

Case No. SAU9997873

MELVIN GARCIA GALDAMES,

Applicant,

vs.

VINYL TECHNOLOGY, INC.;

Defendants.

IN RE

*Mesa Pharmacy, Mesa Pharmacy, Inc., and Mesa
Pharmacy Irvine, Lien Claimants*

FINDINGS OF FACT

The above entitled matter having been heard and regularly submitted, the Honorable Amy Britt, Workers' Compensation Administrative Law Judge, now decides as follows:

ISSUE

The issue for trial was whether John Garbino, who was convicted of Medicare fraud, was a 10% or greater owner, a director, an officer, or had *de facto* control of the Lien Claimant, Mesa Pharmacy. Labor Code §139.21(a)(3).

FINDINGS OF FACT

Mesa Pharmacy did not maintain itself in such manner as to be a legal entity as a corporation. The putative officers, owners and directors of the business offered differing and oftentimes conflicting accounts of what positions they held, what their duties consisted of and what their ownership interest were.

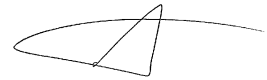
Mesa was unable or unwilling to produce the minutes of the Board of Directors. As such the court asserts an adverse interest that they indicate either that Mesa was being run as a shell with no corporate formalities observed allowing for Garbino to assert control, or that Garbino was in fact in de facto control of Mesa.

Various conflicting legal documents, filed in different jurisdictions, list different people in the exact same position during concurrent time periods.

Garbino, who plead guilty to Medicare fraud, was the only significant revenue stream for Mesa. But for him, the company would never have grown beyond its inception as a corner pharmacy. He drove the expansion and because of this the company did what he told it to.

The court therefore finds that Garbino was in de facto control of Mesa Pharmacy under Labor Code §139.21(a)(3).

DATE: February 5, 2021



Amy Britt
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

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CASE NUMBER: SAU9997873

**MELVIN GARCIA
GALDAMES**

-vs.-

**VINYL TECHNOLOGY,
INC., DIR AFU; SEDGWICK**

-in re -

*Mesa Pharmacy, Mesa
Pharmacy, Inc., and Mesa
Pharmacy Irvine, Lien
Claimants*

**WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE: Amy Britt**

DATE: January 13, 2021

OPINION ON DECISION

Facts as Found by the Court

Mytu Do, a professional house flipper, and Bud Birch, a landscaper by trade and a bankruptcy fraud by conviction, decided to open a pharmacy together. Ms. Do testified that it appeared to be a decent business to be in, even though she possessed no experience in such things, as her relative ran one. To that end, they enlisted her son, Andrew Do, as the chief pharmacist. Mr. Do's qualifications for this critical position lay in a few months of work in the industry and a pharmacist's license on which the ink was barely dry. Their cohorts consisted of Mr. Birch's son, Benny Birch, daughter, Robin Rene Kurtz, and son-in-law, Ed Kurtz, none of whom had ever been involved in running a pharmacy. An octogenarian, Betty Konecney, who almost no one of the principles had met and couldn't be found for the trial, was somehow involved as a silent investor.

On May 22, 2006, MESA Pharmacy filed Articles of Incorporation. A year later, Pharmacy Development Corporation sprang into existence. Both use the same pharmacy permit number PHY50766 doing business as Mesa Pharmacy VII.

At various times and on various documents, Andrew Do, is listed as Chief Executive Officer, Chief Financial Officer, Director, and/or President. Mr. Do did not recall ever holding any of those positions. Mr. Do could not recall ever attending a Board of Directors' Meeting. No one could produce, to the court, any records of any Board of Directors' Meetings for these entities. Ms. Do and Mr. Bud Birch testified that they weren't all that involved in the day to day running of the business. Both were fairly certain that Board of Directors' Meetings were held. Neither could recall a specific instance of actually attending one.

Ed Kurtz's testimony paints himself as a long-suffering corporate officer who was herding cats. Mesa limped along like this for several years.

Into this chaos walks John Garbino.

He came into the fray, initially, in late 2011 or 2012. There is a contract between his wholly owned company, Trestles Pain Management (TPS), to market Mesa's pharmaceutical services to doctors. Those doctors would then submit prescriptions to Mesa for fulfillment. The relationship faltered as Mesa wasn't equipped to handle the deluge of business the association with Garbino unleashed. For that, they needed capital.

Garbino obliged by introducing and facilitating meetings with finance companies who would "factor" Mesa's unpaid billing – essentially providing immediate cash in exchange for a lien against the anticipated liens. Garbino and Kurtz worked on this together. Garbino had access to financial documents and attended the in-person meetings with the potential financiers. Putative members of the Board of Directors did not attend, and may not even have been aware, that these meetings were occurring. Because of this financing, Mesa was able to re-start their dealings with Garbino and entered into a new relationship with them in 2014.

Mesa went from a company barely squeaking by to an entity raking in hundreds of millions of dollars essentially overnight.

At this point, April 2014, Mesa merged with PAWS Pet Company and Pharmacy Development Company Nevada (not to be confused with Pharmacy Development Company in California). With PAWS being the lead after it changed its name to PRAXSYN Corporation. Kurtz and Garbino end up on PRAXSYN's Board of Directors. Mr. Shebanow (who had been the principle of PAWS) was also on the Board.

There is conflicting testimony, between Kurtz and Shebanow, as to whether PRAXSYN ran MESA or MESA ran PRAXSYN. What everyone seems to agree on, and all the documents seem to support, is that all the money for either company is generated through the contracts MESA had with Garbino. In February of 2015 PRAXSYN's attorney fired MESA's Pharmacist in Charge, Andrew Do, despite Mr. Do –apparently- still being on the Board of MESA as President and CEO.

There were stock transfers in 2014. They were all MacGuffins,¹ as the stock really never existed as something actually intended to be traded in the open market. Shares were distributed and redistributed like Monopoly Money with many of the holders unaware of their participation in the stock holdings or the values thereof.

Garbino ended up listed as an owner of Mesa with the Arizona Pharmacy Board. None of the players could explain why that was or who drafted that document.

Ultimately, in 2015, Garbino was forced out of the Praxsyn board. It was discovered that he'd agreed to share his cut with two other gentlemen, Reily and Fish, one of whom already had a criminal conviction for fraud. He had not disclosed these side agreements and apparently felt that they would go undetected as if he knew no one was actually "minding the store," at Mesa/Praxsyn.

Garbino was ultimately charged and convicted of Medicare fraud, preventing him from participating in the Workers' Compensation System. His association with Mesa Pharmacy was examined and found to be sufficient to place Mesa on the list of suspended providers under Labor Code §4615. Mesa Pharmacy challenged that decision, claiming that there Garbino never held a position with Mesa that would subject them to the suspension. This trial followed.

Issue For Trial

The issue for trial was whether John Garbino, who was convicted of Medicare fraud, was a 10% or greater owner, a director, an officer, or had *de facto* control of the Lien Claimant, Mesa Pharmacy. Labor Code §139.21(a)(3).

A factual analysis by the court can established that a physician, practitioner or provider exercises influence such that they hold de facto ownership of the entity and/or exercise de facto control consistent with the rights and duties of an officer or director of the entity which would subject the entity to the provisions under Labor Code §139.21(a)(3) and 4615.

Opinion

There are simple questions to answer here.

- *Was John Garbino a 10% or greater owner of Mesa Pharmacy?* No he was not.
- *Was John Garbino a director of Mesa Pharmacy?* No he was not.
- *Was John Garbino an officer of Mesa Pharmacy?* No he was not.
- *Did he have de facto control of Mesa Pharmacy?* To the extent that anyone did, yes.

Mesa, as a functioning corporation, was a fiction. In the most charitable view of its inception; it was a business hastily cobbled together around a germ of an idea. It operated like a house with a foundation and an exterior shell but inside consisted of a few propped up stud walls, a floor littered with debris and lacking plumbing or electrical.

¹ Miriam Webster Dictionary defines a MacGuffin as, "an object, event, or character in a film or story that serves to set and keep the plot in motion despite usually lacking intrinsic importance"

In order to be considered a corporation with an existence separate and apart from those who ran it, there were simple steps that had to be taken.

Mesa had to have a board of directors. On paper it did – but the people listed on those papers weren't aware of it or admitted to being figureheads. Garbino ended up listed as an owner of Mesa with the Arizona Pharmacy Board. And while that doesn't prove he was an actual owner, it does show that no one was paying attention to who *was* being asserted by the corporation as having ownership interest in legal filings in other states. That creates a strong inference that there was no actual corporate structure at Mesa, they just made it up with whatever names seemed to be the best fit at the time.

Mesa Board of Directors had to keep regular accounts of their dealings. The minutes of a Board of Directors for a closely held corporation are simple enough; a record of date and time of the meeting, the members present and what was discussed. Mesa, when asked by the court, could not produce those. People allegedly serving on the board couldn't recall having meetings outside of an occasional vague memory. This court ordered Mesa to produce the corporate minutes. They could not, or would not, do so. Kimberly Brooks, a party affiliated witness as corporate counsel, refused to produce them or testify. Testimony indicated that she would have possession of those records.

Thus the court can and does take an adverse inference relating to this. There are two possible conclusions, neither of which is good for Mesa. The first, that they never kept minutes of Board meetings because there were no Board meetings. Thus the company wasn't acting as a corporation and was ripe for interference by Garbino. The second, and arguably worse, is that there were minutes and they show Garbino's fingers in all the pies.

All this is to say that John Garbino arrived on scene in 2013 and de facto took over a company that was somehow surviving in spite of itself. He helped find them financing. He provided nearly all of their revenue stream. He was their savior. Without him they were nothing.

So while Mesa is correct that the determination of whether to pierce the veil is *fact-specific*. It is generally necessary that, "(1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow." *Mid-Century Ins. Co. v. Gardner* (1992) 9 Cal.App.4th 1205, 1212; *Zoran Corp. v. Chen* (2010) 185 Cal.App.4th 799, 815. Where they fail is that in order to wrap itself in the legal fiction of an entity separate and apart from those running it Mesa had to follow a very simple playbook. They were incapable of doing so. They never got to having separate "personalities" in the first place.

Also, in this context, the discussion of any wrongdoing or inequitable result under, *Sonora Diamond Corp. v. Superior Court*, 83 Cal.App.4th at 539. Here we are not concerned with a wrongdoing against individual insurance carriers, rather, it is a wrong perpetrated against the Workers' Compensation System. The State cannot, by looking the other way, allow an entity tainted by the fraudulent actions of one of its major players to potentially perpetrate further abuse within the Workers' Compensation System.

Kurtz and Garbino present themselves as accomplished and genial business men. They are calm. They are reasonable. Like used car salesmen, they smile a lot. Bud Birch is felon, convicted of bankruptcy fraud who had no business being involved with a pharmacy. Mytu Do should have stuck to flipping houses. Andrew Do is a hot mess. Mesa wants the court to look at the men “wearing suits” and not at the cadre of characters who held all the titles yet were running around like their hair was on fire.

Mesa also disputes the de facto standard as it does not exist under strict corporate law standards. We, however, are dealing in hybrid situation where the issue of de facto control of an entity is the standard but the WCAB avails itself of the elements of corporate law to build the framework of the decisions. The court looks to the significant panel decision in *Ana Villanueva v. Teva Foods* 84 Cal.Comp. (2019) Therein the Appeals Board clarified that the necessary control as defined in Labor Code section §139(a)(3), and by extension §4615, may be established with admissible evidence that the physician, practitioner or provider is or was an “officer or a director” of the entity; is or was “a shareholder with a 10 percent or greater interest” in the entity; or ***has or does hold de facto ownership of the entity; or, has or does exercise de facto control consistent with the rights and duties of an officer or director of the entity.***

Thus “legal” participation in corporate governance is not what matters. The court can, and does, look to whether the facts demonstrate that there was a person behind the curtain pulling on the strings. Garbino showed up, turned on the music, and Kurtz and the others waltzed into the pile of cash that stood to be made. He told them what to do and how to do it. He connected them with financiers. He supplied the pool of doctors to write the prescriptions Mesa would fill. He made them rich on paper. He was the catalyst that catapulted Mesa from a corner drug store to being in reach of nationwide chain status. Mesa’s two-bit cast of grifters with a reasonably intelligent front-man found a real crook to teach them to do business. Now they have to live with the taint of his wrong-doings.

Conclusion

For all the forgoing reasons the Court finds that Garbino had de facto control of Mesa Pharmacy enough to subject Mesa, and its liens, to proceedings under Labor Code §139.21(e).

DATE: February 5, 2021



Amy Britt
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

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