IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL

SUNLIGHT ELECTRICAL CONTRACTING CO., INC.	:	FEBRUARY TERM, 2013
	:	NO. 01418
Plaintiff,	:	
v.	:	COMMERCE PROGRAM
JOHN J. TURCHI, et al.,	:	
Defendants.	:	

Sunlight Electrical Contracting Co., Inc. Vs-OPFLD

13020141800053

OPINION

Plaintiff appeals from this court's Order entered on May 19, 2014, in which the court granted defendants' Motion for Summary Judgment and dismissed, without prejudice, plaintiff's claims to pierce the corporate veil of one or more bankrupt entities to reach defendants' assets. This court did so because plaintiff's claims belong not to plaintiff but to two bankrupt entities' estates, and such claims must be prosecuted by their trustees on behalf of all the bankrupt entities' creditors, not just plaintiff. A copy of the Opinion issued in support of the May 19th Order is attached hereto.

In plaintiff's Statement of Matters Complained Of On Appeal, plaintiff raises an issue that is not directly addressed in the court's May 19th Opinion, namely whether defendants waived the issue of plaintiff's standing by not raising it until the summary judgment stage in the proceedings.

Defendants did not raise plaintiff's lack of standing in their Preliminary Objections.[1] Nor did they plead it as an affirmative defense in their New Matter.[2] The case law provides that

[1] Pa R. Civ. P. 1028(a) does not list standing as one of the grounds for filing preliminary objections. It does list "lack of capacity to sue" but that is a different issue. In re Estate of Sauers, 613 Pa. 186, 198, 32 A.3d 1241, 1248 (2011) ("The capacity to sue is the right to come into court; if he sues as a representative, [then] he shall

the issue of standing may be waived, but the question is at what point the court should deem it so. Clearly, if standing is not raised at the trial or agency level, it cannot be raised for the first time on appeal.[3] In addition, some courts have held that a challenge to standing is waived if it is not raised in a party's first pleading, either an Answer or Preliminary Objections.[4] If so, then defendants have waived it here.

However, in this case, the plaintiff's standing is called into question because the right it is attempting to enforce belongs to someone else, namely two, now closed, federal bankruptcy estates. Those estates, whose rights are being litigated here, therefore appear to be indispensable parties to this litigation. Failure to join an indispensable party is a non-waivable defense, which goes to the court's subject matter jurisdiction, and may be raised at any time, even *sua sponte*.[5]

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possess the character in which he sues. It is distinguished from standing to sue which is a right to relief, which goes to the existence of the cause of action.")

[2] Lack of standing is not one of the affirmative defenses enumerated in Pa R. Civ. P. 1030(a).

[3] *See* Kuwait & Gulf Link Transp. Co. v. Doe, 92 A.3d 41, 45 (Pa. Super. 2014) ("This Court has long held that the issue of standing may be waived by a party if not objected to at the earliest possible opportunity. [Appellee] admits in its own brief that it did not raise the issue of standing before the trial court. Therefore, [Appellee] has waived any standing issue on appeal."); THW Grp., LLC v. Zoning Bd. of Adjustment, 86 A.3d 330, 343-44 (Pa. Commw. 2014) ("our review of the record reveals that [Appellant] did not raise a standing issue before the ZBA; therefore, this issue is waived. Indeed, in zoning cases, this Court consistently holds that failure to raise the issue of standing during the proceedings before the fact-finder results in waiver.") *See also* Thirty, Inc.v. Smart 2014 WL 1477646 (Pa. Commw. Apr. 14, 2014)("The [Appellant] filed a Post–Trial Brief on November 19, 2012, in which it raised for the first time since its general denial, the issue of the [Appellees'] standing to appeal the final decision of the OOR. That was six months after the [Appellees] filed their Petition for Review. In that six-month span of time, judicial resources were expended at a status conference and a full-day hearing. Five witnesses appeared at the hearing and testified. Undoubtedly, the [Appellees] incurred legal fees preparing for and presenting their case against disclosure of the Monthly Reports. Because the [Appellant] failed to object to the [Appellees'] standing at the earliest opportunity and, in fact, appeared at all times to affirmatively concede the [Appellees'] standing, it waived this objection.")

[4] *See* Bullock v. Cnty. of Lycoming, 859 A.2d 518, 523 (Pa. Commw. 2004) ("Not surprisingly, the [Appellant] failed to cite case law in support of its claim that standing is a jurisdictional issue. To the contrary, the issue of standing is not jurisdictional and failure to raise it in preliminary objections waives the issue in future proceedings."); In re Estate of Alexander, 758 A.2d 182, 189 (Pa. Super. 2000) ("Also, we find [Appellant's] standing argument to have been waived. Challenges to a litigant's capacity to sue must be raised by way of preliminary objections or answer. Here, the first time [Appellant] raised this issue was in his post-trial motions. Therefore, it is waived.")

[5] Sprague v. Casey, 520 Pa. 38, 48-49, 550 A.2d 184, 189 (1988) ("It is true, of course, that unless all indispensable parties are made parties to an action, a court is powerless to grant relief. Thus, the absence of such a

An award to plaintiff on the veil piercing claims it asserted in this action would necessarily deprive the bankruptcy estates and the bankrupt entities' creditors of assets that could be distributed in accord with federal bankruptcy law. In other words, the estates' rights to those assets could be impaired by a ruling on plaintiff's claims, which makes the estates indispensable parties to this litigation. As indispensable parties, the bankruptcy estates, or their trustees, must be joined as plaintiffs, or the court lacks jurisdiction to hear the matter.[6] Since the estates are closed, the court directed plaintiff to attempt to re-open them, so the trustees may bring the claims for piercing the corporate veil that were asserted by plaintiff here.[7]

Additionally, federal bankruptcy law preempts conflicting state law[8] so that the Bankruptcy Code can uniformly regulate the affairs of debtors and their creditors. As a result,

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party goes absolutely to the court's jurisdiction. A party is indispensable when his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights."); Polydyne, Inc. v. City of Philadelphia, 795 A.2d 495, 496 (Pa. Commw. 2002) ("[W]e note that the failure to join an indispensable party to a lawsuit deprives the court of subject matter jurisdiction. Whether a court lacks jurisdiction due to the failure to join an indispensable party may be raised at any time or *sua sponte*. A party is deemed to be indispensable when his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights.")

[6] Pa R. Civ. P. 1032(b).

[7] After this court rendered its decision to dismiss this action, the Superior Court issued its decision in Morrison Informatics, Inc. v. Members 1st Federal Credit Union, 2014 WL 3907098 (Pa. Super. Aug. 12, 2014). In that case, the court found that the plaintiff shareholders lacked standing, but the bankrupt corporation did not. The Superior Court then directed the trial court to allow the Complaint to be amended to substitute the trustee for the bankrupt corporation.

In light of this decision, the Superior Court may wish to direct this court to stay this action, rather than dismiss it, while plaintiff attempts to re-open the bankrupt estates, and then the trustees can be substituted for the plaintiff here.

[8] "[P]reemption may be found where Congress has legislated in a field so comprehensively that it has implicitly expressed an intention to occupy the given field to the exclusion of state law. [In addition], a state enactment will be preempted where a state law conflicts with a federal law. Such a conflict may be found in two instances, when it is impossible to comply with both federal and state law, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Stone Crushed P'ship v. Kassab Archbold Jackson & O'Brien, 589 Pa. 296, 305, 908 A.2d 875, 881 (2006) (the court held "that the Bankruptcy Code preempts a state law claim of abuse of process based upon a frivolous claim filed in Bankruptcy Court proceedings because: (1) Congress evinced an intent to govern the whole field; and (2) Fed. R. Civ. P. 11 (Rule 11), and the Bankruptcy Code potentially provide for the equivalent protection afforded by this Commonwealth to its citizens in a Dragonetti Act claim.")

In this case, Congress has 1) evinced an intent to govern the whole field of bankruptcy law and 2) the state common law regarding waiver of plaintiff's standing arguably stands as an obstacle to the accomplishment and this court will not hold that the defendants, who allegedly owe money to the bankrupt estates, have waived the estates' rights to assert their claims against the defendants simply because the defendants waited until the summary judgment phase to raise the issue of plaintiff's standing to pursue such claims alone.

For all the foregoing reasons, as well as those contained in the May 19th Opinion attached hereto, the court respectfully requests that its May 19th Order be affirmed on appeal.

Dated: September 15, 2014

PATRICIA A. McINERNEY, J.

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execution of the full purposes and objectives of Congress, which are to have the bankruptcy trustee amass all of a debtor's assets and distribute them equitably among its creditors.

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SUNLIGHT ELECTRICAL CONTRACTING CO., INC.	:	FEBRUARY TERM, 2013
	:	NO. 01418
Plaintiff,	:	
v.	:	COMMERCE PROGRAM
JOHN J. TURCHI, et al.,	:	Control No. 13112307
Defendants.	:	

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MAY 16 2014
C. HART
CIVIL ADMINISTRATION

ORDER

AND NOW, this 16th day of May, 2014, upon consideration of defendants' Motion for Summary Judgment, the response thereto, and all other matters of record, and in accord with the Opinion issued simultaneously, it is **ORDERED** that said Motion is **GRANTED** and all of plaintiff's claims against defendants are **DISMISSED** without prejudice to reassert them if permitted by the bankruptcy court.

BY THE COURT

Pat M. [signature]

PATRICIA A. McINERNEY, J.

Sunlight Electrical Con-ORDOP
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	:	NO. 01418
Plaintiff,	:	
v.	:	COMMERCE PROGRAM
JOHN J. TURCHI, et al.,	:	Control No. 1312307
Defendants.	:	

OPINION

Plaintiff Sunlight Electrical Contracting Co., Inc. ("Sunlight") brought this fraud action to pierce the corporate veil of defendant 23S23 Construction Inc. ("23S23") to reach the assets of defendants John J. Turchi, Jr. ("Turchi")and Turchi Inc. Sunlight's grievances arise out of a condominium construction project at 23 South 23rd Street in Philadelphia known as the Carriage House Condominium (the "Condominium"). The owner of the Condominium was Carriage House Condominiums L.P. ("CHC LP"), whose general partner was Carriage House Condominiums G.P. Turchi was the principal officer and owner of both the limited partnership and the general partnership, as well as of Turchi, Inc. and 23S23.

In 2005, 23S23, acting as Construction Manager for the Condominium project, entered into a subcontract with Sunlight pursuant to which Sunlight was to perform electrical work on the Condominium project. 23S23 allegedly paid Sunlight some of the money due under the subcontract, but failed to pay all of it and failed to pay for additional work requested of, and performed by, Sunlight, despite Turchi's repeated promises that payment would be made. Instead, Sunlight alleges, construction monies that should have been paid by 23S23 and CHC LP to Sunlight and other subcontractors went to Turchi, Turchi, Inc., and other related entities controlled by Turchi.

In 2009, Turchi caused 23S23 and CHC LP to file for bankruptcy. In 2010, CHC LP's plan of reorganization was confirmed and its debts discharged. 23S23 was found to have no assets and was liquidated. The debts owed by the bankrupt parties to Sunlight were listed on their schedule of liabilities. However, the veil piercing claims asserted by Sunlight in this action apparently were not listed or treated as assets of either bankrupt entities' estate, even though an earlier iteration of Sunlight's claims was pending before a federal court at the time the bankruptcies were filed.[1]

The money that Turchi and Turchi, Inc. allegedly siphoned off of, or failed to pay into, 23S23 and CHC LP may be recoverable through a claim to pierce 23S23's and CHC LP's corporate veils to reach Turchi and possibly Turchi, Inc. as well.[2] In addition to Sunlight, at least two other subcontractors who worked on the Condominium project, and who claim not to have been fully paid for their work, have attempted to bring veil piercing claims in state court.[3]

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[1] That action was originally filed with this court as Sunlight Electrical Contracting v. Turchi et al., May Term, 2008, No. 03911, and was subsequently removed to federal court.

[2] *See e.g.,* Lumax Indus., Inc. v. Aultman, 543 Pa. 38, 42, 669 A.2d 893, 895 (1995) ("the factors to be considered in disregarding the corporate form [are] as follows: undercapitalization, failure to adhere to corporate formalities, substantial intermingling of corporate and personal affairs and use of the corporate form to perpetrate a fraud."); S.T. Hudson Engineers, Inc. v. Camden Hotel Dev. Associates,747 A.2d 931, 935 (Pa. Super. 2000) (the court recognized "the alter ego theory of piercing the corporate veil, a theory which applies where the individual or corporate owner controls the corporation to be pierced, and the controlling owner is to be held liable.")

[3] *See* BVF Construction Co., Inc. v. Turchi, Inc. et al, October Term, 2007, No. 02084 (Phila. Ct. Com. Pl). The veil piercing claims in that action were recently dismissed by this court. *See also* Morris Black & Sons, Inc. v. Turchi, Inc. et al., 2012 WL 1379499 (Lehigh Co. Ct. Com. Pl.) (the court dismissed a claim for piercing the corporate veil in connection with the Carriage House Condominiums).

Such veil piercing claims against Turchi and Turchi, Inc. are potential assets of 23S23's and CHC, LP's bankrupt estates.[4] However, Sunlight and the other shorted subcontractors chose not to pursue such claims in bankruptcy court where they belong, nor to do so on behalf of all similarly situated creditors. Instead, each subcontractor asserted individual claims seeking the repayment of the allegedly stolen sums directly and only to it.

The point of a bankruptcy proceeding is not to shield a swindler from the reach of those he duped. It is instead a chance for his victims to help the trustee locate the debtor's assets, so that they can be distributed fairly among all his creditors.[5] This court would undermine the federal bankruptcy scheme if it were to permit Sunlight's individual veil piercing claims to proceed here.[6] Instead, Sunlight's claims in this action must be dismissed without prejudice for them to be re-filed in re-opened bankruptcy proceedings involving 232S23 and CHC, L.P.[7]

[4] *See* St. Paul Fire & Marine Ins. Co. v. PepsiCo, Inc., 884 F.2d 688, 705 (2d Cir. 1989) ("because an alter ego claim is the property of the estate, and because the injury in this case is a generalized one . . . [creditor] does not have standing to assert its alter ego claim outside of the bankruptcy proceeding."); Cedarbrook Plaza, Inc. v. Gottfried, 1997 WL 330390 *10 (E.D. Pa. June 6, 1997) ("The Court finds that [creditor's alter ego claim] presents a claim for generalized harm. The injury alleged is primarily to the corporation, and is injury to the plaintiff creditor only insofar as it decreases the assets of the corporation to which he must look for satisfaction of his debt. Thus, the suit is for a tort suffered by the corporation, and properly brought by the trustee. The claim is not personal to [creditor].")

[5] *See* Union Bank v. Wolas, 502 U.S. 151, 161, 112 S. Ct. 527, 533, 116 L. Ed. 2d 514 (1991) ("The purpose of the preference section is two-fold. First, by permitting the trustee to avoid pre-bankruptcy transfers that occur within a short period before bankruptcy, creditors are discouraged from racing to the courthouse to dismember the debtor during his slide into bankruptcy. The protection thus afforded the debtor often enables him to work his way out of a difficult financial situation through cooperation with all of his creditors. Second, and more important, the preference provisions facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor. Any creditor that received a greater payment than others of his class is required to disgorge so that all may share equally. The operation of the preference section to deter 'the race of diligence' of creditors to dismember the debtor before bankruptcy furthers the second goal of the preference section—that of equality of distribution.")

[6] "Allowing the claim to proceed would, in effect, elevate [Sunlight] to the status of a preferred creditor with rights superior to those of [23S23's and CHC LP's] other creditors." Cedarbrook Plaza, 1997 WL 330390 at *11.

[7] *See* 11 U.S.C.A. § 350 ("A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause."); Fink v. EdgeLink, Inc., 2014 WL 211810 (3d Cir. Jan. 21, 2014) ("The belated discovery of undisclosed pre-petition assets . . . may provide good reason to reopen a bankruptcy case.")

CONCLUSION

For all the foregoing reasons, defendants' Motion for Summary Judgment must be granted and plaintiffs' claims must be dismissed.

BY THE COURT

PATRICIA A. McINERNEY, J.