

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Eastern Comfort Assisted Living :
(ECAL) IV and V, :
Petitioners :
 : No. 959 C.D. 2013
v. :
 : Submitted: November 1, 2013
Department of Public Welfare, :
Respondent :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH

FILED: February 11, 2014

Eastern Comfort Assisted Living (ECAL) IV and V (Petitioners) petition for review of the May 7, 2013 final administrative action order of the Department of Public Welfare (Department), Bureau of Hearings and Appeals (BHA), adopting in its entirety the recommendation of an administrative law judge (ALJ) to deny Petitioners' appeal of the Department's determination directing Steven Miga (Miga) to cease operating an unlicensed personal care home and issuing him a \$500.00 fine. We affirm.

Miga is the president and sole shareholder of Steven J., Inc., the corporation that owns ECAL IV and V, as well as ECAL I, a licensed personal care home located in Easton, Pennsylvania. ECAL IV and V are located in Palmerton, Pennsylvania, and had been licensed personal care homes until 2010. ECAL IV and

V are on separate plots of land but are within 150 feet of each other, and there is a connecting pathway between the two buildings. ECAL IV and V are commonly referred to as the “blue” and “yellow” buildings. As the result of a zoning board order limiting ECAL I’s capacity in Easton to sixteen residents, ECAL I transferred six residents to ECAL IV and V.¹ A personal care home was recommended for at least three of these six residents. (Findings of Fact Nos. 1-8.)

On March 19, 2012, Department representatives Jason Harvey and Leslie Patton conducted on-site inspections of ECAL IV and V. The inspections revealed that ECAL IV and V were staffed by only two people, each serving both buildings and working twelve-hour shifts. The six residents of ECAL IV and V had various health and mental health issues and required assistance with daily living activities, including medication administration. All meals and medication were distributed in ECAL IV, although three residents slept at ECAL IV and three slept at ECAL V. (Findings of Fact Nos. 9-12.)

As a result of these inspections, the Department sent a letter to Miga dated March 28, 2012, directing that he cease operating an unlicensed personal care home at ECAL IV and V and that he pay a fine of \$500.00 for illegal operation of a personal care home. (Finding of Fact No. 14.) By letter received April 2, 2012, on ECAL IV and V letterhead, Miga appealed the Department’s decision. (Finding of Fact No. 15.) The matter was assigned to an ALJ, who conducted a hearing on June 19, 2012.

Louis Bisignani, director of the Department’s Northeast Regional Office of Adult Residential Licensing, testified that, subsequent to the inspections at ECAL IV and V, he spoke with Diane Deemer, administrator of ECAL I, and she provided

¹ The date of this transfer is not evident in the record.

him with the medical evaluations for the six residents transferred from ECAL I to ECAL IV and V. Deemer informed him that the residents were transferred because of a zoning board order limiting ECAL I's capacity to sixteen residents. Bisignani explained that the Department initiated the inspections following an anonymous complaint that an unlicensed personal care home was being operated at ECAL IV and V. Bisignani identified Miga's April 2, 2012, appeal letter and indicated that the letter was accompanied by a personal check from Miga in the amount of \$500.00. (Reproduced Record (R.R.) at 10-16.)²

On cross-examination, Bisignani acknowledged that he did not know who owned the properties in Palmerton upon which ECAL IV and V sit and that he was surprised to learn that the properties were separately deeded. Bisignani noted that, historically, ECAL IV and V were operated by an entity known as ECAL, Inc. Bisignani also acknowledged that the Department's inspection revealed that three residents slept at ECAL IV and three residents slept at ECAL V. Bisignani stated that these residents had been paying ECAL I prior to their transfer and he understood, from his conversation with Deemer, that ECAL I was still receiving payment from these residents, even though ECAL I is not permitted to provide services off-site. (R.R. at 16-26.)

Bisignani could not explain why the Department's March 28, 2012 letter was directed to Miga, other than the fact that his report contained a statement from Deemer that the residents were transferred from ECAL I at Miga's direction. However, Bisignani stated that, for purposes of licensing, the Department does not

² The reproduced record does not contain the "small a" after the Arabic numerals, as required by Pa.R.A.P. 2173.

take action against corporations; rather, it takes action against the legal entity listed on the articles of incorporation. (R.R. at 26-33.)

Harvey, the Department's licensing representative who inspected ECAL IV, testified that he met staff member Kelly Dodder at the facility. After Harvey explained the purpose of his visit, Dodder stated that she had to call Miga and Deemer. Harvey observed four residents in ECAL IV when he arrived, with another resident arriving later.³ Harvey interviewed Dodder and all of the residents. Harvey testified that Dodder was the only staff member present at the facility and that she and another staff member worked twelve-hour shifts. According to Harvey, Dodder was responsible for serving meals, laundry, medication, and transportation for appointments. Harvey noted that meals were prepared and provided in ECAL IV and that medication was also distributed in ECAL IV. In fact, Harvey observed a locked medication cart in the kitchen of ECAL IV. (R.R. at 46-57.)

On cross-examination, Harvey acknowledged that he did not speak to the other staff member from ECAL IV and did not know where that staff person provided medication or meals or did laundry. Harvey also conceded that he did not check whose medication was in the locked medication cart in the kitchen area of ECAL IV. Harvey admitted that Dodder informed him that there were three residents each in ECAL IV and V. On re-direct, Harvey stated that Dodder informed him that no medications were distributed in ECAL V. Upon questioning from the ALJ, Harvey stated that all meals and medications were served at ECAL IV. Harvey also testified that Dodder informed him that she was responsible for all six residents during her shift. (R.R. at 65-80.)

³ Harvey consistently referred to the blue house and the yellow house throughout his testimony. For purposes of clarity, we will refer to these buildings as ECAL IV and V.

Patton, the Department's licensing representative who inspected ECAL V, testified that Dodder informed her that while three residents slept in that building, services such as meal preparation and serving and medication administration, were provided in ECAL IV. Patton stated that she observed no food or other evidence of cooking in the kitchen area of ECAL V, nor any medication storage area or container. On cross-examination, Patton acknowledged that she did not open any cabinets in the kitchen to look for pots or pans or food, but she did find the refrigerator to be empty. While Patton did not observe any laundry facilities in ECAL V, she could not state with certainty whether the building contained any such facilities. Patton conceded that she did not look into every room in the building. (R.R. at 83-94.)

Miga testified that he is merely a stockholder of certain companies that own personal care facilities, including ECAL I, II, III. Miga noted that he had also been a shareholder in ECAL IV, which ceased operations two years earlier. Miga described the operation of these companies, explaining that the residents receive Supplemental Security Income (SSI) and that the personal care homes receive federal funding and a state subsidy to care for the residents. Miga noted that he had a contractual relationship with one personal care facility, ECAL I, and he was familiar with the residents in question. (R.R. at 101-08.)

Miga confirmed that the six residents were transferred from ECAL I because of a zoning order limiting the number of residents at that facility. However, Miga denied any personal involvement with this transfer or with any other operation at the personal care facility. Miga specifically denied any ownership interest in ECAL IV and V, noting that those properties are owned by Steven J., Inc. Miga stated that he was a shareholder in Steven J., Inc. Miga testified that the residents pay ECAL I for the services they receive at ECAL IV and V, and that ECAL I pays rent

to Steven J., Inc., for use of these two properties. In other words, Miga indicated that ECAL I leases ECAL IV and V from Steven J., Inc. (R.R. at 108-13.)

On cross-examination, Miga acknowledged that he is the sole stockholder and president of Steven J., Inc. Miga also acknowledged that he is the sole stockholder and president of ECAL I. Upon questioning from the ALJ, Miga stated that ECAL IV and V are no longer in operation, and that he refers to these buildings simply as the blue and yellow buildings. Miga explained that there never was an ECAL V, that both buildings were operated by ECAL IV, Inc., and that the Department created ECAL V to differentiate the buildings. However, Miga indicated that both buildings were shut down by the Department in 2010. Miga specifically denied that ECAL IV and V were being operated as a personal care home. (R.R. at 113-24.)

On re-direct examination, Miga clarified that prior to 2010, ECAL IV, Inc., operated both ECAL IV and V, with each building being separately licensed by the Department. Miga noted that another corporation had applied for, but was denied, new licenses for ECAL IV and V. On re-cross, Miga stated that the corporation that applied for the new licenses was ECAL III, of which he is the sole stockholder and president. (R.R. at 125-29.)

In her adjudication, the ALJ credited the testimony of the Department's witnesses and rejected Miga's testimony as not credible. Based on this credible testimony and the findings described above, the ALJ concluded that:

Although ECAL IV and V were two separate buildings for property and tax purposes, they essentially operated as *one premise* for the purpose of providing food, shelter and personal assistance or supervision, for more than 24 hours, for four or more adults who were not related to the operator that did not require the service in or of a licensed long-term facility, but did require assistance or supervision in

activities of daily living [ADL] or instrumental activities of daily living [IADL].

(ALJ's Adjudication at 7) (emphasis in original). The ALJ noted that section 2600.4 of DPW's regulations defines "[p]remises" as "grounds and buildings on the same grounds used for providing personal care services." 55 Pa. Code §2600.4 (emphasis in original). The ALJ indicated that ECAL IV and V met this definition.

Additionally, while only three adults slept in each building, the ALJ concluded that ECAL IV and V "were two buildings which operated as one and run as if it were *one* PCH [personal care home]." (ALJ's Adjudication at 7) (emphasis in original). In this regard, the ALJ noted that there was only one staff person available to assist the six adults living in ECAL IV and V with ADL and IADL. Indeed, at the time of DPW's inspection, the ALJ indicated that Dodder was the only staff person at ECAL IV and V and that she was responsible for administration of medication, transportation, laundry, and feeding all of the adult residents. The ALJ described each of these residents, former residents of ECAL I, as requiring "various levels of supervision and medication administration" for numerous "mental and physical health needs." (ALJ's Adjudication at 8.)

With respect to Miga, the ALJ found that his testimony was "not credible" and that it "appeared to be carefully calculated and rehearsed. . . ." *Id.* The ALJ noted that Miga was familiar with the way a PCH operates, the names of the residents transferred from ECAL I, and the reasons underlying their transfer, i.e., problems with zoning and a sprinkler system. The ALJ also noted that Miga was the president and sole shareholder of ECAL I and Steven J., Inc., the latter of which owns ECAL IV and V. Finally, the ALJ indicated that Miga filed his appeal request on ECAL IV and V letterhead. For these reasons, in her May 7, 2013 adjudication, the ALJ recommended that Petitioners' appeal be denied. By order of

the same date, BHA’s Chief ALJ adopted the ALJ’s recommendation in its entirety. Petitioners thereafter filed a petition for review with this Court.

On appeal,⁴ Petitioners argue that BHA erred in concluding that ECAL IV and V were being operated as a personal care facility. We disagree.

Section 1001 of the Public Welfare Code (Code)⁵ defines a “personal care home” as:

[A]ny premises in which food, shelter and personal assistance or supervision are provided for a period exceeding twenty-four hours for four or more adults who are not relatives of the operator, who do not require the services in or of a licensed long-term care facility but who do require assistance or supervision in such matters as dressing, bathing, diet, financial management, evacuation of a residence in the event of an emergency or medication prescribed for self administration.

62 P.S. §1001.

The Department’s regulations similarly define a “[p]ersonal care home” as:

(i) A premise in which food, shelter and personal assistance or supervision are provided for a period exceeding 24 hours, for four or more adults who are not relatives of the operator, who do not require the services in or of a licensed long-term care facility, but who do require assistance or supervision in activities of daily living or instrumental activities of daily living.

⁴ Our scope of review is limited to determining whether the BHA abused its discretion, committed an error of law, or made unsupported findings of fact. Section 704 of the Administrative Agency Law, 2 Pa.C.S. §704; *Gilroy v. Department of Public Welfare*, 946 A.2d 194 (Pa. Cmwlth. 2008).

⁵ Act of June 13, 1967, P.L. 31, *as amended*, 62 P.S. §1001.

(ii) The term includes a premise that has held or presently holds itself out as a personal care home and provides food and shelter to four or more adults who need personal care services, but who are not receiving the services.

55 Pa. Code §2600.4. While the term “premises” is not defined in the Code, the Department’s regulations, as noted above, define this term as “[t]he grounds and buildings on the same grounds, used for providing personal care services.” *Id.*

This same regulation defines “[p]ersonal care services” as “[a]ssistance or supervision in ADL or IADL, or both.” *Id.* ADL includes “eating, drinking, ambulating, transferring in and out of a bed or chair, toileting, bladder and bowel management, personal hygiene, securing health care, managing health care, self-administering medication and proper turning and positioning in a bed or chair.” *Id.* IADL includes:

[T]he following activities when done on behalf of a resident:

- (i) Doing laundry.
- (ii) Shopping.
- (iii) Securing and using transportation.
- (iv) Managing finances.
- (v) Using a telephone.
- (vi) Making and keeping appointments.
- (vii) Caring for personal possessions.
- (viii) Writing correspondence.
- (ix) Engaging in social and leisure activities.
- (x) Using a prosthetic device.
- (xi) Obtaining and keeping clean, seasonal clothing.

Id.

The BHA concluded that ECAL IV and V were being operated as a single, unlicensed personal care home. This conclusion was supported by the ALJ’s findings and the undisputed testimony before the ALJ. For example, this testimony revealed that six individuals resided at the premises for more than a twenty-four-hour

period and that the premises were staffed by two individuals, each working a twelve-hour shift. Furthermore, this testimony established that the residents required and received personal care services in the nature of meal preparation, medication administration, laundry services, and transportation to and from appointments, but did not require the services of a long-term care facility.

We are not persuaded by Petitioners' reliance on the fact that ECAL IV and V constitute separate, and legally distinct, properties. Upon review of the testimony cited above, we are convinced that the BHA properly concluded that these two properties were being operated as a single facility. Additionally, while ECAL contends in its brief to this Court that food, medication, and personal assistance were provided at each of these properties, the record does not support that contention. Further, we are not persuaded by the fact that each building houses only three residents. A review of the record reveals that all of the personal care services were provided in a single building. Thus, we conclude that the BHA did not err in determining that ECAL IV and V were being operated as a personal care facility.

Next, Petitioners argue that the BHA erred in ordering Miga to cease and desist operating a personal care home and in imposing the fine against him. Again, we disagree.

With respect to penalties, section 1086(e) of the Code⁶ provides that:

A personal care home or assisted living residence found to be operating without a license shall be assessed a penalty of five hundred dollars (\$500). If, after fourteen days, a provider cited for operating without a license fails to file an application for a license, the department shall assess an additional twenty dollars (\$20) for each resident for each

⁶ Added by the Act of December 21, 1988, P.L. 1883, *as amended*, 62 P.S. §1086(e).

day in which the home or residence fails to make such application.

62 P.S. §1086(e).⁷

Petitioners argue that, by sending the cease and desist letter to Miga and imposing the fine against him in his individual capacity, the BHA inappropriately pierced the corporate veil. We cannot agree. “Piercing the corporate veil is an extraordinary remedy reserved for cases involving exceptional circumstances.” *Newcrete Products v. City of Wilkes-Barre*, 37 A.3d 7, 12 (Pa. Cmwlth.), *appeal denied*, 616 Pa. 648, 48 A.3d 1250 (2012) (citations omitted). “There is a strong presumption against piercing the corporate veil, and the independence of separate corporate entities is presumed.” *Id.* However, while the accepted rule in Pennsylvania is that a corporation is an entity distinct from its shareholders even if the stock is held entirely by one person, the corporate entity can sometimes be justifiably pierced, such as when the person in control of a corporation uses that control or corporate assets to further his own personal interests. *College Watercolor Group, Inc. v. William H. Newbauer, Inc.*, 468 Pa. 103, 116-17, 360 A.2d 200, 207

⁷ The Department’s regulations essentially mirror this section of the Code, stating as follows:

If a home is found to be operating without a license, a penalty of \$500 will be assessed. After 14 days, if the home operator cited for operating without a license fails to file an application for a license, the Department will assess an additional \$20 for each resident for each day during which the home operator fails to apply.

55 Pa. Code §2600.262(g).

(1976). In such circumstances, the shareholder, in effect, pierces the corporate veil by intermingling his personal interests with the corporation's interests.⁸ *Id.*

In the present case, the record established that Miga was the president and sole shareholder of Steven J., Inc., the corporation that owns ECAL IV and V, as well as ECAL I. Miga is also the sole stockholder and president of ECAL I, Inc., which operates ECAL I, and ECAL IV, Inc., which remains an active corporation, and previously operated the licensed personal care homes at ECAL IV and V. Indeed, Miga's April 2, 2012 appeal letter was on ECAL IV and V letterhead. In addition, Miga himself directed that the residents of ECAL IV and V be transferred there from ECAL I, and he was fully aware of the circumstances surrounding this transfer and the operation of all of these corporate entities. Thus, the BHA did not err in ordering Miga to cease and desist operating a personal care home and in imposing the fine against him.

Accordingly, the final administrative action order of the BHA is affirmed.

PATRICIA A. McCULLOUGH, Judge

⁸ While there is no bright-line test for when to pierce the corporate veil, courts have looked at the following factors: “[1] [u]ndercapitalization, [2] failure to adhere to the corporate formalities, [3] substantial intermingling of corporate and personal affairs and [4] use of the corporate form to perpetrate a fraud.” *Newcrete Products*, 37 A.3d at 13 (citing *Lumax Industries, Inc. v. Aultman*, 543 Pa. 38, 42, 669 A.2d 893, 895).

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	:	
Department of Public Welfare,	:	
Respondent	:	

ORDER

AND NOW, this 11th day of February, 2014, the final administrative action order of the Department of Public Welfare, Bureau of Hearings and Appeals, dated May 7, 2013, is hereby affirmed.

PATRICIA A. McCULLOUGH, Judge