

Ahcom, Ltd. v. Smeding, 623 F.3d 1248 (2010)

53 Bankr.Ct.Dec. 223, 10 Cal. Daily Op. Serv. 13,331, 2010 Daily Journal D.A.R. 16,125

623 F.3d 1248
United States Court of Appeals,
Ninth Circuit.

AHCOM, LTD., Plaintiff–Appellant,
v.
Hendrik **SMEDING**; Lettie
Smeding, Defendants–Appellees.

No. 09–16020.

|
Argued and Submitted March 8, **2010**.

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Filed Oct. 21, **2010**.

Synopsis

Background: Judgment creditor that won international arbitration award against corporation that subsequently filed for Chapter 11 bankruptcy brought action against corporation's sole shareholders, seeking to pierce corporate veil and collect its arbitration award. The United States District Court for the Northern District of California, [Samuel Conti, J., 2009 WL 1108658](#), granted shareholders' motion to dismiss, and creditor appealed.

[Holding:] The Court of Appeals, [Wallace](#), Senior Circuit Judge, held that creditor, rather than corporation's Chapter 11 bankruptcy trustee, had standing to assert claim against corporation's shareholders.

Reversed and remanded.

Attorneys and Law Firms

***1249** [William H. Parish](#), Parish & Small, Stockton, CA, for the plaintiff-appellant.

[John G. Michael](#), Baker, Manock & Jensen, Fresno, CA, for the defendants-appellees.

Appeal from the United States District Court for the Northern District of California, [Samuel Conti](#), District Judge, Presiding. D.C. No. 3:07–cv–01139–SC.

Before: [J. CLIFFORD WALLACE](#), [SUSAN P. GRABER](#)
and [M. MARGARET McKEOWN](#), Circuit Judges.

OPINION

[WALLACE](#), Senior Circuit Judge:

This case poses the question of whether a creditor of a corporation in bankruptcy has standing to assert a claim against the corporation's sole shareholders on an alter ego theory or whether that claim belongs solely to the corporation's bankruptcy trustee. The district court had jurisdiction pursuant to [28 U.S.C. § 1332](#) and concluded that the claim belonged solely to the trustee. We have jurisdiction over this timely appeal under [28 U.S.C. § 1291](#), and we reverse and remand for further proceedings.

I.

Plaintiff-appellant [Ahcom](#), Ltd. ([Ahcom](#)), a United Kingdom-based corporation, entered into a contract to buy almonds from Nuttery Farms, Inc. (NFI), a California corporation. NFI allegedly failed to deliver the contracted-for almonds. Pursuant to a clause in the contract, [Ahcom](#) brought, and prevailed in, an arbitration action against NFI in the Court of Arbitration of the Waren–Verein der Hamburger Boerse e.V. [Ahcom](#) then sued in California state court to collect its arbitration award. However, it did not sue NFI, which had petitioned for bankruptcy soon after the arbitration. Instead, [Ahcom](#) sued NFI's sole owners, defendants-appellees Hendrik and Lettie [Smeding](#), seeking to pierce NFI's corporate veil. The [Smedings](#) removed the suit to the Northern District of California and successfully moved to dismiss the action. That dismissal is the subject in this appeal.

[Ahcom's](#) first amended complaint (FAC) asserted two substantive claims, one related to the foreign arbitration award and one related to a breach of contract. [Ahcom](#) also alleged an alter ego claim whereby they sought to pierce the corporate veil to hold the [Smedings](#) responsible for NFI's actions. Crucially, both of [Ahcom's](#) substantive claims to recover the arbitration award and the contract-related damages, by their terms, depend on the success of [Ahcom's](#)

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alter ego allegations. Without those allegations, **Ahcom** has no claim against the **Smedings**.

In their motion to dismiss, the **Smedings** attacked **Ahcom's** alter ego theory. They argued that **Ahcom** is asserting a claim that harms not just **Ahcom** but all creditors and thus this claim is exclusively the *1250 property of the trustee. The district court agreed and dismissed **Ahcom's** complaint without leave to amend, which we interpret as dismissal of the action, giving us jurisdiction. *Gompper v. VISX, Inc.*, 298 F.3d 893, 898 (9th Cir.2002). **Ahcom** now appeals.

II.

[1] The question in this appeal is whether the claims against the **Smedings** can be brought by **Ahcom** or by the trustee. We review de novo the district court's dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. *Cervantes v. United States*, 330 F.3d 1186, 1187 (9th Cir.2003).

[2] A Chapter 11 bankruptcy trustee has a special role. The trustee “stands in the shoes of the bankrupt corporation and has standing to bring any suit that the bankrupt corporation could have instituted had it not petitioned for bankruptcy.” *Smith v. Arthur Andersen LLP*, 421 F.3d 989, 1002 (9th Cir.2005) (internal quotation marks omitted); 11 U.S.C. §§ 704(1), 541(a)(1). However, the trustee's power is limited. The trustee may assert only claims belonging to the debtor corporation and “has no standing generally to sue third parties on behalf of the estate's creditors.” *Smith*, 421 F.3d at 1002 (internal quotation marks omitted).

[3] When the trustee does have standing to assert a debtor's claim, that standing is exclusive and divests all creditors of the power to bring the claim. *Estate of Spirtos v. One San Bernardino Cnty. Superior Court Case*, 443 F.3d 1172, 1176 (9th Cir.2006). Although federal bankruptcy law applies to this action, state law determines whether a claim belongs to the trustee or to the creditor. *Butner v. United States*, 440 U.S. 48, 54-55, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979); see also *St. Paul Fire & Marine Ins. Co. v. PepsiCo, Inc.*, 884 F.2d 688, 700 (2d Cir.1989). The parties agree that California law applies because NFI is a California corporation.

The focus of our inquiry is on **Ahcom's** FAC, which asserts two substantive claims: (1) “Confirmation of Foreign Arbitration Award against all Defendants,” and (2) “Breach of contract against all Defendants.” In an attempt to hold the **Smedings** responsible for NFI's actions, the substantive claims rely on one procedural claim: “Alter Ego against all Defendants.” Pursuant to that claim, the FAC alleges that “Defendants controlled, dominated and operated [NFI] as their individual business and alter ego”; “Defendants diverted funds and other assets of [NFI] for other than corporate uses”; “Defendants treated the assets of [NFI] as their own”; and “Defendants diverted assets from [NFI] to themselves to the detriment of creditors, including Plaintiff.”

According to the **Smedings**, these allegations in general, and the last one specifically, are evidence that **Ahcom** is improperly trying to sue for general conduct that harmed all creditors. “The alter ego claim alleged by **Ahcom** is ... a general claim,” the **Smedings** argue and,

[i]n effect, it alleges dissipation of corporate assets to the detriment of all creditors. There is even an express allegation that the diversion of corporate assets affected all creditors, including **Ahcom**. **Ahcom** alleges only a general claim, which belongs exclusively to the trustee and the district court was correct in dismissing it.

To be sure, **Ahcom's** FAC is not a model of clarity and **Ahcom's** attempt to amend the FAC upon receiving the **Smedings'** 12(b)(6) motion is understandable. The FAC has troubling allegations, including its assertion of a general alter ego “claim” in which the **Smedings** allegedly diverted *1251 corporate assets to the detriment of *all creditors*. However, although the **Smedings** prevailed in the district court, there is a crucial problem with their argument: it assumes the existence of a general alter ego claim. We therefore examine whether such a claim exists under California law.

III.

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[4] The issue is not so much whether, *for all purposes*, the corporation is the “alter ego” of its stockholders or officers, [or] whether the very purpose of the organization of the corporation was to defraud the individual who is now in court complaining, as it is an issue of whether *in the particular case presented and for the purposes of such case* justice and equity can best be accomplished and fraud and unfairness defeated by a disregard of the distinct entity of the corporate form.

Mesler v. Bragg Mgmt. Co., 39 Cal.3d 290, 216 Cal.Rptr. 443, 702 P.2d 601, 606–07 (1985) (internal quotation marks omitted) (emphases added); *see also Communist Party of U.S. v. 522 Valencia, Inc.*, 35 Cal.App.4th 980, 41 Cal.Rptr.2d 618, 627 (1995) (no California case found in which “the alter ego doctrine has been employed to establish a relationship of identity between the defendant corporation and the plaintiff”). In fact, there is no such thing as a substantive alter ego claim at all: “A claim against a defendant, based on the alter ego theory, is not itself a claim for substantive relief, e.g., breach of contract or to set aside a fraudulent conveyance, but rather, procedural....” *Hennessey’s Tavern, Inc. v. Am. Air Filter Co.*, 204 Cal.App.3d 1351, 251 Cal.Rptr. 859, 863 (1988).

Notwithstanding this precedent, the **Smedings** argue that *Stodd v. Goldberger* created a “general alter ego claim” that a trustee can assert on behalf of all creditors. 73 Cal.App.3d 827, 141 Cal.Rptr. 67 (1977). In *Stodd*, a bankruptcy trustee sued the debtor’s shareholders “on the theory of alter ego [to] establish defendants’ personal liability for all of [the debtor’s] debts.” *Id.* at 70. The trial court dismissed the action and the California Court of Appeal affirmed, holding that a trustee “cannot maintain an action against defendants on an alter ego theory *absent some allegation of injury to the corporation giving rise to a right of action in it against defendants*,” without which “the asserted cause of action belongs to each creditor individually, and [the trustee] is not the real party in interest.” *Id.* at 71 (emphasis added).

A bankruptcy court and a bankruptcy appellate panel (BAP) in this circuit have relied on *Stodd*, in particular the “absent some allegation of injury to the corporation” passage, to conclude that California law permits a corporation to bring a general alter ego claim against its owners. In *In re Davey Roofing, Inc.*, the United States Bankruptcy Court for the Central District of California relied on *Stodd* in holding that, under California law, a corporation can proceed on

an alter ego claim against its shareholder as long as it alleges some “injury to the corporation.” 167 B.R. 604, 608 (Bankr.C.D.Cal.1994). *Davey Roofing* explained,

[i]n the case at bar, [a creditor] alleges that Debtor’s principal misappropriated for his own benefit assets belonging to the bankrupt corporation, to the detriment of the estate and all of Debtor’s creditors, rather than any individual creditor. Thus, Debtor is the proper party to assert alter ego claims, and all of Debtor’s creditors are bound by the outcome of the estate’s action.

Id.

A few years later, the **Ninth Circuit** BAP—whose rulings are persuasive but *1252 not binding authority in this court, *Bank of Maui v. Estate Analysis, Inc.*, 904 F.2d 470, 472 (9th Cir.1990)—adopted *Davey Roofing’s* reasoning. In *CBS, Inc. v. Folks (In re Folks)*, under facts similar to those in *Davey Roofing*, the creditor, CBS, alleged that: “Folks [the owner] has treated BYCA [the corporation] as his alter ego,” “Folks used the bank accounts and funds of BYCA for his own personal expenditures,” and that “Folks failed to observe any of the corporate formalities with respect to BYCA.” 211 B.R. 378, 387 (9th Cir.BAP1997). According to *Folks*, the court in *Stodd* “recognized that the corporate bankruptcy trustee has standing to assert an alter ego claim if injury to the corporation is alleged, otherwise each creditor individually has standing.” *Id.* at 385. *Folks* held that CBS was asserting a general alter ego claim “because all creditors are affected and [there was] no particularized injury to CBS.” *Id.* at 387. Therefore, *Folks* concluded, only the BYCA trustee, not CBS, had standing to bring a general alter ego action on behalf of BYCA. *Id.* at 388.

Folks and *Davey Roofing* misread *Stodd*. *Stodd* clarified the passage upon which *Folks* and *Davey Roofing* rely to imply a general alter ego claim (that a trustee “cannot maintain an action against defendants on an alter ego theory *absent some allegation of injury to the corporation giving rise to a right of action in it against defendants*”) by citing examples of what constitutes such an injury: “an action by a trustee in bankruptcy to recover assets of the bankrupt by setting aside *fraudulent and preferential transfers*”; “an action by

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creditors and a trustee in bankruptcy for *conversion by a corporate stockholder of assets of the bankrupt corporation*”; “*an action by the trustee of a bankrupt corporation against the sole shareholders on an alter ego theory upon allegations that ... defendants deposited corporation funds into their personal bank accounts or that corporation funds were received by the defendants personally.*” *Stodd*, 141 Cal.Rptr. at 71 (internal quotation marks omitted) (emphases added). These examples illustrate that *Stodd* was not, as the **Smedings** maintain, creating a “general alter ego claim.” Instead, *Stodd* was attempting to distinguish established “right[s] of action” that are properly brought by the trustee (fraudulent conveyance, conversion, and theft, to take the examples from the list above) from those that are not. Under *Stodd*, the trustee can sue for the former but not for the latter. *Id.* This reading is unavoidable when we consider that no California court has recognized a freestanding general alter ego claim that would require a shareholder to be liable for all of a company's debts and, in fact, the California Supreme Court stated that such a cause of action does not exist. *Mesler*, 216 Cal.Rptr. 443, 702 P.2d at 606–07.

Indeed, if we were to adopt *Folks* ' and *Davey Roofing* 's readings of *Stodd*, *Stodd* would contradict itself. *Stodd* teaches that a trustee “is not an appropriate general representative of creditors.” 141 Cal.Rptr. at 72. Yet, that is exactly what *Folks* and *Davey Roofing* have made it out to be by allowing the trustee to bring a claim for a made-up cause

of action “because all creditors are affected.” *Folks*, 211 B.R. at 387.

[5] Thus, we conclude that California law does not recognize an alter ego claim or cause of action that will allow a corporation and its shareholders to be treated as alter egos for purposes of all the corporation's debts. Just because NFI's trustee could not bring such a claim against the **Smedings** under California law, there is no reason why **Ahcom's** claims against the **Smedings** cannot proceed.

***1253 IV.**

Ahcom argued in the alternative that the district court abused its discretion in denying **Ahcom** leave to file a second amended complaint. Because we hold that **Ahcom's** complaint should not have been dismissed, we need not address the question of whether **Ahcom** should have been permitted to amend the complaint. Finally, we deny as moot the **Smedings's** motion to strike the appendix which contains the second amended complaint.

REVERSED AND REMANDED.

All Citations

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