

**IN THE COURT OF APPEALS OF IOWA**

No. 3-033 / 12-1213  
Filed February 27, 2013

**CCS, INC.,**  
Plaintiff-Appellant,

vs.

**K&M ENTERPRISES, L.L.C.,  
SHANE T. KLINE and  
SCOTT MORRISON,**  
Defendants-Appellees.

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Appeal from the Iowa District Court for Polk County, Robert B. Hanson,  
Judge.

A construction company appeals from an adverse summary judgment decision on breach of contract, breach of contract implied-in-fact, and unjust enrichment claims against the principal members of a limited liability company.

**AFFIRMED.**

Robert M. Holliday of Sullivan & Ward, P.C., West Des Moines, for  
appellant.

Billy Joe Mallory of Brick Gentry, P.C., West Des Moines, for appellees.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

**MULLINS, J.**

CCS, Inc. appeals the district court's decision to grant Shane Kline's and Scott Morrison's motion for summary judgment on breach of contract, contract implied-in-fact, and unjust enrichment claims. CCS, Inc. argues tax returns showing improper distributions from a limited liability company to Kline and Morrison, and the sale of the company's assets after its administrative dissolution create a genuine issue of material fact sufficient to preclude summary judgment on each claim. For the reasons contained herein, we affirm.

**I. Background Facts & Proceedings**

This case arises out of a dispute over payment for services between K&M Enterprises, L.L.C. (K&M) and CCS, Inc. (CCS). K&M is a limited liability company organized in Iowa. Shane Kline and Scott Morrison each held a 50% membership interest in K&M. CCS is a construction company incorporated in Nebraska.

In 2009, K&M served as a subcontractor on a school construction project. During that time K&M employed more than ten employees. To complete the construction project, a K&M employee reached an oral agreement with CCS to perform directional drilling for the laying of fiber optic pipe. CCS completed the work and provided K&M with an invoice for \$50,570.10. K&M never paid CCS.

In August 2010, the Iowa Secretary of State administratively dissolved K&M for failure to file a biennial report. In June 2011, CCS filed a petition against K&M, Kline, and Morrison. CCS made allegations of breach of oral contract, breach of contract implied-in-fact, and unjust enrichment against K&M. CCS

further alleged that K&M was merely an alter ego of Kline and Morrison and that it was undercapitalized, was used to promote fraud, and was a mere sham. Kline and Morrison, as individuals, moved for summary judgment.

The district court heard Kline's and Morrison's motion for summary judgment. On the morning of the hearing, Kline and Morrison presented an affidavit from K&M's accountant asserting neither Kline nor Morrison accepted cash, property, or distributions as part of K&M's dissolution. CCS presented K&M's tax returns from 2009 and 2010. CCS's attorney argued the tax returns documented improper distributions and a sale of K&M's assets for profit. The court granted the motion for summary judgment. The court denied CCS's subsequent motion to reconsider. This appeal followed.

## **II. Standard of Review**

Our review of the district court's decision to grant partial summary judgment is for correction of errors at law. *Mueller v. Wellmark, Inc.*, 818 N.W.2d 244, 253 (Iowa 2012). Summary judgment is appropriate where "there are no genuine issues of material fact" and "the movant is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3); *see also Mueller*, 818 N.W.2d at 253. To determine whether summary judgment is appropriate, we view the evidence submitted in the light most favorable to the nonmoving party. *Mueller*, 818 N.W.2d at 253.

## **III. Analysis**

CCS contends the district court erred in granting summary judgment in favor of Kline and Morrison, as individual defendants, on CCS's claims against K&M for breach of contract, breach of contract implied-in-fact, and unjust

enrichment. The district court limited its decision to “whether the court should pierce the corporate veil and subject Kline and Morrison to individual liability.”

One of the hallmark features of a limited liability company is the limited liability of its members and managers. Iowa Code § 489.304 (2009). A member or manager is not liable for the “debts, obligations, or other liabilities of a limited liability company, whether arising in contract, tort, or otherwise” solely by reason of acting as a member or manager. *Id.* To hold Kline and Morrison individually liable for K&M’s debts and obligations, the parties agree the court must disregard K&M’s limited liability structure under the analysis set forth in *Cemen Tech, Inc. v. Three D Indus., L.L.C.*, 753 N.W.2d 1, 6 (Iowa 2008).

In exceptional circumstances, the court will pierce the veil of a limited liability company and hold members or managers individually liable. See *Cemen Tech*, 753 N.W.2d at 6 (applying the corporate veil-piercing analysis in the limited liability company context).

The burden is on the party seeking to pierce the corporate veil to show the exceptional circumstances required. Factors that would support such a finding include (1) the corporation is undercapitalized; (2) it lacks separate books; (3) its finances are not kept separate from individual finances, or individual obligations are paid by the corporation; (4) the corporation is used to promote fraud or illegality; (5) corporate formalities are not followed; and (6) the corporation is a mere sham.

*Id.* (internal quotation marks and citation omitted).

In this case Kline and Morrison argue the limited liability structure of K&M should shield them from individual liability. From 2008 through 2009, K&M employed more than ten employees. A K&M employee reached an agreement with CCS to perform construction services. Neither Kline nor Morrison had any

contact with CCS until after CCS completed the construction work. Kline and Morrison presented certificates of capitalization for K&M. K&M maintained liability and workers' compensation insurance. K&M maintained company books separate from its members. K&M's bank account at Community State Bank was separate from both Kline and Morrison. There is no record of K&M ever paying the individual obligations of its members. Although the revised Iowa Limited Liability Companies Act no longer requires any particular formalities with respect to management and activities of a limited liability company to preserve its limited liability status, K&M held an organizational meeting, adopted an operating agreement, elected officers, and otherwise followed corporate formalities. See Iowa Code § 489.304(2).

On the morning of the hearing on the motion for summary judgment, Kline and Morrison presented an affidavit from the K&M accountant responsible for preparing the company's tax returns. The affiant asserted neither Kline nor Morrison accepted distributions, cash, or property as part of K&M's dissolution. Over CCS's objection to the timeliness of the affidavit, the court accepted and considered the affidavit in granting the motion.

CCS contends the tax returns reveal improper distributions and the sale of K&M assets for a profit, the court should not have considered the late-filed affidavit, and there exists a genuine issue of material fact sufficient to preclude summary judgment. Pursuant to Iowa Rule of Civil Procedure 1.981(5), when a party makes and supports a motion for summary judgment, an adverse party "must set forth specific facts showing that there is a genuine issue for trial." "An

issue of fact is 'material' only when the dispute is over facts that might affect the outcome of the litigation, given the applicable governing law." *Dickerson v. Mertz*, 547 N.W.2d 208, 212 (Iowa 1996).

Kline and Morrison presented evidence to show they properly structured K&M to limit their individual liability on company debts and obligations. See Iowa Code § 489.304 (providing limited liability for members and managers acting as such); *Cemen Tech*, 753 N.W.2d at 6 (setting forth the six-step analysis for piercing the veil of a limited liability company). After Kline and Morrison made this initial showing, it was incumbent on CCS to "set forth specific facts showing that there is a genuine issue for trial." Iowa R. Civ. P. 1.981(5).

CCS presented no evidence to support assertions that K&M was undercapitalized; lacked separate books; failed to keep separate finances, or paid individual member obligations; or failed to follow corporate formalities. See *Cemen Tech*, 753 N.W.2d at 6. Assuming, without deciding, that the late-filed accountant's affidavit should not have been considered by the court, and viewing the evidence in a light most favorable to CCS, the allegations of improper distributions and the sale of K&M assets for a profit do not generate a genuine issue of material fact as to whether K&M was used to promote fraud or was a mere sham. See *id.* As CCS has presented no facts sufficient to demonstrate a genuine issue as to any of the six factors set forth in *Cemen Tech*, Kline and Morrison are entitled to judgment as a matter of law on the breach of contract,

breach of contract implied-in-fact, and unjust enrichment claims.<sup>1</sup> *See id.* We find no error in the district court's decision to grant Kline's and Morrison's motion for summary judgment as to their personal liability on the breach of contract, breach of contract implied-in-fact, and unjust enrichment claims against K&M. Accordingly, we affirm.

**AFFIRMED.**

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<sup>1</sup> As the piercing analysis is dispositive for the breach of contract, contract implied-in-fact, and unjust enrichment claims, we need not address the elements of each respective claim.