IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE EQUIPMENT LESSORS : CIVIL ACTION

OF PENNSYLVANIA, INC., Debtor :

:

: NO. 98-4752

MEMORANDUM AND ORDER

YOHN, J. May , 1999

The debtor in this chapter 7 bankruptcy case is Equipment Lessors of Pennsylvania, Inc., ("ELOP"), a closely held corporation principally owned and managed by William Thayer ("Thayer"). During its existence, ELOP was involved in several lines of business, including manufacturing and leasing trailers, and leasing helicopters. ELOP filed a voluntary chapter 11 bankruptcy petition on May 19, 1992, which was converted into a chapter 7 liquidation bankruptcy on July 18, 1996. While ELOP proceeded under Chapter 11, it claimed to own assets, the value of which exceeded ELOP's liabilities by approximately $4.8 million, if the assets were valued as part of a going concern. Seven months later, when ELOP's case was converted into a chapter 7 proceeding, many of these allegedly valuable assets were missing.

The current appeal arises from a motion, filed by the Chapter 7 Trustee in the bankruptcy court on October 21, 1997, to sell the debtor's assets located in Florence, New Jersey. Appellants, who are six other corporations owned and controlled by Thayer, and who are also involved in manufacturing, selling and leasing trailers, challenged the Trustee's proposed sale because they claimed to own some of the assets which the Trustee wished to sell. (1) These disputed assets consist primarily of trailers and parts used to manufacture trailers.

After conducting a series of hearings, the bankruptcy court granted the Trustee's motion to sell all of the assets located at ELOP's Florence, New Jersey facility. In denying the Appellants' objections to the sale, the bankruptcy court ruled that ELOP was judicially estopped from denying that it owned the disputed assets, and that even if the Appellants held title to the disputed assets, the assets could be sold to satisfy ELOP's debts because Appellants were ELOP's alter egos. Appellants filed a timely appeal of the bankruptcy court's August 5, 1998, order, and filed a motion to stay the pending sale of all the assets located in Florence. Appellants' motion for a stay pending appeal was denied by the bankruptcy court on November 30, 1998, and by this

court on December 7, 1998. The assets located in Florence were sold at an auction conducted by the bankruptcy court on December 9, 1998, for a total price of $74,000. The parties agreed that if Appellants were ultimately able to convince the court that assets belonging to them had been sold improperly, they would be entitled to recover the value of their assets from the proceeds of the sale. Before the court is Appellants' appeal from the bankruptcy court's August 5, 1998, order which found that they had no ownership rights in the disputed assets. For the reasons described below, the bankruptcy court's August 5, 1998, order will be vacated, and the case will be remanded to the bankruptcy court for factual findings consistent with this memorandum.

FACTUAL BACKGROUND

Shortly after the Trustee filed his motion to sell ELOP's assets located in Florence, New Jersey, two inventories describing the assets to be sold were taken. One inventory was taken by the Trustee, and one was taken by Ronald Clever, an attorney for one of ELOP's creditors. See Record on Appeal ("Record"), No. 27. Appellants formally objected to the sale on May 21, 1998, claiming to own some of the assets which the Trustee wished to sell. (2) Between October, 1997, and July, 1998, the bankruptcy court, on numerous occasions, instructed the parties to exchange information and to attempt to resolve their disagreement over the ownership of the disputed assets. After becoming frustrated with the parties' inability, and apparent unwillingness, to resolve their outstanding ownership issues, the bankruptcy court ordered the evidentiary record closed on July 21, 1998. See Record, No. 21, at 90. The court then permitted all interested parties simultaneously to submit briefs explaining their legal positions. See id. at 91.

On August 5, 1998, the court authorized the Trustee to sell all the assets at the Florence facility. The bankruptcy court found that ELOP, the Appellants and Thayer had participated in a "shell game" by swapping assets among Thayer's various corporations in an effort to retain valuable assets for himself and to defeat his creditors' interests. See Record, No. 1, at 3. The court thus concluded that Thayer used ELOP and the Appellant corporations to further his personal interests, and as there is little evidence of their separate corporate existences, found that all of Thayer's corporations are alter egos of one another. See id. at 3-4. The court also held that ELOP's fourth amended disclosure statement and Thayer's testimony in a related bankruptcy case contained admissions that the disputed assets belong to ELOP, and therefore, that Appellants are estopped from now claiming to the contrary. See id. at 3.

Appellants raise six issues in their appeal. They contend that the bankruptcy court erred when it (1) assigned them the burden of proving that they owned the disputed assets; (2) ruled that they had failed to produced sufficient evidence to establish their ownership of the disputed assets; (3) violated their right to procedural due process by sua sponte reaching the issue of whether their corporate veils should be pierced; (4) violated their right to procedural due process by sua sponte reaching the issue of whether they are alter egos of ELOP; (5) ruled that their corporate veils could be pierced; and (6) ruled that they were alter egos of ELOP. (3) See Appellants' Brief, at 6-8. Because the bankruptcy court's opinion did not squarely address the issues described in assignments of error numbers 1 and 2, but instead held that ELOP's creditors may satisfy their claims from the Florence assets, even if the assets are owned by Appellants, the court will first address the assignments of error related to the alter ego and corporate veil piercing theories.

STANDARD OF REVIEW The district court, sitting as an appellate tribunal, applies a clearly erroneous standard to the bankruptcy court's factual findings and a de novo standard to its conclusions of law. See In re Siciliano, 13 F.3d 748, 750 (3d Cir. 1994).

DISCUSSION

I. Piercing the Corporate Veil and Alter Ego Theories of Liability

Appellants make much of the theoretical difference between finding that a corporation's veil should be pierced and finding that it is the alter ego of another entity. See Appellants' Brief, at 38 (arguing that courts analyze these concepts separately); 26-27 (asserting that Appellees presented only one of these issues to the bankruptcy court). They raise issues on appeal treating these principles as completely separate theories of liability when these are, in actuality, two ways of describing the same legal result. Contrary to Appellants' contention that courts have analyzed these issues separately, courts often use these phrases interchangeably to describe the basis on which a corporation's formal existence will be disregarded. For example, the Third Circuit has often referred to "the 'alter ego' theory of veil piercing" when describing the reasons why it has decided to disregard the existence of a corporation. American Bell Inc. v. Federation of Telephone Workers of Penn., 736 F.2d 879, 886 (3d Cir. 1984) (en banc) (listing factors which should be considered when piercing the veil between alter ego corporations); see also U.S. v. Voigt, 89 F.3d 1050, 1069 (3d Cir.), cert. denied, 117 S. Ct. 623 (1996) (finding that the '"alter ego' doctrine exists to pierce the corporate veil"); T&N, plc. v. Pennsylvania Ins. Guaranty Ass'n, 44 F.3d 174, 182 (3d Cir. 1994) (discussing whether two companies are alter egos such that the corporate veil between them may be pierced); Culbreth v. Amosa (PTY) Ltd., 898 F.2d 13, 14 (3d Cir. 1990) (discussing requirements "to pierce the corporate veil on an alter-ego theory" under Pennsylvania and New Jersey law); Publicker Indus., Inc. v. Roman Ceramics Corp., 603 F.2d 1065, 1069 (3d Cir. 1979) (applying an alter ego theory to pierce the corporate veil). Similarly, Pennsylvania courts have used the two phrases interchangeably to describe the circumstances in which a corporation's formal existence will be disregarded. See In re Estate of Hall, 535 A.2d 47, 54 (Pa. 1987) (discussing claim that corporations were alter egos of their sole shareholder and that their corporate veils should be pierced to create "an identity of interest" between the corporations and the shareholder's estate); In re Appeal of Community Gen. Hosp., 708 A.2d 124, 130 (Pa. Commw. Ct. 1998) (finding that a parent corporation's corporate veil would be pierced only if the subsidiary is "the alter ego of the parent"); Carlos R. Leffler, Inc. v. Hutter, 696 A.2d 157, 165 (Pa. Super. Ct. 1997) (describing plaintiff's attempt to "pierce the corporate veils of Reber's and Hutter Stores, thereby making the individual defendants liable . . . on the basis of an alter ego theory").

As these cases demonstrate, the distinction Appellants seek to draw between alter ego doctrine and piercing the corporate veil is nonexistent. See Mega Enterprises, Inc. v. Lahiri, 225 B.R. 582, 591 n.10 (Bankr. E.D. Pa. 1998) (listing factors used "to determine whether the corporate veil should be pierced or whether one corporation is the alter ego of another"); Miners, Inc. v. Alpine Equip. Corp., 722 A.2d 691, 694 (Pa. Super. Ct. 1998) (discussing the "alter ego theory of piercing the corporate veil"). The alter ego doctrine supplies the rationale for a court's decision to pierce the corporate veil. To say that two corporations are alter egos is merely to identify two corporate veils which should be lifted. Appellants cannot seriously contend,

therefore, that though piercing their corporate veils was discussed in the pleadings, an allegation that they were ELOP's alter egos was not. Their claims that their due process rights were violated because neither piercing their corporate veils nor alter ego doctrine were properly litigated constitutes only one claim. (4) Similarly, Appellants' claims that the bankruptcy court erred both when it held that their corporate veils should be pierced and when it held that they are ELOP's alter egos amount to one alleged error. (5)

II. The Bankruptcy Court Did Not Violate Appellants' Due Process Rights

Appellants contend that the bankruptcy court violated their procedural due process rights when it decided to reach the issues of whether their corporate veils should be pierced and whether they are alter egos of ELOP. They contend that because these issues were not specifically mentioned in pleadings to which they had an opportunity to respond, the court committed error when it based its decision on these legal principals. See Appellants' Brief, at 23. Appellees counter that Appellants were well aware that the existence of their separate corporate identities was at issue. See Joint Opposition, at 6. Appellees contend that they sought discovery concerning the existence of separate administrative and financial records from the Appellants, and that Appellants were on notice, from the discovery requests, that Appellees "would be arguing to the Bankruptcy Court that Mr. Thayer had for all intents and purposes disregarded the corporate form in using his multitude of entities." Id. Appellees further assert that they raised both the alter ego and piercing the corporate veil issues in their briefs submitted to the bankruptcy court after the July 21, 1998, evidentiary hearing, and that this was the only pleading which would have mentioned the legal basis for selling the Florence assets. (6) See id. at 7 n.4. As discussed above, there is no difference between piercing Appellants' corporate veils and finding that Appellants are the alter egos of ELOP. See *supra*, part I.

Because the corporate veil issue was explicitly addressed in the briefing which followed the July 21, 1998, hearing, Appellants' claim that they were deprived of their due process right to assert defenses to the piercing of their corporate veils boils down to an assertion that they were unconstitutionally denied the right to respond to their opponents' brief. (7) At the July 21, 1998, hearing, all of the parties, including the Appellants, agreed to a simultaneous briefing schedule rather than presenting oral closing arguments at the time. See Record, No. 21, at 91. Moreover, there is no indication from the record, that after Appellants read their opponents' brief, they sought leave, and were denied the right, to respond to any factual or legal assertions contained in their opponents' brief. There can be, therefore, no deprivation of a constitutional due process right when Appellants agreed to participate in the process suggested by the bankruptcy court, and failed to ask the bankruptcy court's permission to respond to arguments they now claim were a surprise.

In support of their position, Appellants rely on the proposition that parties who are prevented from asserting affirmative defenses to counterclaims are unconstitutionally deprived of due process. See National Union Fire Ins. Co. v. City Savings F.S.B., 28 F.3d 376, 394-95 (3d Cir. 1994) (construing FIRREA to permit parties to assert affirmative defenses to a counterclaim, even if FIRREA did not permit them to bring a declaratory judgment action asserting the validity of their defenses, in order to avoid a due process violation). Contrary to Appellants' contention,

they have not been prevented from asserting defenses to claims against them; instead, they were permitted to litigate their claims of ownership over a period of nine months, during which time they responded to discovery seeking information about their separate corporate existences, the commingling of funds among them, the existence of corporate records and the independence of their finances. (8) See Record, No. 29, 30, 31, 32. Appellants also participated in hearings where their opponents' questioning raised the alter ego issue; John Thayer answered questions from several parties concerning his inability to produce records demonstrating that the Appellants maintained separate corporate identities, or kept separate financial records, and admitted several times that Appellants often transferred assets amongst themselves depending on their relative financial strength. See Record, No. 21, at 30-62. These discovery requests and questions address the interrelated corporate veil and alter ego issues. Based on these facts, the court cannot conclude that Appellants have been denied "an opportunity to be heard upon their claimed right[s]" or that Appellants have been forced to defend themselves without "hear[ing] the claim leveled against [them]." National Union, 28 F.3d at 394-95. Because the Appellants had notice of the claims against them, and were provided with the opportunity to file a post-hearing brief, their due process rights were not violated. See American Flint Glass Workers Union v. Beaumont Glass Co., 62 F.3d 574, 578 n.5 (3d Cir. 1995) (identifying due process concern if court sua sponte granted summary judgment to nonmoving party without notifying opponent); Simmerman v. Corino, 27 F.3d 58, 64 (3d Cir. 1994) (holding that due process requires notice that a court is considering the imposition of sanctions and some opportunity to respond).

III. May the Appellants' Assets Be Sold to Satisfy ELOP's Creditors?

Appellants argue strenuously that the bankruptcy court erred when it held that, even if the disputed assets belong to the Appellants, those assets may be used to satisfy the claims of ELOP's creditors. Appellants assert that the bankruptcy court's order improperly pierced their corporate veils and then improperly found that they were alter egos of ELOP. See Appellants' Brief, at 27-39. Contrary to Appellants' characterization, the bankruptcy court did not make separate findings that the Appellants' corporate veils should be pierced and that Appellants are alter egos of ELOP. Rather, the bankruptcy court's opinion relies on the alter ego theory to find that Thayer used all of his corporations, including ELOP and the Appellants, to further his personal interests and that there is no reason to respect the corporate identities of any of these entities. See Record, No. 1, at 3-4.

Though not discussed in the bankruptcy court's opinion, it is well-established that the parties asking the court to disregard the existence of a separate corporate entity, the Appellees, bear the burden of proving the applicability of the alter ego theory. See Culbreth, 898 F.2d at 14-15; Krueger Assoc., Inc. v. ADT Security Sys., No. 93-1040, 1996 WL 560335, at * 4 (E.D. Pa. Oct. 2, 1996). The court may only disregard Appellants' and ELOP's separate corporate existences when justice or public policy so demand to prevent fraud or illegality, as Pennsylvania law imposes a "strong presumption . . . against piercing the corporate veil." Lumax Indus., Inc. v. Aultman, 669 A.2d 893, 895 (Pa. 1995); see Ragan v. Tri-County Excavating, Inc., 62 F.3d 501, 508 (3d Cir. 1995); Arch v. American Tobacco Co., 984 F. Supp. 830, 839 (E.D. Pa. 1997). In addition, the alter ego corporations must have been shams which were used to further the personal interests of their shareholders. See Ragan, 62 F.3d at 508; Phoenix Canada Oil Co. v. Texaco, Inc., 842 F.2d 1466, 1476 (3d Cir.), cert. denied, 488 U.S. 908 (1988). In determining

whether to pierce a corporation's veil, a court should consider the following factors: "failure to observe corporate formalities, non-payment of dividends, insolvency of the debtor corporation at the time, siphoning of funds by the corporation or by the dominant shareholder, non-functioning of other officers or directors, absence of corporate records, and the fact that the corporation is merely a facade for the operations of the dominant stockholder." Kaplan v. First Options of Chicago, Inc., 19 F.3d 1503, 1521 (3d Cir. 1994), aff'd on other grounds, 115 S. Ct. 1920 (1995); see also Phoenix, 842 F.2d at 1476 (also considering gross undercapitalization); Krueger, 1996 WL 560335, at * 4; Mega Enter., 225 B.R. at 591 n.10; Lumax, 669 A.2d at 895 (also considering undercapitalization and whether the corporate form is being used to perpetrate fraud); Pennsylvania v. Vienna Health Prod., Inc., 726 A.2d 432, 434 (Pa. Commw. Ct. 1999).

The bankruptcy court found that "[t]he record in this bankruptcy case is replete with evidence," and the Appellees' post-hearing brief "recite[s] in abundant detail telling examples" demonstrating Thayer's use of Appellants and ELOP to further his personal interests and to defraud his creditors. See Record, No. 1 at 3. The only evidence which the bankruptcy court cites in support of its conclusion that Appellants and ELOP are Thayer's alter egos is, however, the fact the Appellants were unable to produce accounting records, evidence of their capitalization, financial statements, tax returns, or bank statements. See id. at 3-4. Appellants protest that they did produce two bank statements for Fleet Trailer Corp., and two corporate resolutions of Thayco Financial Services Corp. relating to an assignment of leases with First Lehigh Bank, and therefore, they have demonstrated that Appellants did keep some financial records. See Record, No. 32. The bankruptcy court did not analyze this meager evidence which Appellants produced in support of their contention that they existed as separate corporate entities. The bankruptcy court also made no factual findings concerning the other factors to be considered when determining whether to pierce the corporate veil. As the bankruptcy court made no specific factual findings concerning the essence of the alter ego doctrine, that Thayer used Appellants and ELOP as facades for his actions, its conclusions are inadequate as a matter of law. The bankruptcy court's conclusions that Appellants and ELOP are Thayer's alter egos and that Appellants' assets may therefore be used to satisfy the claims of ELOP's creditors will be vacated. On remand, the bankruptcy court should make specific factual findings concerning the applicability of the alter ego doctrine, as described above, and should discuss the legal and factual basis on which it apparently decided to pierce ELOP's corporate veil. The court does not mean to suggest that, on remand, the bankruptcy court will be unable to marshall the facts in support of its decision to pierce the corporate veils of Appellants and ELOP. The bankruptcy court must, however, provide an explanation for its decision which enables this court to engage in meaningful judicial review of that decision.

Several of Appellants' arguments concerning the applicability of alter ego doctrine, however, merit further attention because Appellants may attempt to further cloud these proceedings with those arguments. First, Appellants argue that the Appellees failed to meet their burden of proving that Appellants and ELOP were Thayer's alter egos because they relied solely on the absence of documents in response to discovery requests instead of deposing witnesses, calling witnesses during the hearings, attempting to inspect Appellants' business records as they are normally maintained, subpoenaing bank records, or obtaining Appellants' corporate records from the state. See Appellants' Brief, at 30. Appellants contend that Appellees were obligated to take these steps in order to meet their burden of proving that Appellants' and ELOP's corporate veils should be

pierced. Though these investigatory measures may have revealed additional evidence that Appellants and ELOP functioned as Thayer's alter egos, the bankruptcy court may determine on remand that Appellees met their burden of proof without seeking further information from these sources, or it may conduct further hearings if it so elects. Appellants' scanty responses to the Appellees' document requests, which sought specific documentation concerning the Appellants' separate corporate identities, are clearly relevant to the bankruptcy court's inquiry concerning whether Appellants in fact maintained separate corporate identities. Moreover, the bankruptcy court was entitled to rely on Appellants' counsel's representation that no other documents evidencing Appellants' corporate formalities were available. See Record, No. 30 (indicating that the whereabouts of responsive documents was unknown, if the documents ever existed). Appellants' assertions that they were not obligated to exert much effort in responding to discovery requests either because the requests were not comprehensive (they sought "any" but not "all" documents), or because they had a limited time frame (forty-five days) in which to respond, are absurd. See Appellants' Brief, at 35, 36. Appellants can point to no rule of civil procedure which excuses them from complying with legitimate requests for relevant documents simply because they do not wish to undertake the "hassle" of locating responsive documents. See Fed. R. Civ. P. 26, 34, 37 (3) (treating an incomplete disclosure or response as a failure to respond). Had the requests truly been unduly burdensome, the bankruptcy court would have granted Appellants' motion for a protective order, which it denied, and which Appellants have not appealed. See Record, No. 19, 20. Moreover, Appellants cannot complain about the requirement that they respond to Appellees' discovery requests within forty-five days, as the Federal Rules provide that litigants should respond to requests for production of documents within thirty days. See Fed. R. Civ. P. 34 (b).

Finally, Appellants' argument that the court must draw a negative inference from Appellees' failure to call additional witnesses at the hearing is meritless. See Appellants' Brief, at 32-33. The cases which Appellants cite have no bearing on the instant situation, as they pertain to the valuation of a house, and the permissible inferences from the invocation of the Fifth Amendment privilege against self-incrimination. See United States v. Local 560, Int'l Brotherhood of Teamsters, 780 F.2d 267, 292 n. 32 (3d Cir. 1985), cert. denied, 476 U.S. 1140 (1986); In re Corbett, 80 B.R. 32, 36 (Bankr. E.D. Pa. 1987). Here, Appellees made an arguably justifiable decision to base their claims on the absence of objective documentation demonstrating that Appellants maintained separate identities rather than to question witnesses whose self-serving and previously unreliable testimony may be less probative. The fact that Appellees relied on documentary, rather than testimonial, evidence to support their arguments is not a reason to discredit that evidence.

IV. Burden of Proving Ownership of the Disputed Assets

If, on remand, the bankruptcy court concludes that the evidence does not support a conclusion that Appellants' and ELOP's corporate veils should be pierced, it will have to decide whether the particular assets in dispute belong to ELOP or to the Appellants. Though the bankruptcy court did not make specific findings regarding the ownership of the disputed assets, Appellants have raised two issues on appeal concerning the evidence that they own the disputed assets. Though it is the bankruptcy court's responsibility, as fact finder, to make the initial determination of who owns the disputed assets, the court will briefly discuss the Appellants' contentions on appeal in

case the bankruptcy court is faced with these issues on remand. See In re Indian Palms Assoc., Ltd., 61 F.3d 197, 210 n.19 (3d Cir. 1995) (noting that the district court should not "engage in independent fact finding" when reviewing a bankruptcy court's decision).

Appellants contend that the bankruptcy court erred by assigning to them the burden of proving that they owned the assets in dispute. In support of their position, they claim that it is well-established that the party asserting that an asset should be turned over to the bankruptcy estate under 11 U.S.C. 542, bears the burden of proof. Thus far, their contention is accurate. See Evans v. Robbins, 897 F.2d 966, 968 (8th Cir. 1990); Boyer v. Davis (In re U.S.A. Diversified Prod., Inc.), 193 B.R. 868, 872 (Bankr. N.D. Ind. 1995), aff'd, 196 B.R. 801 (N.D. Ind.), aff'd, 100 F.3d 53 (7th Cir. 1996); In re High Sierra Transport, Inc., 101 B.R. 432, 434 (Bankr. M.D. Pa. 1989). Though there is some dispute about whether the proper standard of proof in a turnover action is "preponderance of the evidence" or "clear and convincing evidence," courts agree that the burden is assigned to the party seeking inclusion of the assets in the bankruptcy estate. See Evans, 897 F.2d at 968 (applying clear and convincing evidence standard); Alofs Mfg. Co. v. Toyota Mfg., Kentucky, Inc. (In re Alofs Mfg. Co.), 209 B.R. 83, 91 (Bankr. W.D. Mich. 1997) (concluding that elements of 542 turnover action must be proved by a preponderance of the evidence); Boyer, 193 B.R. at 872 n.3 (commenting that "it is doubtful that the need to prove turnover by clear and convincing evidence . . . survived the enactment of 542").

The Appellants' argument falters, however, because the trustee's motion to sell was brought under 11 U.S.C. 363, and not 542. The bankruptcy court issued its ruling under 363, and never indicated, contrary to Appellants' contention, that it was applying 542. See Appellants' Brief, at 17, n. 8. Under 363, "the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest." 11 U.S.C. 363 (o)(2). Thus, if the bankruptcy court correctly decided the Trustee's motion to sell under 363, then it properly required the Appellants to prove they owned the disputed assets.

Appellants argue that 363 does not apply to this action because 363, which gives the trustee the authority to use, sell, or lease property of the bankruptcy estate, assumes that the property that the trustee wants to sell is already part of the bankruptcy estate. Section 542 allows the trustee to recover property of the estate, which it may use or sell under 363, from "an entity, other than a custodian, in possession, custody, or control, during the case," of that property. 11 U.S.C. 542 (a). Appellants contend that allowing the Trustee to proceed with a sale under 363, rather than requiring the Trustee to first secure the assets in a turnover proceeding under 542, would "eradicate the need for a turnover proceeding except in the case of goods such as cash. All tangible items would simply be made the subject of a 363 sale and the Trustee would avoid his burden. Such was clearly not the intention of Congress in drafting that section and the legislative history evidences no support for such a proposition." Appellants' Brief, at 17, n. 8.

The disposition of this assignment of error depends on whether the Trustee had control over the assets in Florence which he wished to sell. It is unclear, from the record before the court, who controlled the Florence site where many of ELOP's assets were stored. If the Trustee controlled the site, and had previously established that all of the property on the site belonged to ELOP's bankruptcy estate, then the bankruptcy court's application of 363 would be correct. If, however, the evidence demonstrates that ELOP, or one of the Appellants, had "possession, custody or

control" of the assets when the Trustee filed his motion to sell, then the bankruptcy court should have placed the burden of proving ownership on the Trustee, as 542 requires. Because the bankruptcy court has not made a factual finding concerning who controlled the assets located in Florence, this court is unable to resolve the issue on appeal. On remand, if the bankruptcy court declines to apply the alter ego theory to pierce Appellants' and ELOP's corporate veils, it should make factual findings which support its application of 363 to the Trustee's motion to sell.

V. Evidence Demonstrating Ownership of the Disputed Assets

Appellants contend, in the alternative, that even if they bear the burden of proving that they own the disputed assets, they have satisfied their burden of proof by producing titles, invoices, manufacturers' statements of origin, and canceled checks indicating that they own the disputed assets. The bankruptcy court did not clearly address this issue because it found that the Appellants were ELOP's alter egos and thus, that it was irrelevant which of Thayer's corporations held title to the vehicles. The bankruptcy court did state, however, that Appellants' current position contradicted Thayer's and ELOP's previous statements that the property located in Florence belonged to ELOP, and that the kinds of assets now at issue had belonged to ELOP. See Record, No. 1, at 3. The court concluded, therefore, that judicial estoppel would prevent the Appellants from now asserting that the assets did not belong to ELOP. See id.

The principles of judicial estoppel do not prevent Appellants from claiming that the disputed assets were owned by corporations other than ELOP. Though the bankruptcy court found that Thayer had previously testified that the disputed assets were ELOP's property, the statements which the bankruptcy court cites in support of its conclusion (in so far as they are part of the record before me) do not contain assertions that the disputed assets necessarily belong to ELOP. The bankruptcy court appears to have relied on both Thayer's testimony in a bankruptcy proceeding involving another of his corporations, Riverfront Concepts, Inc., and the Fourth Amended Disclosure Statement which ELOP filed on January 2, 1996. See Record, No. 33, 34. Neither of these sources contains assertions that ELOP exclusively owned the assets which are the subject of the current dispute. Thayer's testimony in Riverfront Concepts did not exclude the possibility that some of the assets located in Florence belonged to entities other than ELOP. (9) Similarly, the Disclosure Statement identifies only general categories of assets, such as "Trailer Inventory #1," "Trailer Inventory #2," "Machinery and equipment used in trailer manufacturing business" and "Trailer and helicopter parts inventory." Record, No. 33, at 19-20. There is no indication that any of the disputed assets were specifically included in those general categories. Judicial estoppel will not prevent Appellants from contending that they own the disputed assets when Thayer's and ELOP's previous statements relied upon do not compel a contrary conclusion. See Ryan Operations, G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 358, 361 (3d Cir. 1996) (application of judicial estoppel must "rest upon a finding that the party against whom estoppel is sought asserted a position inconsistent with one she previously asserted in a judicial proceeding").

Appellants' final argument that they have produced sufficient evidence to demonstrate their ownership of the vehicles because they have produced titles authenticated by Thayer's son, ignores the poor condition of most of their evidence. Many of the titles on which they rely are barely legible photocopies of titles, where the record owner is not a Thayco entity, and a Thayco

entity's name is only typed onto the back side of the title as a transferee, without an accompanying signature or notarization. See Record, No. 9, 10, 11, 23. Several other titles are signed by Thayer, but are not dated or notarized. See Record, No. 12, 13, 14. Appellants may, however, have produced sufficient evidence to prove that it owned the five trailers it purchased from United Equipment Sales, by producing a signed sale contract and deposit check on the sale. See Record, No. 22. With respect to the unsigned and undated titles, the bankruptcy court was entitled, considering its low estimation of Thayer"s credibility and honesty, to believe that the typed names were added at some later date and that ELOP may have owned the trailers during the pendency of its bankruptcy. Because the bankruptcy court has not made factual findings concerning the ownership of the disputed assets, however, the court will not assess the adequacy of Appellants' proof of ownership on appeal. Should the bankruptcy court reach the question of whether Appellants' evidence constitutes sufficient proof of ownership, the bankruptcy court shall consider the assets separately and shall make factual findings concerning the ownership of each disputed asset.

CONCLUSION

The bankruptcy court's August 5, 1998, order will be vacated. The bankruptcy court failed to make specific factual findings regarding the applicability of the alter ego doctrine to pierce Appellants' and ELOP's corporate veils. The bankruptcy court also failed to consider many of the factors which influence the decision to disregard a corporation's separate existence. Although the court understands the necessity in a busy bankruptcy court to resolve issues expeditiously without extensive fact-finding, and that the parties in this action made such fact-finding particularly difficult, when the parties raise these issues on appeal, I have no alternative other than to require the salient facts to be part of the record. This appeal will be remanded to permit the bankruptcy court to make further factual findings consistent with this memorandum.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE EQUIPMENT LESSORS : CIVIL ACTION

OF PENNSYLVANIA, INC., Debtor :

:

: NO. 98-4752

ORDER

AND NOW, this ____ day of May, 1999, after consideration of the Appellants' Brief in Support of Objections to the Trustee's Motion to Sell Certain Assets, the Appellees' Opposition, and the reply thereto, IT IS ORDERED that the Bankruptcy Court's Order dated August 5, 1998, is VACATED and this case is remanded to the Bankruptcy Court in order to make the factual findings described in the court's memorandum.

William H. Yohn, Jr., J.

1. The Appellants are Thayco Trailer Supercenter, Inc., Fleet Trailer Corp., Fleet Sales & Leasing Corp., Thayco Financial Services, Inc., Thayco Manufacturing Co., Inc., and Fleet Sales of New Jersey.

2. Appellants claimed to own "various vehicles" and "fasteners and suspension parts" which they underlined on the inventory sheet attached to the Trustees's Motion to Sell. See Record, No. 6 (40 items are underlined). The parties subsequently agreed that several items would be deleted from the inventory of items to be sold. See Record, No. 21, at 27-29 (deleting a CAT engine, two forklifts, an air conditioner, a car and several trailers). Though the parties apparently agreed that fewer items were actually in dispute, neither party has provided the court with a list enumerating the items whose ownership remains contested. See Record, No. 29, at 4-5. On remand, the bankruptcy court may want to order the parties to prepare a list of the specific items whose ownership is disputed, identifying the value of each item.

3. Appellants also contend, in their Reply Brief, that the bankruptcy court's order should be reversed because the Trustee has not participated in the appeal, and thus, their appeal may be considered uncontested. See Appellants' Reply, at 1-3. Appellants base this argument on their assertion that the Trustee's counsel did not sign, or participate in preparing, the Memorandum of Law Jointly Submitted on Behalf of the Chapter 7 Trustee and First Lehigh Bank in Opposition to Objections of Thayco Trailer Supercenter, Inc., et al.'s Objection [sic] to Trustee's Motion to Sell Certain Assets ("Joint Opposition"). Though the Trustee's counsel should have signed the jointly submitted brief, the Trustee's counsel has appeared at oral argument on this matter and has submitted a signed letter to

the court affirming his joint participation in filing the Joint Opposition. Appellants' contention that the appeal is uncontested is thus inaccurate.

4. Appellants' third and fourth assignments of error will thus be discussed in part II.

5. Appellants' fifth and sixth assignments of error will thus be discussed in part III.

6. The only pleadings discussing the sale of the Florence assets are the Trustee's original motion to sell property of the estate, the Appellants' opposition to that motion, and the post-hearing briefs submitted by both parties. As the alter ego issue was only raised when it became evident to the Trustee, during discovery on Appellants' motion, that the Appellants' record keeping concerning the ownership of the disputed assets was sloppy or nonexistent, there is no prior pleading which would have raised the alter ego issue.

7. Though the parties have failed to include the briefs submitted after the July 21, 1998, hearing in the Record on Appeal, there seems to be no dispute that the brief filed by the Trustee and ELOP's creditors argued that Appellants' corporate veils should be pierced. See Appellants' Brief, at 25, n. 14 ("Appellants will concede that the issue of piercing the corporate veils was raised in FLB's and the Trustee's joint memorandum."). As these briefs are not part of the Record, it is impossible to evaluate Appellants' contention that the brief did not discuss the alter ego issue, or Appellees' argument that the alter ego issue was addressed because it is factually and legally intertwined with piercing the corporate veil.

8. It also appears that interrogatories were served upon Appellants. See Record, No. 19, at 8 ("additional answers to Interrogatories are due from Movants on June 23, 1998"). Neither the interrogatories nor the responses to those interrogatories are included in the Record.

Appellants further contend that discovery requests cannot suffice to place them on notice of the claims against them. Such an argument flies in the face of logic, for discovery requests must be relevant and related to either party's claims or defenses. See Fed. R. Civ. P. 26 (b)(1). The bankruptcy court specifically held that requests seeking documents "demonstrating financial activity" by the Appellants, and documents demonstrating that Appellants "have actually conducted any business activities whatsoever" were relevant to the issues before the court. See Record, No. 20. These requests were relevant because they sought to provide a factual basis for Appellees' alter ego argument as well as their related assertion that Appellants' corporate veils should be pierced.

9. Thayer owned a corporation named Riverfront Concepts, Inc., which was also involved in a bankruptcy proceeding before Judge Raslavich. On March 13, 1998, in a proceeding to determine whether a bank creditor of Riverfront was entitled to relief from the automatic stay, Thayer testified concerning the ownership of the assets located on the Florence property, which was owned by Riverfront and leased to another Thayco entity, Thayco Trailer Super Center, Inc. See Record No. 34, at 8. Thayer testified that only the assets of Thayco Trailer Super Center and ELOP were stored in Florence, and that 80-90 % of the assets located in the buildings belong to ELOP. See id. at 9, 29