

ORIGINAL

Decision No. 90097 | MAR 27 1973

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

A-ACTION COMPANY, a corporation,)

Complainant,)

vs.)

THE PACIFIC TELEPHONE AND
TELEGRAPH COMPANY,

Defendant.)

Case No. 10109
(Filed June 2, 1976)

William N. Pabarcus, Attorney at
Law, for complainant.
Karen S. Newman, Attorney at Law,
for defendant.

O P I N I O N

Complainant, A-Action Company (A-Action), alleges that defendant has wrongfully denied classified directory advertising to complainant. To the extent that the complaint purports to incorporate by reference a San Diego County Superior Court complaint, attached to the complaint herein, and with the addition of the allegations in the complaint herein, complainant has alleged the following: (1) that complainant requested of defendant on June 18, 1973 certain yellow page advertising and offered to pay defendant in advance, and defendant refused to accept complainant's advertising; and (2) that complainant requested of defendant certain yellow page advertising in February and June of 1974, May of 1975, and on February 12, 1976, and in each case offered to pay in advance, and defendant responded on May 14, 1976 with a denial of the request for yellow page

advertising. The complaint further alleges that defendant's denial is based on defendant's belief that complainant is too closely associated with A-Advanced Products Company (A-Advanced). The complaint alleges that complainant and A-Advanced are separate entities; and while complainant bought a portion of A-Advanced, the principal shareholder of complainant had no interest in A-Advanced. In addition, the complaint alleges that defendant is authorized by the Commission to collect in advance or to procure some other form of guaranteed payment from an advertiser and that, although defendant has extended this privilege to other advertisers, defendant's denial of that option to complainant is discriminatory. Complainant requests an order of the Commission that defendant be required to accept complainant's advertising for forthcoming yellow page telephone directories, provided complainant pays the applicable charges in advance. No damages or other reparations are requested.

In its answer, filed July 7, 1976, defendant admits that complainant requested yellow page advertising in February of 1976 and that complainant offered to pay in advance. The answer admits that defendant refused such advertising to complainant and alleges that complainant has never offered to satisfy the outstanding debt of A-Advanced for previous directory advertising charges. Defendant further admits that its denial of advertising to complainant is based on defendant's belief that complainant is too closely associated with an entity known as A-Advanced, which is currently being sued by defendant for delinquent yellow page advertising charges. Defendant admits that complainant in this case is not a party to the collection action by defendant against A-Advanced. Defendant denies that complainant and A-Advanced are separate entities or that the principal shareholders of complainant had no interest in A-Advanced. Defendant further denies that it has been authorized by the Commission to collect yellow page advertising charges in advance or to procure some other guaranteed form of payment as a sole condition

for acceptance of advertising orders from an entity which is delinquent on past directories, or that defendant has extended that option to any other advertisers. In addition, defendant denies that its refusal of yellow page advertising to complainant is discriminatory, nonuniform, or against public policy. Defendant further denies, on information and belief, that complainant has been and will continue to be injured as a result of defendant's actions alleged in the complaint.

As an affirmative defense, defendant alleges: that its actions were taken in reliance on its tariff Schedule Cal. P.U.C. 39-T, Special Condition No. 9a; that complainant has offered to pay in advance or to guarantee payment for future advertising but has made no offer to pay any past-due charges for its alter ego, A-Advanced; that A-Advanced and complainant are in effect the same entity; and that defendant's application of Special Condition No. 9a is reasonable and justified.

After extensive discovery by both parties, defendant filed on December 21, 1976 a motion to dismiss the complaint on the grounds that complainant is the alter ego of another entity which is indebted to the defendant for yellow page advertising and that complainant willfully refused to answer interrogatories. On March 7, 1977 a hearing was held to receive oral argument on defendant's motion to dismiss before an Administrative Law Judge who had previously been assigned to the case. The motion to dismiss is now denied. A hearing was held in San Diego on December 13, 1978 before Administrative Law Judge James D. Tante and the parties filed briefs in the form of letters to the hearing officer on or before December 29, 1978. At the request of complainant, the time for the presentation of the briefs was extended to January 3, 1979 and the matter was submitted on that date.

On January 3, 1979 a letter was received by the hearing officer from the attorney for complainant. Enclosed therewith was a brief which the letter stated was prepared by the attorney's client, and was signed by Mrs. Margaret O. Brothers, president of A-Corp. Accompanying the letter and brief was an unsworn statement of facts and review signed by Mr. Philip R. Brothers, a purported decision and recommendation of the hearing officer for the Board of Equalization of the State of California, and a notice of issuance of securities, all of which were attached to the letter, but cannot be considered as evidence in this proceeding.

Complainant's Evidence

Mrs. Brothers testified for complainant (A-Action is a division of A-Corp, a corporation). She testified that the complaint was filed by her husband, Mr. Brothers. He was president of complainant at the time the complaint was filed, but has not been an officer since March of 1978.

The witness stated that she was vice president when A-Corp was formed in June of 1973, and since March of 1978 she has been president. Mrs. Sharon Swaner, her daughter, is vice president and Mrs. Karen White is secretary-treasurer.

The witness testified that she owns 1 percent and Mrs. Swaner owns 99 percent of the stock. When the corporation was formed in 1973, the witness owned 45 percent and her husband, Mr. Brothers, owned the remaining 55 percent of the stock. In 1977, after this case was filed, Mr. Brothers conveyed his 55 shares and the witness conveyed 44 of her shares to Mrs. Swaner, their daughter.

She testified that A-Advanced was a fictitious name for a sole proprietorship which ceased doing business as A-Advanced in June of 1973. After complainant was incorporated, it offered

to pay defendant in advance for yellow page directory advertising for a directory year for the business of A-Action and the offer was rejected because of the balance that A-Advanced owed defendant for advertising.

She testified that A-Advanced was in the business of sales and service of home products and the repairing of appliances. A-Action has narrowed that business down to sales of rainjets, which are self-contained water fountains for decorative purposes and to the repair of garage doors and garage door openers. It does not engage in any other line of business. She stated that West Coast Development is another division of A-Corp, which operates a portable sawmill in the High Sierra Mountains.

The witness testified that from 1973 to the date of the hearing, complainant has not been able to place advertising with defendant in behalf of A-Corp or any of its divisions. She testified that A-Advanced was a sole proprietorship owned by Mr. Brothers, which was begun approximately in 1963, at which time she was and she is now married to Mr. Brothers. She stated that A-Advanced ceased doing business in approximately June 1973. A-Advanced was not sold, there was no inventory on hand that was sold, and it had no assets other than accounts receivables. The accounts receivables were transferred to A-Corp in return for its agreement to handle warranty service of customers that A-Advanced had during the time that it was operated by Mr. Brothers.

She stated that the address of A-Advanced and complainant was the same from 1969 to the present time. The building in which complainant does business was owned by Mr. Brothers and the witness until 1974 when it was transferred by them to the witness, and is now held in her name alone. The telephone numbers now used by complainant are the same as those that had been used by A-Advanced.

The witness testified that during the period 1970 to 1973 any property that her husband had in his name was community property of his and the witness'. The witness testified that A-Corp is a California corporation, incorporated under the laws of California, and is doing business as of the present time. She does not know whether the California Department of Corporations ever issued a permit to allow A-Corp to issue stock and she does not have any document, nor has she received any document, indicating that she is the owner or has been the owner of any stock in A-Corp. She stated that her husband, Mr. Brothers, handled matters of that nature and she was not familiar with what was done, but she knew she owned one share because her husband had told her so, and because it was set forth in the minutes of a Board of Directors meeting of A-Corp, held approximately in June of 1977. At that time her husband, her daughter, Mrs. Swaner, and David M. Phillips were the directors. She stated: that she did not pay for any shares of stock in A-Corp; that no shares were given to her; and that she did not know how she became an owner of stock. As to her daughter, Mrs. Swaner, the witness stated that there was some form of an agreement, or a gift, or an agreement to perform services in exchange for the issuance of stock to her. The witness stated that when her stock was transferred to Mrs. Swaner she received no compensation for the shares that were transferred, but the transfer was a part of an agreement between her daughter and her husband for services rendered, or to be rendered.

The witness testified that during the period 1973 to March of 1978, Mr. Brothers entered into contracts with third parties in behalf of A-Corp. During the period 1973 to March of 1978 when she was vice president, she does not recall whether she entered into any contracts in behalf of A-Corp and since March of 1978, as president, she has not entered into any contracts in behalf of A-Corp and does not know whether any officer, other

than Mr. Brothers, entered into any such contracts. She testified that during the period 1973 to 1978 she and her husband have loaned approximately \$15,000 of their joint property to A-Corp and a Mr. D. M. Phillips, a brother of David M. Phillips who is a director of the corporation, loaned A-Corp \$10,000.

The witness testified that her husband is not an officer of the corporation at the present time, but works for the affiliated corporation operating the sawmill in the High Sierras.

The witness testified that complainant has listings in the white pages under A-Action, including one for A-Action Decorative Fountain Company, two for A-Action Door Company, one for A-Action Garage Door Company, one for A-Action Garage Door Repair Company, and one for A-Action T.V. Antenna Installation which was canceled after the directory had been printed and circulated.

The witness testified that, as president of A-Corp, she is charged with the duty of management of the company, keeps the books and accounts, and makes decisions in the operation of the company. She stated that Mrs. White, secretary-treasurer, manages the office; but Mrs. Swaner, who owns 99 percent of the stock, does not perform any work for complainant. ✓

The witness testified that A-Advanced ordered advertising from defendant for the 1972 San Diego directories. The advertising was published as ordered to her knowledge and A-Advanced has not paid any of the charges for the advertising.

On redirect examination the witness testified that the advertising was published as ordered with some errors in the advertising, but she could not say to what extent there was error. However, there was advertising that was ordered and not paid for. She stated that the debts of A-Advanced were not assumed by A-Corp.

Defendant's Evidence

Mr. Al Thomas, an employee of defendant assigned the responsibility of handling defendant's complaints relating to its classified directory, testified for defendant. The notes of Mr. Thomas (Exhibit 1), with the approval of counsel for complainant, were received in evidence.

Defendant's witness testified that he has been employed in the directory department of defendant since 1963, and in 1976, when the complaint in this case was filed, his primary responsibility was to handle the directory department's formal Commission complaints for defendant. He is familiar with the complaint in this case.

Defendant has denied the advertising request because it believes that complainant and A-Advanced are both operated by Mr. and Mrs. Brothers, who were and are providing the same services with the same address and telephone numbers, and who currently owe defendant \$56,386.44 for prior advertising.

The testimony of the witness, (Exhibit 1), sets forth in detail the transactions between Mr. Brothers, dba A-Advanced, and defendant during the years 1971, 1972, and 1973. Defendant granted a total of \$3,141.31 in adjustments, which were reflected on Mr. Brothers' November 1972 bills. At present Mr. Brothers, dba A-Advanced, owes defendant \$15,106.44 for 1971 advertising and \$41,280 for 1972 advertising, for a total of \$56,386.44. Defendant has filed a civil suit in the San Diego County Superior Court seeking to recover the sum it alleges is due by Mr. Brothers.

On June 12, 1973 defendant denied Mr. Brothers' request for further advertising until such time as the \$56,386.44 then due was paid. On June 18, 1973 Mr. Brothers wrote defendant requesting advertising for A-Corp, a corporation for which Mr. Brothers filed Articles of Incorporation on June 14, 1973, two days after defendant's meeting with him in which he was denied further advertising.

There have been requests from complainant for advertising in the San Diego directories in 1974, 1975, and 1976. The 1974 and 1976 requests were signed by Mrs. Brothers and the 1975 request was signed by Mr. Brothers. All of the requests were denied by defendant.

Discussion

The evidence indicates that at least as of February 14, 1977 the California Department of Corporations had not issued a permit or qualification authorizing a sale or issuance of securities for A-Corp or A-Action (see Exhibit 14). There is no indication in the record that a permit was issued subsequent to that date. Complainant's witness testified that she has no knowledge as to whether the California Department of Corporations had issued a stock permit, and complainant has produced no evidence to indicate that such a permit was ever issued.

Complainant's witness testified that, although she owns stock in A-Corp, she has no certificate or any other document indicating her ownership of that stock. She was simply told that she owned the stock and the amount thereof. Furthermore, she testified that she paid nothing for her stock, although she was never told that it was a gift.

The record establishes that equitable ownership of A-Advanced and A-Corp are virtually identical. Mrs. Brothers testified that A-Advanced was a sole proprietorship owned by Mr. Brothers, her husband, now and at the time A-Advanced was in business. It appears that Mrs. Brothers had a full community

property interest in the business of A-Advanced and had no reason to believe that she would not share the benefit of that business. Upon formation of the new entity, A-Corp, the stock of that corporation, if any stock was ever issued, was divided between Mr. Brothers, with 55 shares, or 55 percent, and Mrs. Brothers, with 45 shares, or 45 percent of the stock. Subsequently, the entire 55 shares of Mr. Brothers and 44 of the 45 shares of Mrs. Brothers were allegedly transferred to their daughter, Mrs. Swaner, who presently is said to hold 99 shares, or 99 percent of the stock. This putative transfer of stock to Mrs. Swaner occurred sometime in 1977, after the present case was filed and after defendant's alter ego theory was disclosed to complainant. Complainant has offered no evidence as to the reason for the stock transfer and has thus failed to rebut the inference that it was done to avoid the effect of defendant's alter ego defense. Complainant's only witness indicated she had no knowledge about the contents of the minutes of the Board of Directors meetings or any other corporation records which would indicate the issuance or transfer of stock. She made a vague reference to the minutes of a Board of Directors meeting in June of 1977 and indicated that she thought the minutes reflected some type of agreement or gift from Mr. Brothers to their daughter, Mrs. Swaner, indicating the transfer of his shares to Mrs. Swaner. The record indicates that all of the stock, if any actually exists, has at all times been owned by either Mr. or Mrs. Brothers or their daughter. There is no indication that any stock has ever been owned by anyone outside their immediate family. Mrs. Swaner, owner of 99 percent of the stock, did not testify and does not participate in the operation of the business.

Both A-Advanced and A-Action have done business at the same location and both have used the same telephone numbers. Although complainant's witness testified that she was vice president of the corporation until March of 1978 and has been president since that date, she has exhibited a lack of knowledge

about the affairs of the corporation, indicating that actual control and operation of the corporation lies elsewhere. She testified that she has never entered into any contracts on behalf of A-Corp either during the time she was vice president or since she became president of the corporation. Complainant has offered no credible evidence as to where true management and control of the corporation lies.

The evidence demonstrates that complainant A-Action, division of A-Corp, is the alter ego of an entity which had previously done business as A-Advanced and which is currently indebted to defendant in the amount of \$56,386.44. It is well settled that when the corporate form is used by an individual or individuals or by another corporation to accomplish some wrongful or inequitable purpose, the separate corporate entity may be disregarded and the acts treated as if they were done by the individuals themselves or by a controlling corporation. It is not necessary that the domination be by a single individual, for the same result may be reached when two or more persons own all the stock and control the corporation. (Rittle v Leuschner (1959) 51 Cal 2d 574, 581.) In order to establish that one entity is the alter ego of another, it is necessary to demonstrate that the corporation is dominated or controlled by the particular individual or individuals and that failure to recognize that one entity is the alter ego of the other would sanction a fraud or promote injustice upon a third party. (Miniffe v Rowley (1921) 187 Cal 481.) More particularly, evidence that an individual operates a business as a sole proprietorship, incurs a debt in the operation of that business, and later incorporates the same business under circumstances indicating a desire to evade the debt of the individually owned business will normally suffice to indicate that, for purposes of the debt, the corporate veil of the new entity should be pierced. (D. N. & E. Walter Company v Zuckerman (1931) 214 Cal 418.)

In addition to the factors set forth above, a number of other factors indicate that complainant is the alter ego of A-Advanced: (1) Complainant failed to obtain authority to issue stock or to actually issue stock; (2) it failed to maintain minutes or adequate corporate records; (3) there is identical equitable ownership in the two entities; (4) domination and control of the two entities is similar; (5) the two entities share mutual directors and officers responsible for supervision and management; (6) sole ownership of all the stock is held among members of a family; and (7) both entities use the same office or business location. (See generally, Associated Vendors, Inc., v Oakland Meat Co. (1962) 210 Cal App 2d 825.)

Defendant's tariff, Schedule Cal. P.U.C. 39-T, Special Condition No. 9a, provides:

"9a. In addition to Special Condition, No. 9 above, any applicant or advertiser who has refused or failed to pay charges for advertising service in the current or a preceding directory or directories in accordance with terms and conditions of the signed advertising order, may be refused further advertising in any directory; or may be required, prior to the closing date of the subsequent directory, to pay the amounts which had been previously billed, and also to pay in full for all advertising desired in any subsequent directory or directories."

Defendant's witness testified (and there is no evidence to the contrary) that it is defendant's normal practice, when it finds an allegedly new entity seeking advertising when the responsible party for the new entity already owes defendant for the past advertising, to uniformly deny the advertising requested by the new entity unless it pays the delinquency or deposits the disputed amount due with the Commission. That practice applies even if the new entity offers to pay in advance. Under such circumstances, defendant is not required to provide advertising.

Complainant has failed to show that defendant has violated any law or any order or rule of the Commission. A-Corp is responsible for all of the yellow page advertising of A-Advanced incurred and now due and unpaid in the sum of \$56,386.44 and defendant is not required to provide complainant with directory advertising unless and until such sum is paid. (See D.81527 dated June 6, 1973.)

On July 3, 1973 Mr. Brothers signed a Request for Supersedure (Exhibit 15) on behalf of himself as the outgoing subscriber and on behalf of A-Corp as the incoming subscriber. It reads as follows:

"In consideration of the telephone company's compliance with this request, I the undersigned incoming subscriber, agree to pay all unpaid charges and to assume all obligations of the outgoing subscriber in connection with the service existing on the date of supersedure, including any charges and obligations for advertising."

It is clear from the Request for Supersedure that despite Mr. Brothers' attempt to avoid liability for the yellow page advertising ordered on behalf of A-Advanced, he was put on notice of the obligation of A-Corp to assume the outstanding obligations of A-Advanced, and he agreed to that obligation by executing the Supersedure Agreement.

Findings

1. Until June 14, 1973 Mr. Brothers did business under the name A-Advanced at 2243 Moreno Drive, San Diego, California. During the time that business was in operation he was married to Margaret O. Brothers. During the time that he did business under A-Advanced, he ordered yellow page advertising from defendant for 1971 issues of the San Diego Directory, the South San Diego Directory, and the North San Diego Directory.

2. Mr. Brothers contracted for yellow page advertising for A-Advanced for the 1972 issues of defendant's San Diego, South San Diego, and North San Diego directories. This advertising was substantially published as ordered.

3. At the time Mr. Brothers ordered the advertising for the 1972 directories, defendant's records indicated that he was delinquent in the amount of \$29,040.59. In an attempt to devise an equitable arrangement whereby Mr. Brothers could continue his advertising in the 1972 issues of defendant's directories, defendant agreed to accept from him a partial payment of \$17,033.34 and not to pursue the remaining delinquent amount of \$12,007.25, pending the outcome of an investigation into Mr. Brothers' allegations of errors in the January 1971 and October 1971 directories, as well as the claim for adjustment due to the failure of a call diverter.

4. Defendant indicated that no further adjustments were warranted for the 1971 directories and notified Mr. Brothers by registered letter on October 3, 1972 to pay the remaining delinquent amount for the 1971 directory advertising.

5. Mr. Brothers has never paid any amount owed defendant for directory advertising in the 1972 San Diego directories. Based on the unpaid delinquencies, defendant denied directory advertising for 1973, 1974, 1975, and 1976. At the present time, Mr. Brothers is indebted to the defendant in the total sum of \$56,386.44.

6. On June 14, 1973, two days after defendant's denial of yellow page advertising, Mr. Brothers caused A-Corp to be incorporated to continue the business of A-Advanced.

7. The principal business of A-Corp was substantially similar to the business conducted by A-Advanced.

8. A-Corp's office is located at the same address in which A-Advanced had done business.

9. At the time of incorporation Mr. Brothers was the president of A-Corp and continued in that capacity until March of 1978.

10. At the time of incorporation Mrs. Brothers was vice president of A-Corp and continued in that capacity until March of 1978, when she became president of A-Corp.

11. All the stock in A-Corp, if any has ever been legally issued, has been and continues to be held by either Mr. and Mrs. Brothers or their daughter, Mrs. Swaner.

12. On July 3, 1973, Mr. Brothers signed defendant's "Request for Supersedure" as both the outgoing subscriber, A-Advanced, and on behalf of the incoming subscriber, A-Corp. That form requires the incoming subscriber to assume the obligations of the outgoing subscriber, including all charges for directory advertising.

13. Defendant terminated the yellow page advertising service to A-Corp and all of its divisions on the basis of its filed tariff to permit the cancellation or refusal to accept further ads if charges for previous or existing ads have not been paid.

Conclusions

1. Complainant is the alter ego of A-Advanced, and the corporate entity should be disregarded and the liability of Mr. Brothers to defendant treated as the liability of complainant for the purpose of this case.

2. Defendant's refusal of yellow page advertising to complainant was lawful and reasonable and in accordance with defendant's tariffs filed with this Commission.


3. Defendant's denial of yellow page advertising to complainant did not result in unlawful discrimination by defendant, and the relief requested by complainant should be denied.


O R D E R

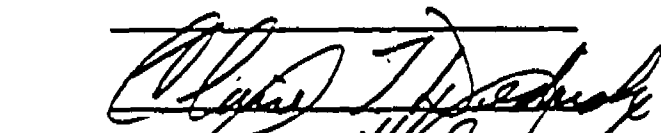
IT IS ORDERED that the relief requested herein in Case No. 10109 is denied.

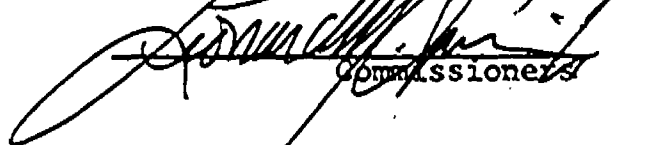
The effective date of this order shall be thirty days after the date hereof.

Dated at San Francisco, California, this 27th day of MARCH, 1979.



President






Commissioners

Commissioner Richard D. Gravello, being necessarily absent, did not participate in the disposition of this proceeding.