

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000101-001 DT

12/22/2011

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT
J. Eaton
Deputy

WESTERN REFINING WHOLESALE
COMPANY INC

JOHN D PARKER II

v.

A A B C O INC (001)
ALFRED A BIANCO (001)
CONTRACTORS BONDING & INSURANCE
CO (001)

GERALD F GIORDANO JR.

REMAND DESK-LCA-CCC
UNIVERSITY LAKES JUSTICE COURT

RECORD APPEAL RULING / REMAND

Lower Court Case No. CC2009400403RC

Plaintiff Appellee Western Refining Wholesale, Inc. (Plaintiff) requests that this Court—pursuant to Rule 14, Superior Court Rules of Appellate Procedure—Civil (SCRAP—Civ.) rehear this matter. Plaintiff contends the court erred. For the reasons stated below, the court declines to rehear this case.

I. FACTUAL BACKGROUND.

Following a trial at the University Lakes Justice Court, Plaintiff Appellee was successful and received a judgment against Defendant. Defendant appealed. On October 25, 2011, this Court, by Minute Entry, reversed the trial court's determination. Plaintiff filed a Motion for Rehearing on November 9, 2011. Defendants did not respond to this Motion.

II. DISCUSSION

Plaintiff premises its motion on its claim that “there are sufficient facts to conclude it would be unjust for AABCO and Bianco to escape liability” and relies on *Gatecliff v. Great Republic Life Ins. Co.*, 170 Ariz. 34, 821 P.2d 725 (1991). This Court finds the *Gatecliff* case is distinguishable from the current situation. First, the *Gatecliff* case involved a summary judgment and the issue the court resolved was whether the plaintiffs in *Gatecliff* introduced sufficient

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evidence to create a genuine issue of material fact. “We accepted review because we believe that the evidence was sufficiently disputed to make a grant of summary judgment inappropriate.” *Gatecliff v. Great Republic Life Ins. Co., id.*, 170 Ariz. at 37, 821 P.2d at 728. The current case was decided after a trial on the merits followed by an appeal. Secondly, the *Gatecliff* decision held the trial court erred in failing to “find a question of fact regarding unity of control.” *Id.* The Supreme Court continued in *Gatecliff, id.*, and indicated ways in which total control could be proved. The Supreme Court then found five of the seven factors present in the *Gatecliff* scenario and concluded:

We have previously stated that despite the well-settled law that a corporation is a separate legal entity, “when one corporation so dominates and controls another as to make that other a simple instrumentality or adjunct to it,” the courts will look beyond the legal fiction of distinct corporate existence, as the interests of justice require.

Gatecliff v. Great Republic Life Ins. Co., id., 170 Ariz. at 38, 821 P.2d at 729. [Citations omitted.] This Court did not find an equivalent unity of ownership. Plaintiff then asserts this Court should rehear the case because it would be unjust to not allow Plaintiff to prevail and because Plaintiff now argues it was prevented from determining: if “Mike, Mary or Vanessa were AABCO employees or Air Excellence employees.”¹ This argument disregards the facts of the case. As stated in this Court’s Minute Entry ruling of October 25, 2011,² Plaintiff presented no testimony about:

(1) its reasons for determining how or why it knew or believed Mr. Boudreaux was authorized to change or create an account; (2) what investigation it performed into Excellence LLC as a separate entity; (3) who signed for any account; or (4) why Plaintiff disregarded the requirements of its own paperwork that any change or modification of the existing (AABCO) paperwork be in writing. Neither Mr. Rees—for the Plaintiff—nor Mr. Bianco—for the Defendant—had personal knowledge about the creation of the multi account and these were the only witnesses present at trial. Plaintiff presented no evidence about why it believed Excellence LLC was part of AABCO or whether this was a reasonable belief.

In addition, Plaintiff does not demonstrate injustice. *Youngren v. Rezzonico*, 25 Ariz. App. 304, 305, 543 P.2d 142, 143 (Ct. App. 1975) discussed the meaning of injustice and held:

The term injustice or unjust act as used in the Arizona cases is not easy to define. Injustice falls within the realm of equity and has been interpreted as:

“Equity is reluctant to permit a wrong to be suffered without remedy. It seeks to do justice and is not bound by strict common law rules or the absence of

¹ Motion for Rehearing filed November 9, 2011, at p. 3, ll. 18–19.

² P. 8.

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precedents. It looks to the substance rather than form. It will not sanction an unconscionable result merely because it may have been brought about by means which simulate legality. And once rightfully possessed of a case it will not relinquish it short of doing complete justice.

Here, there is no showing Excellence LLC was a sham corporation and no showing the corporation was formed to defraud Plaintiff or others. There is also no evidence that Excellence LLC held itself out as being one with AABCO. Admittedly, Plaintiff believed the companies were united, but Plaintiff failed to demonstrate wrongdoing on Defendants' part. Additionally, Plaintiff did not follow the requirements of its own contract that any modification to the contract be in writing. Nor did Plaintiff demonstrate how or why Plaintiff created the multi account. It was Plaintiff's burden to support its contentions. Plaintiff failed to meet this burden.

When there is a commercial dispute between two companies, one company prevails. Not being the successful party is not tantamount to injustice.

III. CONCLUSION.

Based on the foregoing, this Court denies Plaintiff's Motion for Rehearing.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Myra Harris

THE HON. MYRA HARRIS
Judicial Officer of the Superior Court

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