

14AP0693

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT 2

Harold Gabbei Wholesale Meats Incorporated,
Plaintiff-Respondent

v.

Appeal No.: 2014AP000693

William Vander Pas, d/b/a Komp Bros. Market,
Defendant-Appellant,
Lori Kunstman, d/b/a Komp Bros. Market,
Defendant

ON APPEAL FROM A JUDGMENT
ENTERED BY THE CIRCUIT COURT FOR WASHINGTON COUNTY,
THE HONORABLE JAMES K. MUEHLBAUER, PRESIDING

BRIEF OF APPELLANT

**William Vander Pas
7463 Ireland Drive
Hartford, WI 53027
262-488-1193**

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TABLE OF AUTHORITIES

Case Law

1. Benjamin Plumbing, Inc v. Butler, 470 NW 2d 162 Wis. 2d 837 - Wis. Supreme Court, 1991(cited in Issue 3 and Arguments 1 and 3)
2. Wilke v. First Fed. Sav, & Loan Ass'n, 108 Wis. 2d 650, 654, 323 N.W. 2d 179 (Ct. App. 1982) (cited in Argument 2)

Statutes

1. **402.201(1)** (cited in Argument 2)

Uniform Commercial Code

1. **UCC 4-210(b)** (cited in Argument 2)

STATEMENT OF THE ISSUES

Defendants petition the Wisconsin Court of Appeals on three issues:

1. Sufficient Notice.

Defendants claim they verbally told the Plaintiff, Gabbei Wholesale Meats, Inc., that Komp Bros. Market was owned and operated by Industrial Resales LLC. Defendants also claim that a "Customer Information Sheet" containing the particulars of the LLC was provided to Gabbei Wholesale Meats. Defendants further asserted that payment envelopes sent to Gabbei Meats had "Industrial Resales LLC" prominently displayed in the return address area. These payment envelopes were submitted over 50 times during the course of the business relationship between the two entities.

In Judge Muehlbauer's decision he held that the payment envelopes did in fact have "Industrial Resales LLC" on the return address, but he felt that this alone was not sufficient notice. Judge Muehlbauer stated that verbally

informing and/or providing written information to a delivery representative was not enough.

2. All Invoices Paid.

Defendants continued to do business with Gabbei Wholesale Meats, Inc. after the lawsuit was filed. They also made payments to Gabbei Meats which they assert should have been credited to oldest invoices first. The amount of payments exceeded the balance at the time of the lawsuit.

Therefore, Defendants claim, the outstanding balance is entirely made up of unpaid invoices which occurred after the Plaintiff undeniably was aware of the entity "Industrial Resales LLC".

Judge Muehlbauer made no ruling on this Issue.

3. Insulation from Liability.

Defendants referenced Wisconsin case law, **Benjamin Plumbing, Inc v. Butler**, 470 NW 2d 162 Wis. 2d 837 - Wis. Supreme Court, 1991. Defendants claimed that since all orders for meat submitted to Gabbei Meats were submitted by agents of the company other than themselves, they cannot be held liable if the ownership entity was not disclosed or only partially disclosed.

Judge Muehlbauer made no ruling on this Issue.

STATEMENT ON ORAL ARGUMENT

Oral arguments are not required by Defendants. Rulings may be published at the discretion of the Court of Appeals.

STATEMENT OF THE CASE

In February of 2012, a Summons and Complaint were filed on behalf of Harold Gabbei Wholesale Meats, Inc., 510 S. Nine Mound Rd., Verona, WI 53593-0255, by attorney Randall Andersen, One Point Place, Ste. 201, Madison, WI 53719. This Complaint is a collections matter.

Defendants named in the complaint are William Vander Pas, d/b/a Komp Bros. Market and Lori Kunstman, d/b/a Komp Bros. Market. Their home address is 7463 Ireland Drive, Hartford, WI 53027.

Defendants answered the complaint in March of 2012 stating that Komp Bros. Market was owned and operated by Industrial Resales LLC, a Wisconsin Limited Liability Company; so Mr. Vander Pas and Ms. Kunstman were not personally liable.

Defendants erroneously failed to attend a scheduling conference set for August of 2012, and a default judgment was executed.

Defendants retained counsel, attorney Nelson Martell, 325 N. Corporate Drive, Ste. 100, Brookfield, WI 53045. In November of 2012, attorney Martell moved the court on behalf of the Defendants to vacate the judgment.

In late November of 2012, as part of Plaintiff's Replevin action, Defendant William Vander Pas was deposed at attorney Andersen's office in Madison.

In late January of 2013 Judge Muehlbauer granted the motion to vacate the judgment and re-opened the case.

In April of 2013, attorney Martell moved the court to allow him to withdraw as counsel. The motion was granted, and the Defendants proceeded self-represented.

A scheduling conference was held in April of 2013.

Defendants submitted a request for documents and a list of interrogatories to Plaintiff's counsel in late April of 2013.

Defendants filed a motion for Summary Judgment in late June of 2013, and briefs were filed by both parties.

Judge Muehlbauer denied the requested summary judgment in October of 2013.

A pretrial conference was scheduled and attended by attorney Andersen and Defendant William Vander Pas. The trial was scheduled for February 6th of 2014.

Both parties filed Trial Briefs in late January of 2014.

The trial was held, and Judge Muehlbauer found in favor of the Plaintiff and against Defendant William Vander Pas. He did not find against Defendant Lori Kunstman.

STATEMENT OF THE FACTS

1. Industrial Resales LLC is a Wisconsin Limited Liability Company. (Rec. 62, ex. 9-12)
2. Industrial Resales LLC purchased Komp Bros. Market, and the first day of operation under new ownership was January 3, 2008. (Rec. 62, ex. 19, Rec. 61, 99:17-25, 58:22-25)
3. Komp Bros. Market purchased goods from Harold Gabbei Wholesale Meats, Inc. (Rec. 62, ex. 5-6)
4. Plaintiff presented three witnesses, Melanie Markhardt, Jeffrey Parsons and Paul Markhardt to make its primary case. (Rec. 61, 2)
5. Plaintiff also presented three rebuttal witnesses, Melanie Markhardt, Michael Stamm and Paul Stangler. (Rec. 61, 2)
6. None of Plaintiff's witnesses were owners or officers of Harold Gabbei Wholesale Meats, Inc., on January 3, 2008. (Rec. 61, 50:24-25, Rec. 61, 51:1-11)
7. Melanie Markhardt, presented as bookkeeper for Gabbei Meats, was not the bookkeeper until sometime in 2009. (Rec. 61, 99:17-25)

8. Melanie Markhardt also admitted to searching through someone else's files looking for references to Industrial Resales LLC and specifically for the "Customer Information Sheet"(Rec. 62, ex. 2, Rec. 61, 17:13-25)
9. Melanie Markhardt identified the files she was searching through as belonging to "Gary". (Rec. 61, 18:1-7)
10. No person named "Gary" was produced as a witness for Plaintiff. (Rec. 61, 2)
11. Melanie Markhardt identified Gary Markhardt, Paul Markhardt and Jeff Parsons as Gabbei Meats' representatives who might have been present at Komp Bros. Market on January 3, 2008. (Rec. 61, 1-9)
12. Jeffrey Parsons testified to only phone contact with Komp Bros. Market.(Rec. 61, 36:12-15)
13. Paul Markhardt testified to a few telephone conversations with William Vander Pas. (Rec. 61, 47:21-24)
14. Paul Stangler stated in his affidavit that he was present at Komp Bros. Market on January 3, 2008. (Rec. 61, ex. 22)

15. Paul Stangler testified that he did not meet with Defendant William Vander Pas on January 3, 2008. (Rec. 61, 104:1-8, 106:15-19)
16. Defendant William Vander Pas had very little, if anything, to do with placing orders with Gabbei Meats. (Rec. 61, 37:25, 38:1-7, 101:15-21, 86:1-24)
17. Jeffrey Parsons stated in his affidavit that he spoke with William Vander Pas in early 2008 and that William informed him that he (William) was the new owner of Komp Bros. Market. (Rec. 48, 3)
18. In his testimony, Jeffrey Parsons admitted he was mainly concerned about retaining business under new ownership and didn't pay much attention to the details of ownership. (Rec. 61, 38:16-18, 42, 6-22)
19. In his testimony, Jeffrey Parsons admitted that he assumed William Vander Pas was the owner of Komp Bros. Market. (Rec. 61, 42:22)
20. Melanie Markhardt confirmed that delivery drivers at Gabbei Meats transport checks from customers to Gabbei offices in Verona. (Rec. 61, 30:17-19)
21. All invoices from Gabbei Meats to Komp Bros. Market had terms of "7 days", not cash on delivery, COD. (Rec. 62, ex. 1,5,6) (Rec. 61, 24:20-25, 25:10-25, 26:1-17)

22. Michael Stamm, former employee of Industrial Resales LLC, stated that he deliberately withheld information regarding the ownership of Komp Bros. Market when he ordered products from vendors including Gabbei Meats. (Rec. 61, 101:22-25, 102:1-7, 102:13-22)
23. Defendants presented two witnesses for the defense, William Vander Pas and Jacob Vanoskey. (Rec. 61, 2)
24. William Vander Pas testified that he did not remember whom he met with from Gabbei on January 3, 2008 until Plaintiffs provided Paul Stangler's name on his affidavit. (Rec. 61, 74:15-22, 80:25, 81:1-2)
25. Jacob Vanoskey testified that he was unaware of any COD arrangement with Gabbei Meats. (Rec. 61, 89:6-22)
26. Judge Muehlbauer disallowed any testimony or evidence in regard to any lawsuit settlement discussions. (Rec. 61, 48:21-25, 49:1-25, 50:1-23)
27. Komp Bros. Market could and did buy meat from other sources. (Rec. 62, ex. 3,4)

ARGUMENT

Issue 1: Proper Notice was given to Harold Gabbei Wholesale Meats, Inc. regarding LLC ownership of Komp Bros. Market.

Judge Muehlbauer ruled that the return address label presented as exhibit 13 had been used on correspondence, mostly payment checks, from Komp Bros. Market to Gabbei Meats. (Rec. 61, 119:13:18) Defendants asserted that these payments occurred at least 50 times. (Rec. 43)

This return address label features both Industrial Resales LLC and Komp Bros. Market very prominently. There is nothing ambiguous or confusing about it. The Wisconsin supreme Court decided Benjamin Plumbing, Inc v. Butler based on the omission of "Inc" on the letterhead of a single correspondence. Certainly the return address label usage here meets that criteria. The return address alone should be deemed proper notice.

Defendants assert that William Vander Pas spoke with a representative of Gabbei Meats and gave him a "Customer Information Sheet" on or about January 8, 2008, and

identified Industrial Resales LLC as the ownership entity.
(Rec. 62, ex. 2)

Based on the process of elimination, based on Melanie Markhardt's testimony, it can be inferred that this representative might have been Gary Markhardt, who was an officer of Gabbei Meats at the time. (Statement of Facts, 11,12,13,15) Further, Melanie Markhardt identified a person named "Gary" as someone who would have known about Industrial Resales LLC. (Statement of facts, 8-9) This may or may not refer to Gary Markhardt.

Plaintiffs presented several witnesses who claimed no knowledge of Industrial Resales LLC. Two of them, Melanie Markhardt and Paul Markhardt had no evidentiary dealings with Komp Bros. Market, or either Defendant individually, in the early days of the business relationship. Jeffrey Parsons and Paul Stangler do not have clear memory of these early days, since their affidavits and testimony do not agree. (Statement of Facts, 14,15,17-19)

But what about Gary Markhardt? There is no way to know what he knew or didn't know. Defendants cannot be held responsible for knowledge that was never passed on to the next generation of ownership. It is reasonable to assume Gary Markhardt was aware of Industrial Resales LLC.

The parade of witnesses claiming they had no knowledge of Industrial Resales LLC, whether the witnesses were relevant or not, may have been a tactic to confuse the judge. If so, it appears to have worked. In his decision. Judge Muehlbauer identifies Michael Stamm as a member of this parade. (Rec. 61, 117:5-13) Clearly, by his testimony, Michael Stamm did know about Industrial Resales LLC. (Rec. 61, 102:13-14) Judge Muehlbauer also admits to a bias based on his previous legal practice. (Rec. 61, 120:15-25)

Issue 2: All invoices referenced in the initial lawsuit have been paid in full.

Defendants continued to make payments to Gabbei Meats after the lawsuit was filed. These payments amounted to well over the lawsuit amount. (Rec. 62, ex. 18) Plaintiffs claim that there was a "Cash on Delivery" or COD agreement between the parties. (Rec. 61, 24:18-19) However there is no evidence of this agreement. In fact, all evidence, produced by Gabbei Meats, states the exact opposite. The terms of sale remained at "7 days", not COD. (Statement of Facts, 21)

Even if there was an agreement, it wouldn't stand up to scrutiny.

First of all, both parties have a different idea about how the payments should have been applied. Both ideas are reasonable. Therefore there is sufficient ambiguity to nullify the agreement. (**Wilke v. First Fed. Sav, & Loan Ass'n**).

Second, this agreement was discussed post-trial as part of an overall settlement discussion. By Judge Muehlbauer's ruling, any agreement or discussion of an agreement is inadmissible. (Statement of Facts, 26) A version of this agreement was written down as part of an overall settlement document which was never ratified. (Judge Muehlbauer did not allow its entry into evidence.)

Third, Wisconsin statutes require any contract over \$500 to be in writing. (Wis. 402.201) The only way this alleged verbal agreement could be enforced is if it is considered contractual. All Gabbei Meats invoices in evidence which occurred post-lawsuit are over \$500. (Rec. 62, ex. 5)

Plaintiffs claim that a statement was sent to Defendants twice a month identifying how the payments were being applied. Even if this was true, Melanie Markhardt admits these statements refer to terms as "7 days", and

these statements only show remaining invoices, not paid ones. (Rec. 61, 11:23-25. 12:1-5, 24:20-25, 25:1)

In absence of a valid agreement or contract, oldest invoices should have been credited first. This was the practice pre-lawsuit. This is standard commercial practice. (UCC 4-210(b))

If the invoices are credit properly, this lawsuit collection action should be rendered satisfied.

Issue 3: Insulation from Liability

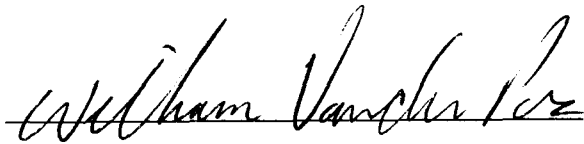
It is generally held that officers of an incorporated entity such as an LLC are not personally liable for finances of the entity. In Benjamin Plumbing, Inc v. Butler, the directors of a non-profit organization were sued for unpaid plumbing services. The Wisconsin Supreme Court held that since the non-profit's status as an incorporated entity had not been properly disclosed, there was liability. However, judgment was only entered against the officer who actually did the ordering of the services. The action was dismissed against the other directors. The court held that the agent who fails to disclose or only partially discloses the incorporated entity is the liable party.

In rebuttal testimony, Michael Stamm admitted to knowing the identity of his employer, Industrial Resales LLC. (Rec. 61, 102:13-18) He also admitted to unilaterally and deliberately withholding this information from vendors including Gabbei Meats. (Statement of facts, 22) Mr. Stamm also testified that he did 100% of the ordering from Gabbei Meats. (Rec. 61, 101:20-21) Defendants, as officers of Industrial Resales LLC, and ignorant to any dealings by their agent, Michael Stamm, should be insulated from liability.

CONCLUSION

For the reasons stated in Issues, Facts and Argument sections of this brief, Defendants William Vander Pas and Lori Kunstman petition the court for a reversal of the judgment entered on February 18, 2014. (Rec. 70)

Respectfully submitted this 14th day of July, 2014.

A handwritten signature in cursive script, reading "William Vander Pas". The signature is written in dark ink and is positioned above a horizontal line.

William Vander Pas, Defendant-Appellant

FORM AND LENGTH CERTIFICATION


I certify that this brief conforms to the rules contained in Wis. Stat. §(Rule)809.19(8)(b) and (c) for a brief produced using the following font:

Monospaced font: 10 characters per inch; double spaced;

1.5 inch margin on left side and 1 inch margins on the

other 3 sides. The length of this brief is **18** pages.


Date: 7-14-2014


Signature

CERTIFICATION OF MAILING

I certify that this brief OR APPENDIX WAS DEPOSITED IN THE United States Mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious. (US Post Office Priority Mail) on **July 14, 2014**. I further certify that the brief or appendix was correctly addressed and the postage was pre-paid.

Date: 7-14-2014


Signature