judgment ruling in favor of Jack Koury and Sandra Postlewait. The court further grants summary judgment as it relates to the defendants, KCAJ Limited Partnership and YURK Limited Partnership, finding that there is no factual evidence before the court to sustain a judgment against these entities. The court denies the motion for summary judgment against the defendants, Beacon Broadcasting, Jackson Station, Brinkr, and 4537 Land Trust. The court finds that the motion for summary judgment effect the substantial rights of the parties and further that the parties have agreed that same may be considered as final, appealable orders and that there is no just cause for delay.”

{¶15} Appellants filed a notice of appeal on June 17, 2003 in case number 2003CA00204 from the trial court's May 19, 2003 entry. Appellants filed a notice of appeal on June 23, 2003 in case number 2003CA00230 from the trial court's June 9, 2003 entry.

{¶16} The cases were consolidated by this court by judgment entry filed June 27, 2003.

{¶17} It is from the trial court's May 19, 2003 and June 9, 2003 judgment entries granting summary judgment to defendant-appellee Jack Koury, Sandra Postlewait, KCAJ Limited Partnership and YURK Limited Partnership that appellants now appeal, raising the following assignments of error:

{¶18} "THE TRIAL COURT COMMITTED ERROR BY DECIDING QUESTIONS OF FACT THAT A JURY SHOULD HAVE BEEN ALLOWED TO DECIDE.

{¶19} "THE TRIAL COURT COMMITTED ERROR BY GRANTING SUMMARY JUDGMENT TO JACK KOURY.

{¶20} "THE TRIAL COURT COMMITTED ERROR BY GRANTNG SUMMARY JUDGMENT TO SANDRA POSTLEWAIT.

{¶21} "THE TRIAL COURT COMMITTED ERROR BY GRANTNG SUMMARY JUDGMENT TO KCAJ LIMITED PARTNERSHIP.

{¶22} "THE TRIAL COURT COMMITTED ERROR BY GRANTING SUMMARY JUDGMENT TO YRUK LIMITED PARTNERSHIP.

{¶23} "THE TRIAL COURT COMMITTED ERROR BY FAILING TO JOURNALIZE ITS RULING REGARDING PLAINTIFF'S MOTION FOR A CHANGE OF VENUE.

{¶24} “THE TRIAL COURT ABUSED JUDICIAL DISCRETION BY ITS CERTIFICATION OF ITS SUMMARY JUDGMENT RULING, THEREBY ADVERSELY AFFECTING JUDICIAL ECONOMY.”

{¶25} Although appellants purport to raise six assignments of error they do not separately brief each issue. See App. R. 16 (A)(7). As appellants argue the errors collectively, the court will address the errors cumulatively. Appellants argue that the trial court erred in granting appellees motions for summary judgment.

{¶26} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St. 3d 35, 36, 506 N.E. 2d 212. As such, we must refer to Civ.R. 56 which provides, in pertinent part:

{¶27} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor."

{¶28} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion

and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall*, 77 Ohio St. 3d 421, 429, 1997-Ohio-259, 674 N.E. 2d 1164, citing *Dresher v. Burt*, 75 Ohio St. 3d 280, 1996-Ohio-107, 662 N.E.2d 264. It is based upon this standard that we review appellants' assignments of error.

{¶29} At issue in this case is whether appellees aided and abetted appellants business partner in breaching his fiduciary duties, hiding radio station profits and subverting an alleged equitable interest in the property on which the radio station is located.

{¶30} In *Aetna Casualty and Surety Co. v. Leahey Construction Co., Inc.* (6th Cir. 2000), 219 F. 3d 519, the court found that under Ohio law a tort of civil aiding and abetting, as set forth by the Restatement (Second) of Torts, is a viable cause of action. *Id.* at 532-533. In a civil aiding and abetting case, a plaintiff must show "two elements: (1) knowledge that the primary party's conduct is a breach of duty and (2) substantial assistance or encouragement to the primary party in carrying out the tortuous act." *Id.* (quoting *Andonian v. A.C. & S., Inc.*(1994), 97 Ohio App. 3d 572, 647 N.E. 2d 190, 191-92).

{¶31} With respect to appellees KCAJ Limited Partnership and YURK Limited Partnership, appellants neither argued nor presented any evidence that either or both of

these entities were involved in wrongful activity that resulted in injury to the appellants. Appellants have set forth no argument in this court as to how they believe these entities are liable. Accordingly, there is no genuine issue of material fact with respect to appellees KCAJ Limited Partnership and YURK Limited Partnership. The trial court did not err in granting appellees' motion for summary judgment. The same cannot be said with respect to appellee's Jack Koury and Sandra Postlewait.

{¶32} Appellee Jack Koury is a member of defendant Jackson Station, Inc. and defendant Brinkr, Inc. Appellee Sandra Postlewait is the trustee of defendant 4537 22nd Street Land Trust. The corporate entities and the land trust remain defendants in this case. On June 9, 2003 the trial court overruled these defendants' motion for summary judgment.

{¶33} A corporate officer, director and/or shareholder may be held personally liable for actions of the company if he or she take part in the commission of the act or if they specifically directed the particular act to be done, or participated or cooperated therein. *State ex rel. Fisher v. American Courts, Inc.* (1994), 96 Ohio App. 3d 297, 300, 644 N.E. 2d 1112, 1114. (Citations omitted). "Courts have been reluctant to disregard the corporate entity and have done so only where the corporation has been used as a cloak for fraud or illegality or where the sole owner has exercised such excessive control over the corporation that it no longer has a separate existence ... It has also been stated that the corporate entity should be disregarded only when justice cannot be served in any other way..." *E.S. Preston Associates, Inc. v. Preston* (1986), 24 Ohio St. 3d 7, 11, 492 N.E. 2d 441, 446. (citations omitted). Personal liability for fraud may

attach even though the corporation is also found liable. *Yo-Can, Inc. v. The Yogart Exchange, Inc.* (2002), 149 Ohio App. 3d 513, 526, 778 N.E. 2d 80, 90.

{¶34} The complaint filed by the appellants appears to center upon the use of the business entities as a cloak for fraud or illegality. If the other elements of the cause of action for aiding and abetting are satisfied, then the individual appellees may be personally liable. As the trial court overruled the motions for summary judgment filed by the business entities, reasonable minds could reach different conclusions as to the issue of whether or not the business entities were used as a cloak for fraud or illegality. We also find, therefore, that different conclusions are possible on the issue of whether or not appellees Jack Koury and Sandra Postlewait aided and abetted Jack Ambozic in using the business entities to commit fraud or illegality. We, therefore, hold that it was premature to enter summary judgment with respect to appellees Jack Koury and Sandra Postlewait. This holding does not in any way indicate the validity of any of appellants' claims or relate to the probability of recovery. The trial court remains free to revisit these issues in connection with the liability, if any, of the business entities.

{¶35} Appellants further raised an issue that the trial court purportedly overruled a motion for change of venue. However, appellants did not address this issue anywhere within their brief. It has been held that a court may disregard an assignment of error not pointed out in the record and separately argued in the brief; and an assignment of error that is set out in the introductory portion of a brief but not separately argued should be overruled. *Halluer v. Emigh* (Summit 1992), 81 Ohio App. 3d 312, 610 N.E. 2d at 1092; *Phillips v. Garfield Hts.* (Cuyahoga 1992), 85 Ohio App. 3d 413, 620 N.E. 2d 86. The record in this case contains no evidence that the trial court ruled on a

motion for change of venue. The appellants would of course remain free to re-submit their motion and/or request their entry in the trial court, accordingly, this assignment of error is overruled.

{¶36} For the foregoing reasons, the judgment of the Stark County Court of Common Pleas, Ohio, is affirmed in part and reversed in part and the case is remanded.

By Gwin, P.J.,

Edwards, J., and

Boggins, J., concur