IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

DAVID SHULTZ, individually and as administrator of the estate of PATRICIA SHULTZ, Plaintiffs,	: NO. 18-1308
vs.	: CIVIL ACTION
ALEC T. BARNES, THOMAS A. BARNES, CHRISTINE M. BARNES, STEVE SHANNON, STEVE SHANNON TIRE COMPANY, INC., COLONIAL HOUSE INN, INC., DONALD W. HUFNAGLE, SHARON A. HUFNAGLE, AND ROCKY SANGUEDOLCE, Defendants.	: *Preliminary Objections to Second Amended Complaint*

ORDER

On April 30, 2010, David Shultz, individually and as administrator of the estate of Patricia Shultz ("Plaintiffs"), filed a Complaint in this action. Plaintiffs' Complaint alleged that in the early morning hours of June 22, 2017, after spending some three (3) hours at Colonial House Inn, Inc. ("CHI"), t/d/b/a Riverside Bar, and drinking, at a minimum, nine (9) beers, Alec T. Barnes drove into the back of a vehicle operated by Patricia Shultz, killing her.[1] Plaintiffs' Complaint also raised claims against CHI and Rocky Sanguedolce, president and owner of CHI (collectively "Defendants"),[2] under Pennsylvania's Dram Shop Act.[3] Defendants thereafter filed Preliminary Objections to Plaintiffs' Complaint on May 16, 2019, to which Plaintiffs filed an Answer. Following argument, on July 17, 2019 the Court issued an Order sustaining Defendants' Preliminary Objections and granting Plaintiffs twenty (20) days to file an Amended Complaint.

Plaintiffs thereafter filed an Amended Complaint on August 8, 2019 and then, with permission of the Court, filed a Second Amended Complaint on September 11,

[1] *See* Complaint ¶¶ 21-33 (April 30, 2019). Plaintiffs also averred these facts in their subsequently filed Amended Complaint and Second Amended Complaint.
[2] Any reference to "Defendants" hereinafter in the body of this Order refers solely to CHI and Rocky Sanguedolce, excluding all other above-captioned Defendants.
[3] *See* 47 P.S. § 4-491 *et seq.*

2019. Defendants filed Preliminary Objections to the Second Amended Complaint on September 19, 2019. Plaintiffs filed an Answer to the Preliminary Objections on October 21, 2019, to which Defendants filed their own Answer on October 25, 2019. The Court held argument on the Preliminary Objections to the Second Amended Complaint on November 18, 2019 ("November 18th Argument"). This Order follows.

Preliminary Objections

Defendants' Preliminary Objection I alleges that pursuant to Pa.R.C.P. 1028(a)(4),[4] Plaintiffs have failed to plead facts sufficient to support a claim under the Dram Shop Act. Specifically, Defendants argue that Plaintiffs' Second Amended Complaint fails to establish that employees of CHI served Alec T. Barnes alcoholic beverages while he was "visibly intoxicated," as required to establish liability under the Dram Shop Act.[5] Plaintiffs' Answer counters that the Second Amended Complaint provides sufficient circumstantial evidence that Alec T. Barnes would have been visibly intoxicated while at CHI to support a Dram Shop Act claim.

Circumstantial evidence may support a Dram Shop Act claim. In *Fandozzi v. Kelly Hotel*, the administrators of the estate of Anthony Shish brought a claim under the Dram Shop Act alleging that defendant Kelly Hotel was liable for Anthony Shish's

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[4] Pa.R.C.P. 1028(a)(4) (Preliminary objections may be filed by any party to any pleading and are limited to the following grounds: . . . (4) legal insufficiency of a pleading (demurrer)[.]").

[5] 47 P.S. § 4-493(1) ("It shall be unlawful . . . For any licensee or the board, or any employe, servant or agent of such licensee or of the board, or any other person, to sell, furnish or give any liquor or malt or brewed beverages, or to permit any liquor or malt or brewed beverages to be sold, furnished or given, to any person visibly intoxicated, or to any minor: Provided further, That notwithstanding any other provision of law, no cause of action will exist against a licensee or the board or any employe, servant or agent of such licensee or the board for selling, furnishing or giving any liquor or malt or brewed beverages or permitting any liquor or malt or brewed beverages to be sold, furnished or given to any insane person, any habitual drunkard or person of known intemperate habits unless the person sold, furnished or given alcohol *is visibly intoxicated* or is a minor.") (emphasis added); 47 P.S. § 4-497 ("No licensee shall be liable to third persons on account of damages inflicted upon them off of the licensed premises by customers of the licensee unless the customer who inflicts the damages was

death by alcohol poisoning. The Pennsylvania Superior Court held on appeal that, even though there was no direct evidence that Kelly Hotel had served Mr. Shish alcoholic beverages while he was visibly intoxicated, there was sufficient circumstantial evidence to preclude the case from being dismissed on summary judgment.[6] This circumstantial evidence consisted in part of witness testimony that Mr. Shish appeared highly intoxicated within hours after leaving the Kelly Hotel – that he was staggering and falling in the street, slurring his words, and smelled of alcohol – and also included a blood sample taken following Mr. Shish's death, some seven hours after he allegedly left the Kelly Hotel, which showed a blood alcohol level of 0.214%.[7] The toxicologist who drew the blood sample estimated that Mr. Shish's blood alcohol content would have been 0.30% at the time he left the Kelly Hotel, the equivalent of over fourteen (14) twelve ounce beers.[8,9]

In the instant matter, circumstantial evidence supporting Plaintiffs' claim that Mr. Barnes was visibly intoxicated while at CHI includes: an averment that Mr. Barnes drank a minimum of nine (9) beers in a little under three hours while at CHI; an averment that some fifteen (15) minutes after leaving CHI, Mr. Barnes, driving recklessly at speeds between one hundred and nine (109) and one hundred and

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sold, furnished or given liquor or malt or brewed beverages by the said licensee or his agent, servant or employe when the said customer was visibly intoxicated.").

[6] *See Fandozzi v. Kelly Hotel, Inc.*, 711 A.2d 524 (Pa. Super. 1998).

[7] *Id.* at 526.

[8] *Id.* at 526-27.

[9] *See also Couts v. Ghion*, 421 A.2d 1184 (Pa. Super. 1980) (plurality decision) (finding there was sufficiently strong circumstantial evidence that Dean Ghion was visibly intoxicated when served his last drink at Holiday House that appellant's Dram Dhop claim should be presented as a factual question to the jury. Such circumstantial evidence included: the averment that Mr. Ghion had consumed nine cocktails before being served his last drink; evidence of Mr. Ghion's erratic driving and failure to turn on his headlights in the dark; testimony from the investigating officer that Mr. Ghion showed visible signs of intoxication such as slurred speech, unsteady gate, and smelled of alcohol; and, evidence from breathalyzer and blood alcohol tests performed two-and-a-half hours after the accident reporting Mr. Ghion's blood alcohol content at 0.12%); *contra* Jenkins v. Krivosh, No. 2045 WDA 2014, 2015 WL 9464468 (Pa. Super. Dec. 23, 2015) (finding circumstantial evidence insufficient to prevent dismissal of appellant's Dram Shop claim against Heron's Landing on summary judgment in light of witness testimony that John Krivosh was not visibly intoxicated when served at Heron's Landing).

eighteen (118) miles per hour, struck the rear end of Ms. Shultz's car; a crash report completed by Corporal Batterson approximately fifteen (15) to forty-five (45) minutes after Mr. Barnes left CHI[10] reporting that Mr. Barnes demonstrated visible signs of intoxication such as glassy and bloodshot eyes, slurred speech, unsteadiness on his feet, that he smelled of alcohol, and that he was unable to give correct information in response to questioning; an averment that a blood sample taken some two hours and twenty minutes after Mr. Barnes left CHI reported a blood alcohol level of 0.089%; an averment that Mr. Barnes vomited in a waste basket at the Pennsylvania State Police Montoursville barracks where he was being interviewed some five (5) hours after the accident; and, an opinion from Plaintiff's toxicologist that Mr. Barnes demonstrated visible signs of intoxication at the time he was interviewed by Corporal Batterson, some fifteen (15) to forty-five (45) minutes after leaving CHI.[11,12]

"When doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it."[13]

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[10] There is some ambiguity about the exact time that Corporal Batterson interviewed Mr. Barnes. Corporal Batterson's crash report indicates that he interviewed Mr. Barnes at 12:25 a.m.; however, the same report indicates that Corporal Batterson was not dispatched until 12:28 a.m. and did not arrive at the accident scene until 12:44 a.m. The reported 12:25 a.m. interview time is therefore likely a typographical error. While the exact interview time is unclear, it appears that Corporal Batterson conducted the interview shortly after arriving at the accident scene.

[11] *See* Plaintiffs' Second Amended Complaint ¶¶ 23-51 (Sept. 11, 2019) ("Second Amended Complaint").

[12] Defendants argue that this circumstantial evidence is superfluous in light of available direct evidence in the form of CHI surveillance footage, which recorded Mr. Barnes from both the front and back during the three hours that he was at CHI. Defendants argue that because Plaintiffs cannot establish visible intoxication via this direct evidence, Plaintiffs should be barred from bringing a claim supported only by circumstantial evidence. However, as Defendants acknowledge, the CHI surveillance footage lacks audio and therefore cannot provide a complete picture of Mr. Barnes' observable demeanor while at CHI. It would not be observable from the surveillance footage, for example, whether Mr. Barnes was slurring his words, had bloodshot eyes, or noticeably smelled of alcohol.

[13] *R.W. v. Manzek*, 888 A.2d 740, 749 (Pa. 2005) ("We begin by reviewing the familiar standard of review applicable to assessing preliminary objections in the nature of a demurrer. In such an instance, all material facts as set forth in the complaint, as well as all inferences reasonably deducible therefrom, must be accepted as true. Cognizant of this factual bias in a plaintiff's favor, we must determine whether there is no potentiality of recovery. Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it.") (internal citations omitted).

> To be clear and free from doubt that dismissal is appropriate, it must appear with certainty that the law would not permit recovery by the plaintiff upon the facts averred. Any doubt should be resolved by a refusal to sustain the objections.[14]

"A demurrer tests the sufficiency of challenged pleadings. Fact-based defenses, even those which might ultimately inure to the defendant's benefit, are thus irrelevant on demurrer."[15]

Upon review of the relevant case law and the facts alleged in Plaintiffs' Second Amended Complaint, the Court cannot find with certainty that the law would not allow Plaintiffs to recover against CHI under the facts averred. Therefore, Defendants' Preliminary Objection I is OVERRULED.

Defendants' Preliminary Objection II alleges that pursuant to Pa.R.C.P. 1028(a)(4), Plaintiffs have failed to plead facts sufficient to support a claim against Defendant Rocky Sanguedolce. Plaintiffs' Second Amended Complaint asserts that Mr. Sanguedolce is liable as president and owner of CHI. The Second Amended Complaint must therefore establish facts that would support piercing CHI's corporate veil,[16] a claim Plaintiff argues is supported by the fact that Mr. Sanguedolce disregarded corporate form. There are several factors a Court should consider when determining whether the proprietor has disregarded corporate form in such a manner that would justify piercing the corporate veil. Such factors include:

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[14] *DeMary v. Latrobe Printing and Pub. Co.*, 762 A.2d 758, 761 (Pa. Super. 2002).
[15] *Werner v. Plater-Zyberk*, 799 A.2d 776, 783 (Pa. Super. 2002) (internal citations omitted).
[16] "In general, piercing the corporate veil is a means of assessing liability for the acts of a corporation against an equity holder in a corporation." *Mosaica Educ., Inc. v. Penn. Prevailing Wage Appeals Bd.*, 925 A.2d 176, 184 (Pa. Commw. 2007). ." A court may pierce the corporate veil under the theory that the corporation functioned as the equity holder's "alter ego" when there is evidence that the equity holder wholly ignored the separate status of a corporation and so dominated and controlled its affairs that its separate existence was a mere sham." *Lycoming County Nursing Home Ass'n, Inc. v. Com., Dept. of Labor and Industry, Prevailing Wage Appeal Bd.*, 627 A.2d 238, 244 (Pa. Commw. 1993) (internal citations omitted). [However,] there is a strong presumption in Pennsylvania against piercing the corporate veil[.] Also, the general rule is that a corporation shall be regarded as an independent entity even if its stock is owned entirely by one person. . . . [T]he corporate form will be disregarded only when the entity is used to defeat public convenience, justify wrong, protect fraud or defend crime. *Good v. Holstein*, 787 A.2d 426, 430 (Pa. Super. Ct. 2001) (internal citations omitted).

"undercapitalization, failure to adhere to corporate formalities, substantial intermingling of corporate and personal affairs and use of the corporate form to perpetrate a fraud."[17] Plaintiffs' Second Amended Complaint alleges various manners in which Mr. Sanguedolce has failed to adhere to corporate formalities.[18]

However, mere evidence that a proprietor has not followed corporate formalities is insufficient to overcome the strong presumption against piercing the corporate veil, absent some demonstration that piercing the veil would prevent inequity, fraud, illegality, or injustice.[19] Plaintiffs' Second Amended Complaint fails to plead facts that would establish some equitable basis for piercing the veil.[20] Therefore, Defendant Preliminary Objection II is SUSTAINED. All claims against Defendant Rocky Sanguedolce as president and owner of CHI are dismissed. Rocky Sanguedolce's name shall be stricken from the case caption.

As the objections raised by Defendants' Preliminary Objections III and IV are interrelated, the Court will address them together. Defendants' Preliminary

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[17] *See Lumax Industries, Inc. v. Aultman*, 669 A.2d 893, 895 (Pa. 1995) (internal citations omitted).
[18] This includes: 1. His failure to issue stock; 2. His failure to hold shareholder meetings to elect directors, hold director meetings, or prepare minutes of these meetings; 3. His failure to formally approve or carefully document transactions between the business and its shareholders or members; 4. His failure to keep detailed financial records; 5. His failure to record minutes of major decisions; and 6. His failure to identify CHI as "owner" to the public and instead holding himself out as owner and operator. *See* Second Amended Complaint ¶ 110.
[19] *Village at Camelback Property Owners Assn. Inc. v. Carr*, 538 A.2d 528, 533 (Pa. Super. 1988) ("Piercing the corporate veil is admittedly an extraordinary remedy preserved for cases involving exceptional circumstances. As some courts have phrased it, liability for the acts of a corporation may be assessed against the owners thereof wherever equity requires that such be done either to prevent fraud, illegality or injustice or when recognition of the corporate entity would defeat public policy or shield someone from public liability for crime.").
[20] *See e.g.*, *Revere Press, Inc. v. Blumberg*, 246 A.2d 407 (Pa. 1968) (holding that president of nonprofit corporation H.R.B., could not be subject to liability via piercing the corporate veil, even though plaintiff proffered evidence that H.R.B. had not issued stock and that president had a personal financial interest in the H.R.B.'s charitable activities as a stockholder, as there was no evidence that president had used H.R.B. as a device to defraud plaintiff); *see also Fort Washington Resources, Inc. v. Tannen*, 153 F.R.D. 565 (E.D. Pa. 1994)(finding allegations that corporation did not keep formal corporate records, hold a meeting to elect its board of directors, that the corporation was primarily capitalized by funds provided by the acting chief executive officer (CEO), and that the acting CEO failed to disclose that the corporation had a history of not meeting debts when due were insufficient to warrant piercing the corporate veil).

Objection III alleges that pursuant to Pa.R.C.P. 1028(a)(4) and (a)(2),[21] Plaintiffs have failed to plead facts supporting a claim of "reckless" conduct. Defendants' Preliminary Objection IV alleges that pursuant to Pa.R.C.P. 1028(a)(4) and (a)(2) Plaintiffs have failed to plead facts supporting demands for punitive damages. Defendants' Preliminary Objections III and IV move to strike any reference to Defendants' alleged recklessness or any demands for punitive damages.

Following discussion at the November 18th Argument, counsel for Plaintiffs represented that Plaintiffs' Second Amended Complaint does not allege that Defendants CHI and Rocky Sanguedolce's actions were in any way willful, wanton, or reckless as to entitle Plaintiffs to punitive damages, and any allegations of recklessness within Plaintiff's Second Amended Complaint are expressly limited to Defendants Alec T. Barnes, Thomas A. Barnes, Christine M. Barnes, Steven H. Shannon, Steve Shannon Tire Company, Inc., Donald W. Hufnagle, and Sharon A. Hufnagle. As Plaintiff's claims of recklessness and demands for punitive damages do not apply to objecting Defendants, Defendants' Preliminary Objections III and IV are OVERRULED. Plaintiff is not precluded, however, from raising claims of recklessness and making demands for punitive damage if, in the course of discovery, facts are uncovered to support such claims.

Conclusion

In summary, Defendants' Preliminary Objection I is OVERRULED. Defendants' Preliminary Objection II is SUSTAINED. All claims against Plaintiff Rocky Sanguedolce as president and owner of CHI are dismissed. Rocky Sanguedolce's name shall be stricken from the case caption. Defendants' Preliminary Objections III and IV are OVERRULED without prejudice to Plaintiff to seek to amend the Complaint in the future should new facts support such

[21] Pa.R.C.P. 1028(a)(2) ("Preliminary objections may be filed by any party to any pleading and are limited to the following grounds: . . . (2) failure of a pleading to conform to law or rule of court or

amendment.

IT IS SO ORDERED this 16th day of January 2020.

BY THE COURT,

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Eric R. Linhardt, Judge

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inclusion of scandalous or impertinent material[.]").