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CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 18-0657

DA 18-0657

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 149N

WILLIAM (BILL) D. HARRISON and
HARRIET (SHERRIE) A. HARRISON,
individually and as husband and wife,

Plaintiffs,

v.

THOMAS (TOM) D. HARRISON and
KIMBERLY (KIM) HARRISON,
husband and wife; and LINCOLN ROAD
RV PARK, INC., a Montana corporation,

Defendants and Counter-Plaintiffs,

v.

WILLIAM (BILL) D. HARRISON and
HARRIET (SHERRIE) A. HARRISON,
individually and as husband and wife,
Counter-Defendants.

and

JON BOUSER, KIMBERLY BOUSER, individually and as husband and wife, ERICK BRODSHO, HEATHER BRODSHO, individually and as husband and wife, GORDON BROWN, LYNDEE BROWN, individually and as husband and wife, PAUL CHATRIAND, TAMRAH CHATRIAND, Individually and as husband and wife, KENDALL CUNNINGHAM, ABIGAIL CUNNINGHAM, individually and as husband and wife, REBECCA SMITH EANES, JOSEPH FOWLER, FRANK GONZALEZ, TRACY GONZALEZ, individually and as husband and wife, HEATHER HARRINGTON, ROBERT HOLLIDAY, ZACHARY KOZAK, CHERIE LOFTON, JOSEPH MARINER, RICHARD NEWBY, KRISTEN NEWBY, individually and as husband and wife, ROBIN ROUSE, ALLEN TARYN ROUSE, individually and as husband and wife, IAN STEFFAN, JESSICA STUART, LINDSAY ZELL, EMILIANO CUAUTEMOC ZELL, individually and as husband and wife, GV75, LLC, a limited liability company,

Intervenors, Plaintiffs, and Appellees,

v.

THOMAS (TOM) D. HARRISON and KIMBERLY (KIM) HARRISON, husband and wife;

Defendants and Appellants,

and

LINCOLN ROAD RV PARK, INC., a Montana corporation,

Defendant and Appellee.

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Lewis and Clark, Cause No. ADV 2015-959
Honorable Mike Menahan, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

Palmer A. Hoovestal, Hoovestal Law Firm, PLLC, Helena, Montana

For Appellees:

Candace Payne, Candace Payne Law, PLLC, Helena, Montana

Scott Svee, Sean D. Slanger, Jackson, Murdo & Grant, P.C., Helena, Montana

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Submitted on Briefs: April 24, 2019

Decided: July 2, 2019

Filed:

Clerk

Justice Dirk Sandefur delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Thomas D. Harrison and Kimberly Harrison (Tom and Kim) appeal the judgment of the Montana First Judicial District Court ordering them each to remit $25,000 to Lincoln Road RV Park, Inc. (LRRP) to pay ongoing expenses of the corporation in receivership. We affirm.

¶3 LRRP is a closely held Montana business corporation. In 1993, William and Harriet "Sherrie" Harrison (Bill and Sherrie), their son Tom, his wife Kim, and two others chartered LRRP to develop an RV park in or about Helena, Montana.[1] After acquiring the land from Bill and Sherrie without compensation in 1993, LRRP later subdivided and developed it into a 10-acre, 77-space RV park and an adjacent 31-lot residential subdivision (Grand Valley Estates).[2] At all times pertinent, Tom and Kim managed and operated the day-to-day business and affairs of LRRP with the consent of Bill and Sherrie. Bill, Sherrie,

[1] After acquisition of the shares of the other two original shareholders, Bill, Sherrie, Tom, and Kim remained as LRRP shareholders with each couple holding a 50% ownership interest.

[2] On August 5, 2008, LRRP filed the county-approved Amended Plat of the Grand Valley Estates with associated restrictive covenants. In 2009, LRRP filed additional restrictive covenants and incorporated the covenant-specified homeowners association.

Tom, and Kim were the directors of LRRP. For the first 23 years, the LRRP shareholders had an amicable and professional business relationship without significant strife or controversy.

¶4 In 2012, advancing in age, Bill and Sherrie sold their ranch in Dillon, Montana and moved to Helena where they built a house in Grand Valley Estates. Bill and Sherrie lived with Tom and Kim for at least five months during the construction of their home. By 2015, Bill and Sherrie were respectively 87 and 82 years old and had been experiencing various health problems. In July 2015, Bill and Sherrie sold their Helena home and moved into a senior living center in Laurel, Montana, in proximity to their daughter, Lee Ann Harrison. Bill and Sherrie subsequently granted powers of attorney to Lee Ann who has since assisted them in the conduct of their personal and business affairs.

¶5 As of 2015, LRRP still owned and operated the RV park and owned eight subdivision lots. After Lee Ann began administering their affairs, Bill and Sherrie became aware and concerned about various actual or perceived financial and management problems with LRRP including: (1) delinquent federal taxes and penalties related to corporate business; (2) financial discrepancies or self-dealing; (3) a $91,455.40 default judgment against LRRP, Bill, and Sherrie;[3] (4) an adverse administrative action and

[3] The default judgment was based on the alleged breach of a real estate listing agreement between LRRP and a third-party real estate agent regarding the sale of the RV park.

penalty against LRRP by the United States Environmental Protection Agency (EPA);[4] and (5) a brewing dispute with Grand Valley Estates property owners over LRRP's outstanding development obligations under the subdivision plat and covenants. On December 14, 2015, Bill and Sherrie filed a district court complaint against LRRP, Tom, and Kim, asserting various tort claims and claims for corporate accounting, shareholder indemnification, dissolution of the corporation, appointment of a pre-dissolution receiver, preliminary injunctive relief, and punitive damages.

¶6 Upon consideration of the complaint, an *ex parte* motion for a receiver, and supporting affidavits, the District Court found an "immediate danger" that the RV park "assets will be removed . . . or lost, materially injured, destroyed, or unlawfully disposed of." The court accordingly appointed a receiver to "preserve, protect, and liquidate" the assets and business of LRRP including:

> the authority to sell all of the real and personal property of [LRRP], to incur and pay when due (to the extent they accrue after the Receiver's appointment) all expenses incurred by [LRRP] in the ordinary course of business, and to make such other payments that the Receiver determines in good faith are necessary or beneficial to the winding down of [LRRP's] business operations and the liquidation of [its] assets.

The court further temporarily excluded Tom and Kim from the business and ordered the receiver to file monthly reports on the administration of the receivership. The court

[4] The EPA action was based on alleged water quality monitoring and reporting deficiencies regarding a privately owned public water system constructed and operated by LRRP on its property.

restricted the receiver from selling or disposing of LRRP assets "outside of the ordinary course of business" without prior court approval.

¶7 On January 29, 2016, Tom and Kim filed an amended answer denying the material assertions underlying Bill and Sherrie's claims. They further asserted various affirmative defenses and counterclaims including, *inter alia*, claims for removal of Bill and Sherrie as LRRP directors, tortious interference with the operation of LRRP, and appointment of a guardian for Bill and Sherrie. On February 19, 2016, based on alleged procedural and substantive deficiencies in her appointment, Tom and Kim filed a motion for termination and discharge of the receiver. On April 19, 2016, a number of Grand Valley Estates property owners (Homeowners) filed a motion for leave to intervene and assert various contract and tort claims against LRRP and its shareholders.[5]

¶8 Upon mediation on August 30, 2016, the parties formally: (1) agreed to continuation of the receivership; (2) agreed to cooperate with a forensic accountant to facilitate the filing of necessary amended tax returns and resolution of other disputed financial issues; (3) authorized the receiver to list the RV park and LRRP's remaining subdivision lots for sale; and (4) authorized the receiver to borrow money in the interim, secured by corporate assets, to pay "outstanding corporate debts, as well as the taxes, penalties, and

[5] The Homeowners sought leave to assert claims for compensatory and punitive damages largely predicated on LRRP's alleged failure to complete and transfer ownership of the subdivision water and sewer system in accordance with the subdivision plat and covenants. Tom and Kim did not timely respond and the motion lingered without ruling.

interest . . . for tax years 2012-2015." Upon hearing, the District Court authorized the receiver to proceed accordingly.

¶9 On January 24, 2017, upon joint motion of the party-shareholders, the District Court authorized the receiver to personally buy the RV park for $1.5 million.[6] The transaction closed on March 1, 2017. Meanwhile, the receiver continued to act to resolve the water and sewer system and other disputes with the Homeowners.

¶10 Upon a second mediation in March 2017, the shareholders entered into a written settlement agreement intended to effect a final settlement of all disputes between them without providing for resolution of the disputed issues with Homeowners who had yet to obtain leave to intervene. The receiver opposed the motion and recommended various revisions. On May 31, 2017, the District Court rejected the agreement and granted the Homeowners leave to intervene.

¶11 At hearing on September 12, 2017, the shareholders presented a revised settlement agreement for court approval. In pertinent part, the new agreement provided for: (1) a 60/40 distribution of corporate assets to the shareholders (60% to Bill and Sherrie—40% to Tom and Kim) upon complete liquidation except for retention of $34,082.81 for use by the receiver to satisfy "all Corporate Expenses," as defined in the agreement; (2) mutual shareholder releases and transfer of Bill and Sherrie's shares to Tom and Kim for a nominal sum; (3) dismissal of Bill and Sherrie from the action with prejudice upon payment from

[6] The appraised value of the RV park was $1,775,000. The only firm offer received upon listing the property was $1.3 million. As of January 2017, only three Grand Valley Estates lots remained in LRRP ownership, then valued at $70,000 each.

their distribution of specified attorney fees incurred by the Homeowners to date; and (4) continued pendency of the action for resolution of the Homeowners' claims against the corporation and remaining shareholders. On September 12, 2017, the District Court approved the new settlement agreement, directed the receiver to proceed accordingly, dismissed all claims and counterclaims between the shareholders, and provided for dismissal of Bill and Sherrie from the action. Upon subsequent stipulation of the Homeowners, the court dismissed Bill and Sherrie from the action on November 6, 2017, as agreed.

¶12 On August 30, 2018, as administration continued, the new receiver requested further instruction from the court. She reported that the corporation lacked sufficient assets to complete final wind-up of the corporate affairs. The receiver reported that, as directed, she had since distributed the liquidated corporate assets to the shareholders—$545,227.39 to Tom and Kim, and $854,961.13 to Bill and Sherrie, thus leaving $30,188.42 for satisfaction of the outstanding "Corporate Expenses" described in the 2017 settlement agreement. She reported that, as of July 31, 2018, only $5,861.25 remained for wind-up of the remaining corporate affairs. At hearing in September 2018, the receiver identified the remaining corporate expenses other than the Homeowners' outstanding claims—costs of securing necessary government approval to allow irrigation use of the subdivision water source, costs of resolving remaining federal tax issues arising from the corporate business, payment of the remaining attorney fees owed to the Homeowners as an agreed corporate expense, and the cost of final accounting.

¶13 On November 9, 2018, based on the 2017 settlement agreement, the resulting court order, the approved receiver's report, and supplemental hearing testimony, the District Court ordered Tom and Kim to each remit $25,000 from their combined shareholder distribution to pay the "ongoing" corporate expenses identified by the receiver.[7] The court specifically found that: (1) Tom and Kim had received a combined post-liquidation distribution in excess of $500,000; (2) Bill and Sherrie had already suffered a $24,621.48 reduction of their shareholder distribution to pay the majority of the Homeowners' attorney fees stipulated as corporate expenses; (3) Tom and Kim were the sole remaining shareholders of LRRP; (4) the corporation had various "known unresolved debts" including federal tax liability ($6,000-$8,000), "DNRC water" permitting costs ($500-$10,000), and the "[r]emaining amount owed as legal fees" to the Homeowners ($7,204[8]); and (5) only $5,861.25 in corporate funds remained to wind-up corporate affairs as previously directed.[9] Tom and Kim appeal.

¶14 They assert the court had "no legal basis" upon which to require them to "personally pay" for post-liquidation corporate debts without either piercing the corporate veil or

[7] The court ordered the receiver, upon final accounting, to distribute any residue of the recoupment to Tom and Kim equally. The court further ordered that any failure to timely pay as ordered "will be treated as a contempt" subject to "appropriate actions."

[8] The court found further that the corporation had already paid $3,809 for this purpose. Thus, it is unclear whether the $7,204 is an adjusted or unadjusted figure.

[9] The receiver testified that, as of the date of hearing, the balance of remaining corporate funds had dropped to $2,721.76.

actually dissolving the corporation. They further assert that the court's finding of fact regarding outstanding tax liability was clearly erroneous. We disagree.

¶15 Upon shareholder petition, district courts have discretion to dissolve corporations on various enumerated statutory grounds. Section 35-1-938(2), MCA. In an action for judicial dissolution, the court has further discretion to appoint a receiver "to wind up and liquidate . . . the business and affairs of the corporation." Section 35-1-941(1), MCA. *See also* § 27-20-103, MCA. Upon administration in receivership under §§ 35-1-938(2) and -941(1), MCA, courts have broad discretion to grant equitable relief other than dissolution. *See* § 35-1-939, MCA. *See also Thisted v. Tower Mgmt. Corp.*, 147 Mont. 1, 14-15, 409 P.2d 813, 821 (1966) (broad discretion of courts to equitably fashion remedies to achieve equitable results in receivership of closely-held corporations). If the assets of a dissolved corporation "have been distributed in liquidation," a claim against the corporation "may be enforced . . . against a shareholder of the dissolved corporation to the extent of the . . . corporate assets distributed to the shareholder in liquidation." Section 35-1-937(2)(b), MCA. Section 35-1-937(2)(b) embodies Montana's "strong policy" of ensuring payment of corporate creditors "before shareholders." Section 35-1-937, MCA, cmt. 1.[10]

[10] Section 35-1-937 "codifies the common law trust fund doctrine" providing that, upon dissolution, corporate property "is considered a trust fund for the payment of corporate debts" upon dissolution—"shareholders take . . . subject to the claims of [corporate] creditors." Section 35-1-937, MCA, cmt. 2.

¶16 In judicial dissolution actions under § 35-1-938(2), MCA, we review district court orders imposing and administering receiverships, and granting related equitable relief, for an abuse of discretion. A court abused its discretion only if it exercised discretion based on a clearly erroneous finding of material fact, erroneous conclusion of law, or otherwise acted arbitrarily, without conscientious judgment or in excess of the bounds of reason, resulting in substantial injustice. *Larson v. State*, 2019 MT 28, ¶ 16, 394 Mont. 167, 434 P.3d 241. "A finding of fact is clearly erroneous only if not supported by substantial evidence, the court misapprehended the effect of the evidence," or we are firmly convinced upon our review of the record that the court was otherwise mistaken. *Larson*, ¶ 16. We review "conclusions and applications of law de novo for correctness." *Larson*, ¶ 16.

¶17 While it did not pierce the corporate veil or ultimately dissolve the corporation, the District Court ordered LRRP into receivership upon a claim for judicial dissolution. The shareholders' approved settlement agreement then preempted dissolution in favor of immediate shareholder distributions, buy-out and dismissal of inactive shareholders, and continued administration in receivership with payment of agreed "Corporate Expenses" pending resolution of the Homeowners' outstanding claims. In contrast to as-yet determined damages on the Homeowners' outstanding claims, the expenses at issue are within the scope of "Corporate Expenses" the corporation and remaining shareholders agreed to pay as broadly defined in the 2017 settlement agreement, to wit:

> all expenses arising from or related to completion of the . . . [s]ubdivision . . ., completion of the . . . corresponding water/sewer system . . ., the review and drafting of amended and enforceable organizational documents, bylaws, and covenants related to operation of the [s]ubdivision, water/sewer system and

> [homeowners association] . . ., [and] all expenses arising from or related to transfer of all real and personal property required for . . . sole operation, ownership and control of the [s]subdivision, water/sewer system, and [homeowners association] [by the Homeowners].

¶18 As it turned out, the relatively small corporate fund remaining after significant shareholder distributions was insufficient to satisfy the remaining "Corporate Expenses" the corporation and remaining shareholders agreed to pay. The court-ordered recoupment of distributed corporate assets from Tom and Kim was relatively small, if not insignificant, in relation to their significant post-liquidation distribution. At all times pertinent, Tom and Kim were unquestionably the active managing shareholders in the closely held corporation. In contrast, Bill and Sherrie were inactive shareholders whom the active shareholders bought out and agreed to dismiss from the action. In light of the terms of the shareholders' settlement agreements and their ensuing joint motions for approval, Tom and Kim's assertion that the District Court clearly erred in its finding of fact regarding outstanding tax issues related to the corporate business is without merit.

¶19 Whether by direct application of § 35-1-937(2)(b), MCA, or by equitable application of its principle pursuant to § 35-1-939 and *Thisted*, the District Court had discretion to recoup from Tom and Kim's significant post-liquidation distribution to satisfy the relatively small but unfunded "Corporate Expenses" defined by the 2017 settlement agreement. As a matter of law, piercing the corporate veil pursuant to § 35-1-534(2), MCA, and its incorporated common law doctrine, is not necessary under the narrower and more specific direct or indirect post-liquidation application of §§ 35-1-937(2)(b) and -939, MCA, and *Thisted*. We hold that the District Court did not abuse its discretion in ordering Tom

and Kim to each remit $25,000 from their post-liquidation distribution for outstanding expenses of post-liquidation wind-up of the corporation.

¶20 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent.

¶21 Affirmed.

/S/ DIRK M. SANDEFUR

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ INGRID GUSTAFSON