

**IN THE COURT OF APPEALS OF IOWA**

No. 7-961 / 07-0612  
Filed January 16, 2008

**THOMAS H. BURKE, as Receiver of  
Lifestyle Communications Corporation,  
and not individually,**  
Plaintiff-Appellee,

**vs.**

**CONTINENTAL BROADCASTING,  
INC., CONTINENTAL RADIO BROADCASTING  
OF IOWA, L.L.C. and DAVID F. PESCHAU,**  
Defendants-Appellants.

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Appeal from the Iowa District Court for Polk County, Donna L. Paulson,  
Judge.

The defendants appeal from the adverse judgment on the plaintiff's breach  
of contract action. **AFFIRMED.**

Harley Erbe, West Des Moines, for appellant.

Jonathan Kramer of Whitfield & Eddy, P.L.C., Des Moines, for appellee.

Considered by Sackett, C.J., and Vaitheswaran and Baker, JJ.

**BAKER, J.**

**I. Background Facts and Proceedings.**

The plaintiff in this action, Thomas Burke, is the court-appointed receiver of Lifestyle Communications Corporation, a company which owns three Iowa radio stations. Defendant David Peschau is the sole owner and officer of defendants Continental Broadcasting, Inc. (hereinafter Continental Broadcasting), and Continental Radio Broadcasting of Iowa, L.L.C. (hereinafter Local Continental).

In September of 2001, Continental Broadcasting submitted a letter of intent (LOI) to purchase Lifestyle for \$2,200,000. The LOI specifically defined the buyer as "Continental Broadcasting, Inc., C/O David Peschau." At some point in time, Continental Broadcasting assigned its interests in the LOI to Local Continental. On May 10, 2002, Burke and Local Continental entered into an Asset Purchase Agreement (APA), under which Local Continental became the party responsible for paying the purchase price. Although the APA does not specifically note a closing date for the transaction, Burke and Peschau apparently agreed that it would be January 31, 2003.

On January 30, 2003, Burke, through counsel, sent Peschau a letter stating his opinion that all conditions precedent to the sale had been completed and that failure to perform would be considered a breach. The following day Peschau responded stating that funds for closing were available. After not receiving the funds, Burke sent a letter expressly terminating the APA on February 1, 2003. In a subsequent letter, Peschau still indicated a commitment to wire the purchase price by February 28, 2003. Local Continental, however,

never made such payment. Peschau at this point had not indicated any problems with any of the conditions precedent.

Burke subsequently filed a petition alleging a breach of the sale contract. Following a bench trial, the court found in favor of Burke. In doing so, it determined that because Local Continental was a “shell or sham entity” its corporate veil could be pierced, thus making Peschau liable for damages. It therefore entered judgment against Peschau, Local Continental, and Continental Broadcasting, jointly and severally, in the amount of \$750,000. The defendants appeal from this judgment.

## **II. Scope of Review.**

In a law action tried to the court, our review is for the correction of errors at law, and the district court’s findings of fact are binding on us if they are supported by substantial evidence. *Hendricks v. Great Plains Supply Co.*, 609 N.W.2d 486, 490 (Iowa 2000). “Evidence is substantial if reasonable minds would accept it as adequate to reach a conclusion.” *Schlegel v. Ottumwa Courier*, 585 N.W.2d 217, 221 (Iowa 1998).

## **III. Liability of Peschau and Continental Broadcasting, Inc.**

The defendants first maintain the court “incorrectly concluded that Continental Broadcasting, Inc., and David Peschau were personally liable on the asset purchase agreement.” In this regard, they assert Peschau should not have been held liable under a theory of piercing the corporate veil. We conclude substantial evidence supports the court’s conclusions.

The “corporate veil may be pierced under exceptional circumstances, for example, where the corporation is a mere shell.” *Briggs Transp. Co. v. Starr*

*Sale Co.*, 262 N.W.2d 805, 810 (Iowa 1978). Factors which would support such a finding include:

(1) the corporation is undercapitalized, (2) without separate books, (3) its finances are not kept separate from individual finances, individual obligations are paid by the corporation, (4) the corporation is used to promote fraud or illegality, (5) corporate formalities are not followed or (6) the corporation is merely a sham.

*Adam v. Mt. Pleasant Bank & Trust Co.*, 355 N.W.2d 868, 872 (Iowa 1984).

Here, Local Continental was never funded with any assets. It had no separate books and no established course of business. It was admittedly formed for the sole purpose of purchasing the radio stations. As a result, we concur that Peschau was liable for the damages incurred by the receivership in the name of Local Continental.

The defendants further assert Continental Broadcasting, Inc., was not liable under the APA. We conclude substantial evidence supports the court's finding Continental Broadcasting remained liable for the breach. Continental Broadcasting was the original contracting party with Burke; however, it later assigned its rights to Local Continental. The district court was correct in concluding there was no novation of Continental Broadcasting's obligations and Burke did not release Continental Broadcasting from those obligations. See *Matter of Integrated Resources Life Ins. Co.*, 562 N.W.2d 179, 182 (Iowa 1997) (defining a novation as a "substituted contract that includes as a party one who was neither the obligor nor the obligee of the original duty").

#### **IV. Breach of the Asset Purchase Agreement.**

Next, the defendants claim the district court erroneously determined that they were liable for breaching the asset purchase agreement for a variety of

reasons. We conclude substantial evidence supports the district court's findings in this regard. The defendants' protestations that they were not provided with accurate financial information, that Burke had not disclosed all liabilities, and that various conditions precedent to the sale were not satisfied are all post-hoc justifications for the failure to perform. At the time scheduled for the original closing, Peschau never claimed that unmet contingencies existed; rather he claimed he had the funds available to close but was simply unavailable. His counsel's letter, sent after the January 31, 2003, closing date that indicated his client's desire and ability to close on February 28, supports a finding that Peschau was not dissatisfied with the extent of Burke's performance.

#### **V. Damages.**

Finally, the defendants claim the damages awarded by the district court were excessive. The court awarded the plaintiff \$750,000 based on the additional interest that was incurred on \$2,200,000 in debt, plus any new debt incurred in continuing to operate the stations while sold, and all attorney fees paid by the receivership to re-market and sell the stations. We conclude this was an appropriate measure of damages and was supported by substantial evidence. The additional interest accrued on the debt and the expenses incurred in further sales efforts were reasonably foreseeable, and thus recoverable as consequential damages. See *City of Dubuque v. Iowa Trust*, 519 N.W.2d 786, 790 (Iowa 1994)

Because the trial court applied the proper law and because substantial evidence supports the court's conclusions, we affirm its decision.

**AFFIRMED.**