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SUMMARY
February 29, 2024

2024COA22

No. 22CA1154, *Million v. Grasse* — Business Organizations — Limited Liability Companies — Piercing Doctrine — Alter Ego; Contracts — Breach of Contract; Civil Theft

A division of the court of appeals holds, as a matter of first impression, that neither the piercing the corporate veil doctrine nor the concept of alter ego may be utilized to construe an ambiguous term in a contract dispute.

The division also holds that to state and prevail on a claim for civil theft that is based on the theft of money, in addition to the other statutory requirements, the claimant must allege and prove that there is a specifically identifiable funds, or funds from a specifically identifiable account, that belong to the plaintiff and were stolen.

COLORADO COURT OF APPEALS **2024COA22**

Court of Appeals No. 22CA1154
Boulder County District Court No. 21CV30048
Honorable Patrick Butler, Judge

Gilbert Million,

Plaintiff-Appellant and Cross-Appellee,

v.

Carol Grasse; Chesed, LLC, a Colorado limited liability company; Rose Valley, LLC, a Colorado limited liability company; and Nugae, LLC, a Colorado limited liability company,

Defendants-Appellees and Cross-Appellants.

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division V
Opinion by JUDGE BERGER*
Yun, J., concurs
Kuhn, J., concurs in part and dissents in part

Announced February 29, 2024

Thomas P. Howard, LLC, Thomas P. Howard, Kammie Cuneo, Louisville, Colorado; Law Office of Kenneth R. Morris, Kenneth R. Morris, Boulder, Colorado, for Plaintiff-Appellant and Cross-Appellee

Huntington C. Brown and Associates LLC, Huntington C. Brown, Yvonne Sell, Denver, Colorado; Spencer Fane LLP, Dean Neuwirth, Denver, Colorado, for Defendants-Appellees and Cross-Appellants

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2023.

¶ 1 Plaintiff, Gilbert Million, appeals the trial court's partial summary judgment dismissing his civil theft claim against defendants, Carol Grasse and three of her entities — Chesed, LLC, Rose Valley, LLC, and Nugae, LLC. Grasse cross-appeals the trial court's money judgment in favor of Million. We affirm the partial summary judgment but reverse the trial court's money judgment in favor of Million and remand with directions.

I. Relevant Facts and Procedural History

A. The Parties' Relationship

¶ 2 Million and Grasse were friends for over thirty years. The two engaged in a business relationship from the early 2000s until the relationship deteriorated in August 2018. Using his business and construction background, Million located properties to purchase, and Grasse financed the purchases. Those properties included three in Boulder: the Sixth Street Property, the Dakota Property, and the Highland Property. Because of the pair's long friendship, they often did not reduce the details of their agreements to writing.

B. The Properties and the Loans

¶ 3 In 2014, Million formed Chesed as a Colorado limited liability company (LLC). Million was Chesed's sole member. Chesed then

purchased the Sixth Street Property. Also in 2014, Million needed money to pay his attorney fees in a criminal case. To accomplish that objective, Million's lawyer (apparently with Grasse's consent) formed another Colorado LLC: Nugae, which was wholly owned by Grasse.

¶ 4 In February 2015, Nugae made two loans to Million and Chesed of $50,000 and $35,000. The money came from Grasse. Million executed promissory notes for both loans to Nugae, and the loans were secured by deeds of trust on the Sixth Street Property.

¶ 5 Grasse was also the sole member of another Colorado LLC named Rose Valley. In February 2015, Rose Valley made two loans to Million and Chesed of $25,000 and $125,000. The $25,000 loan was to pay Million's legal fees, and the $125,000 memorialized an earlier loan between the two. Again, Grasse provided the money and the loans were secured by deeds of trust in favor of Rose Valley on the Sixth Street Property.

¶ 6 In June 2015, Million transferred his Chesed membership to Grasse, and Grasse thereby became the sole owner of Chesed. In August 2015, Rose Valley paid a $425,000 promissory note relating to Chesed's purchase of the Sixth Street Property. All in all, by

August 2015, Nugae and Rose Valley held five deeds of trust on the Sixth Street Property, securing five loans for Million's benefit, totaling approximately $660,000.

C. Prior Suit and Settlement Agreement

¶ 7 In 2018, Million sued Grasse over a dispute concerning the Highland Property. In 2019, the parties successfully mediated the dispute before the Judicial Arbiter Group and signed a "Settlement Agreement."

¶ 8 This appeal arises out of the Settlement Agreement. In it, Grasse agreed to reconvey title to the Highland Property to Million and to sell the Sixth Street Property and the Dakota Property and divide the sale proceeds with Million.

¶ 9 Under the Settlement Agreement, Grasse would receive the first $725,000 from the sale of the two properties, "with the remaining net proceeds to be split 50/50 between the parties as they are made available." Net proceeds were defined as "the selling price minus commission costs, costs, fees, third parties liens and obligations." The Settlement Agreement also obligated Grasse's attorney to establish a "separate trust account for distribution of the monies" and further required Grasse or her attorney to confer

with Million's counsel prior to making distributions from the trust account.

¶ 10 In July 2020, Grasse closed on the sale of the Sixth Street Property for $975,000. Subsequently Grasse closed on the sale of the Dakota Property in February 2021. Grasse consistently claimed that the liens held by Nugae and Rose Valley were third-party liens because neither Nugae nor Rose Valley was a named party to the Settlement Agreement. Because the liens held by Nugae and Rose Valley were, according to Grasse, "third parties liens" Grasse deducted the amount of those liens from the settlement proceeds, leaving nothing to be distributed to Million. Grasse's attorney apparently never established the trust account required by the Settlement Agreement.

D. Trial Court Proceedings

¶ 11 Million sued Grasse again, asserting a variety of claims, including breach of contract and civil theft.

¶ 12 Applying the piercing the corporate veil doctrine,[1] Million contended that the liens were not third-party liens, and instead, that Nugae and Rose Valley were alter egos of Grasse. Thus, according to Million, Grasse breached the Settlement Agreement and committed civil theft by treating the liens as third parties' liens and subtracting their value when calculating the net proceeds.

¶ 13 After a bench trial, the trial court entered written findings of fact and conclusions of law, determining that Nugae and Rose Valley were indeed alter egos of Grasse and that, therefore, Grasse improperly deducted those liens from the proceeds of the sales of the properties. The court determined that Grasse owed Million $634,553.75 in damages, plus interest, attorney fees, and costs. The court dismissed Million's civil theft claim on Grasse's motion for partial summary judgment.

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[1] Courts have variously referred to this legal construct as "piercing the corporate veil" or the "alter ego doctrine" (which appears to be either one way to pierce the corporate veil or a requirement to pierce the corporate veil). *See Great Neck Plaza, L.P. v. Le Peep Rests., LLC*, 37 P.3d 485, 490 (Colo. App. 2001). To avoid confusion and recognizing that the entities in this case are LLCs, not corporations, we refer to the doctrine as the "piercing doctrine."

E. Contentions on Appeal

¶ 14 Million appeals the trial court's dismissal of his civil theft claim. He contends that the trial court erred by granting the motion for partial summary judgment on this claim because (1) there were genuine factual issues for trial; and (2) the court incorrectly applied the law when it ruled that Million's civil theft claim was a breach of contract claim that does not fall under the purview of the civil theft statute, section 18-4-405, C.R.S. 2023.

¶ 15 On cross-appeal, Grasse contends that the trial court improperly applied the piercing doctrine.

¶ 16 We conclude that the trial court correctly dismissed the civil theft claim. However, because we conclude that the piercing doctrine has no proper application in this case, we reverse the trial court's money judgment in favor of Million and remand for further proceedings to redecide the case without regard to the piercing doctrine. Finally, on remand the trial court must also determine who is the prevailing party and then award that party reasonable attorney fees.

II. Cross-Appeal — Money Judgment in Favor of Million

¶ 17 We begin with Grasse's cross-appeal. Grasse contends that the trial court erred by piercing the limited liability veil between her and the LLCs that she owned and thereby concluding that the liens in question were not "third parties liens." We agree.

A. Additional Facts

¶ 18 At trial, Million argued that Grasse "wholly owned and wholly controlled" Rose Valley, Nugae, and Chesed, making them her alter egos. Therefore, according to him, these LLCs were not third parties to the Settlement Agreement and those liens could not be deducted from the two properties' sales proceeds.

¶ 19 In its written findings and conclusions, the trial court agreed and addressed the three required prerequisites to the application of the piercing doctrine, making the following findings:

- neither Nugae nor Rose Valley had a bank account in its name;
- any money used on behalf of Nugae and Rose Valley came from Grasse, individually;

- neither Nugae nor Rose Valley had any independent capitalization other than money from Grasse or an entity solely owned and controlled by Grasse;
- Nugae's and Rose Valley's only business holdings were the promissory notes and deeds related to the Sixth Street Property, which Chesed held;
- neither LLC ever had any income, filed a tax return, had employees, or had an office;
- Grasse used personal funds to pay for the minor operating expenses of both LLCs;
- tenants at the Sixth Street Property made out their rent checks to Grasse personally;
- legal formalities were disregarded and funds and assets were comingled;
- both LLCs were thinly capitalized; and
- the entities and Grasse were so comingled that when Grasse released the deeds of trust in June 2020 prior to the sale of the Sixth Street Property, neither entity received any money to satisfy the loan obligations by Chesed.

¶ 20 Turning to the second and third prongs of the piercing doctrine, the court found that Million proved that justice required recognizing the relationship between Grasse and Nugae and Rose Valley over the LLC form because "persisting in this corporate fiction would defeat his rightful claim." The trial court also determined that holding Grasse liable for the corporate obligation was equitable under all the relevant circumstances.

¶ 21 Grasse argues the court erred in (1) determining Grasse misused the corporate form because it misunderstood the elemental features of LLCs; (2) concluding Grasse misused Nugae and Rose Valley to defeat Millions "rightful claim"; and (3) concluding that veil-piercing was necessary to achieve an equitable result.

B. Standard of Review and the Piercing Doctrine

¶ 22 "'Piercing the corporate veil involves a mixed question of law and fact.'" *Stockdale v. Ellsworth*, 2017 CO 109, ¶ 17 (quoting *Lester v. Career Bldg. Acad.*, 2014 COA 88, ¶ 42). For that reason, "[w]e defer to the trial court's findings of fact if they are supported by the record, but review the trial court's legal conclusions de novo." *Id.* (quoting *People v. Marquardt*, 2016 CO 4, ¶ 8). Among

those legal conclusions is a court's determination that the piercing doctrine has any applicability to the facts presented. *See id.*

¶ 23 An LLC "is separate from the members that own the entity." *Griffith v. SSC Pueblo Belmont Operating Co.*, 2016 CO 60M, ¶ 11 (citing *Weinstein v. Colborne Foodbotics, LLC*, 2013 CO 33, ¶ 10). Thus, generally, "[n]either members nor managers of an LLC are personally liable for debts incurred by the LLC." *Id.* (quoting *Weinstein*, ¶ 10).

¶ 24 "Under some circumstances, however, a court may 'pierce the corporate veil' to impose liability on an LLC's members." *Id.* (quoting *Leonard v. McMorris*, 63 P.3d 323, 330 (Colo. 2003)). A "court may disregard the shield that the LLC form would normally provide for its members when (1) the entity is 'merely the alter ego' of the member, (2) the LLC form is used to perpetuate a wrong, and (3) disregarding the legal entity would achieve an equitable result." *Id.* at ¶ 12. All three prongs of the piercing test must be satisfied. *McCallum Fam. L.L.C. v. Winger*, 221 P.3d 69, 74 (Colo. App. 2009). Piercing is justified only in extraordinary circumstances. *Sedgwick Props. Dev. Co.*, 2019 COA 102, ¶ 15 (citing *In re Phillips*, 139 P.3d 639, 644 (Colo. 2006)).

C. Analysis

¶ 25 At bottom, this is a breach of contract case. The contract is the Settlement Agreement. The trial court was tasked with interpreting and enforcing the Settlement Agreement. An unambiguous contract must be enforced in accordance with its plain terms. *Highlands Broadway OPCO, LLC v. Barre Boss LLC*, 2023 COA 5, ¶ 15 (citing *Magnetic Copy Servs., Inc. v. Seismic Specialists, Inc.*, 805 P.2d 1161, 1163 (Colo. App. 1990)).

¶ 26 To the extent that any material provision of the contract is ambiguous — meaning that it is susceptible of two or more reasonable meanings — the trial court must ascertain the actual intent of the parties to the contract and enforce the contract accordingly. *Johnson Nathan Strohe, P.C. v. MEP Eng'g, Inc.*, 2021 COA 125, ¶¶ 12-14.

¶ 27 Put simply, we see no basis to apply the piercing doctrine here. Million has cited no authority that even remotely authorizes the use of the piercing doctrine to construe a disputed term of a contract. We are aware of no such authority. The acknowledged and limited purposes of the piercing doctrine do not support its use to construe contractual terms. The existing authority regarding the

application of the piercing doctrine, some of which is cited above, applies to a traditional debtor-creditor context, where an unpaid creditor seeks to impose legal obligations on persons or entities that were not actual parties to the legal obligation. *See Lester*, ¶ 43 (if the piercing doctrine applies, members of a nonprofit corporation may become personally liable for the debt of the corporation); *Reader v. Dertina & Assocs. Mktg., Inc.*, 693 P.2d 398, 399 (Colo. App. 1984) (if the corporate veil is pierced by application of the alter ego doctrine, stockholders may be held personally liable for corporate obligations).

¶ 28 For these reasons, the trial court erred by applying the piercing doctrine.[2] That, however, does not end our analysis because the trial court offered an alternative basis for its judgment. In its order, the trial court stated,

> Additionally, even if the court had not found that Nugae and Rose Valley were alter egos of Ms. Grasse, the Settlement Agreement language, resolving all *"all [sic] claims, pled or*

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[2] The bulk of Grasse's argument is that the trial court misapplied the required elements of the piercing doctrine. Under the circumstances presented, we believe that the argument that the piercing doctrine has no proper application in this case was adequately preserved. *See People v. Melendez*, 102 P.3d 315, 322 (Colo. 2004).

> *unpled, known or unknown, between* ***all named or potential parties*** *to the litigation arising from joint business transactions between Plaintiff and Defendants,*["] encompasses the Promissory Notes and Deeds of Trust held by Nugae and Rose Valley since such documents represented joint business transactions between Plaintiff and Defendants and involved known claims between the parties at the time of the mediation. Further, since the 6th Street property, owned by Chesed at the time, was specifically identified in the Settlement Agreement and the Notes from Rose Valley and Nugae were to Chesed, the parties to the Settlement Agreement had to include the Notes to Chesed (6th Street) from Rose Valley and Nugae as claims that were being resolved in the mediation.

(Bolded emphasis added.)

¶ 29 Even though Million does not ask us to affirm on that basis, we could do so anyway because we may affirm a trial court's judgment on any basis supported by the record. *People v. Hamm*, 2019 COA 90, ¶ 23. For three reasons, we decline to do so.

¶ 30 First, we cannot determine whether the trial court's alternative ruling was a determination that the Settlement Agreement was unambiguous — that is, that there was only one reasonable interpretation of the Settlement Agreement. The question whether a writing is ambiguous — namely, susceptible of two or more

reasonable interpretations — is a question of law that we review de novo. *Johnson Nathan Strohe, P.C.*, ¶ 11.

¶ 31 Second, if the court ruled that the Settlement Agreement, specifically the third parties liens clause, was unambiguous, we disagree. The plain language of the agreement speaks of "third parties liens" and it is undisputed that the entities that owned the liens were *not* named parties to the Settlement Agreement. There are at least two reasonable constructions of the third parties liens clause. The first construction applies the plain words of the contract and gives effect to the undisputed fact that the LLCs were not named parties to the agreement. The second reasonable interpretation is that despite the plain language of the third parties liens clause, other language in the agreement demonstrates that the parties actually intended to include the liens held by Grasse's affiliated entities within the phrase "third parties liens."

¶ 32 Because the agreement is susceptible of two or more reasonable meanings, we conclude as a matter of law that the Settlement Agreement is ambiguous. Once a determination of ambiguity is made, the trial court is tasked with determining the

actual intent of the parties and enforcing the contract based on that actual intent. *Id.* at ¶¶ 12-14.

¶ 33 Third, to the extent the trial court concluded that the agreement was ambiguous and its alternative ruling was intended to be a determination of the actual intent of the parties, we cannot tell if the trial court engaged in the required inquiry. The court's alternative rationale says nothing about the actual intent of the parties, and, as noted above, it is unclear whether the court concluded that the only reasonable interpretation of the contract was that the liens of persons or entities not parties to the agreement were nevertheless included in the term "third parties liens."

¶ 34 Certainly, it is possible that the $725,000 preferential distribution to Grasse was in consideration of the discharge of all liens by *all* related parties, and if so, that might support a finding that the parties actually (not hypothetically) intended that the discharge of third parties' liens included liens held by related entities. But we can't tell if the trial court so found with record support. It is not the appellate court's function to make such findings.

¶ 35 For this reason, we reverse the trial court's money judgment in favor of Million and remand for further proceedings to determine the actual intent of the parties with respect to the contract term "third parties liens" without regard to the piercing doctrine.

III. Partial Summary Judgment

¶ 36 We must also address the trial court's partial summary judgment order dismissing Million's civil theft claim. Here, we agree with the trial court, albeit on somewhat different grounds.

A. Additional Facts

¶ 37 Grasse moved pretrial for partial summary judgment on the civil theft charge. Grasse asserted that Million's civil theft claim was "essentially, that [Grasse] [had] not paid [Million] the proper contract amount, and that the failure to pay the amount which [Million] claims is due under the Settlement Agreement constitutes civil theft." Grasse further argued that "[n]o basis is alleged for the civil theft claim other than the exact same alleged breach of the Settlement Agreement which makes up [Million's] First Claim for relief, i.e. 'Breach of Contract.'" Grasse argued that although the civil theft statute is broad, "there is no Colorado statute or case law that indicates that civil theft penalties are to apply to all claims for

any kind of debt due under any form of contract." Grasse asked the court to dismiss the claim for civil theft and award Grasse attorney fees and costs incurred in the defense of the civil theft claim.

¶ 38 In response, Million contended that there were disputed issues of material fact for trial regarding his claim for civil theft. Million argued that he had a beneficial interest in, and equitable title to, the net proceeds from the sale of the two properties sufficient to constitute a proprietary interest under the civil theft statute.

¶ 39 The trial court granted partial summary judgment, concluding that Million's claim for civil theft could not stand because "[Grasse] is correct that the basis of [Million's] civil theft claim is essentially that [Grasse] breached the contract by not distributing money or making accounts in accordance with the settlement agreement." The court recognized that a claimant may have a proprietary interest in funds if those funds are held in a special account for the benefit of the claimant. *See People v. Fullop*, 837 P.2d 215, 217 (Colo. App. 1992). Even though the Settlement Agreement required Grasse or her attorney to establish a trust account for the proceeds of the sales of the properties, the court ruled that because no such trust account was, in fact, established, Million did not have a

proprietary interest in the money and thus his civil theft claim failed.

¶ 40 On appeal, Million contends that the trial court erred because there were genuine factual issues for trial.

B. Standard of Review

¶ 41 Summary judgment is appropriate when the moving party establishes that there is no genuine issue of material fact, and the party is entitled to judgment as a matter of law. *McCormick v. Union Pac. Res. Co.*, 14 P.3d 346, 348 (Colo. 2000); *see also* C.R.C.P. 56(c). To show that there is no genuine issue of material fact, the evidentiary facts — the raw, historical data underlying the controversy — must be undisputed. *See Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1340 (Colo. 1988). A material fact is one that will affect the outcome of the case. *Peterson v. Halsted*, 829 P.2d 373, 375 (Colo. 1992).

¶ 42 If the moving party does not meet this burden, summary judgment must be denied. *See Wolther v. Schaarschmidt*, 738 P.2d 25, 28 (Colo. App. 1986) ("[I]f the moving party's proof does not itself demonstrate the lack of a genuine factual issue, summary judgment is inappropriate.").

¶ 43 If the moving party meets its burden, however, the burden shifts to the opposing party to demonstrate the existence of a triable factual issue. *City of Aurora v. ACJ P'ship*, 209 P.3d 1076, 1082 (Colo. 2009). To do so, the nonmoving party must "adequately demonstrate by relevant and specific facts that a real controversy exists." *Id.* The nonmoving party is entitled to the benefit of all favorable inferences reasonably drawn from the undisputed facts, and all doubts must be resolved against the moving party. *Brodeur v. Am. Home Assurance Co.*, 169 P.3d 139, 146 (Colo. 2007). Even when "it is 'extremely doubtful' that a genuine issue of material fact exists, summary judgment is inappropriate." *Westin Operator, LLC v. Groh*, 2015 CO 25, ¶ 21 (quoting *Mancuso v. United Bank of Pueblo*, 818 P.2d 732, 736 (Colo. 1991)).

C. Applicable Law

¶ 44 To prove a claim of civil theft, a plaintiff must establish that a defendant (1) knowingly obtained, retained, or exercised control over anything of value of another without authorization; and (2) intentionally or knowingly deprived the other person permanently of the use or benefit of the property. § 18-4-401(1), C.R.S. 2023; *see In re Estate of Chavez*, 2022 COA 89M, ¶ 47. Property or money

belongs to another if anyone other than the defendant has a possessory or proprietary interest in it. § 18-4-401(1.5). A "proprietary interest" is an ownership interest in the subject property. *See* Webster's Third New International Dictionary 1819 (2002) ("proprietary" means "held as the property of a private owner"); Black's Law Dictionary 968, 1332 (11th ed. 2019) ("interest" is a legal or equitable claim to or right in property; "ownership" implies the right to possess a thing, regardless of any actual or constructive control).

D. Analysis

¶ 45 Initially, we must be wary, as a matter of statutory construction, of interpreting the civil theft statute as imposing treble damages for any contract breach (or even any intentional breach). Such a result would be inconsistent with binding Colorado Supreme Court decisions holding that even an intentional breach of contract does not authorize an award of punitive damages. *See Mortg. Fin., Inc. v. Podleski*, 742 P.2d 900, 903 (Colo. 1987); *Decker v. Browning-Ferris Indus. of Colo., Inc.*, 947 P.2d 937, 941 (Colo. 1997). There is no basis to conclude that the General Assembly intended such a result, which would upend not only Colorado

Supreme Court decisions, but hundreds of years of contract law. *Decker*, 947 P.2d at 941.

¶ 46 Consistent with these principles, a division of this court has held that if the civil theft claimant is merely a creditor, that is insufficient to establish the requisite proprietary interest in the property allegedly stolen. *Tisch v. Tisch*, 2019 COA 41, ¶ 53.

¶ 47 At the same time, we do not hold that the mere existence of a contract precludes a civil theft claim. A multitude of cases reject that proposition. *E.g.*, *Bermel v. BlueRadios, Inc.*, 2019 CO 31, ¶¶ 35-42. But, as the statute mandates, for a civil theft claim to lie, the party claiming civil theft must have a proprietary interest in the property claimed to be stolen, not merely a contractual right or expectancy. *Tisch*, ¶¶ 51-52.

¶ 48 Another division of this court has held that a proprietary interest may exist when the claimant has a right to funds in a special account held or created on his behalf. *Fullop*, 837 P.2d at 217.[3]

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[3] The trial court dismissed the civil theft claim, in part, because the trust account mandated by the Settlement Agreement was not, in fact, created. Although we agree with the trial court's ultimate

¶ 49 To properly distinguish a contractual obligation to pay money that may give rise to a civil theft claim from a contractual obligation that does not support a civil theft claim, we hold that there must be an additional inquiry.[4] This is because money is fungible. *Franklin Drilling & Blasting, Inc. v. Lawrence Constr. Co.*, 2018 COA 59, ¶ 26.

¶ 50 If the property that is the subject of the civil theft claim is money, in order for the plaintiff to have a proprietary interest in the money, there must be either a specifically identifiable account[5] or a wrongful obtaining, retention, or exercise of control over specifically identifiable funds that belong to the plaintiff. This additional requirement for a civil theft claim is supported by the supreme court's opinion in *Van Rees v. Unleaded Software, Inc.*, 2016 CO 51, ¶ 22, where the court held that a civil theft claim failed because the

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dismissal of the civil theft claim, we do not agree with that part of the trial court's analysis because ordinarily, a party may not defeat legal relief by relying on his own breach of legal obligations. *See Rhino Fund, LLLP v. Hutchins*, 215 P.3d 1186, 1195-96 (Colo. App. 2008).

[4] This is in addition to the statutory elements that the defendant knowingly obtained, retained, or exercised control over the money without authorization, and that the defendant intentionally or knowingly deprived the other person permanently of the use or benefit of the money. § 18-4-401(1), C.R.S. 2023.

[5] A specifically identifiable account could be an escrow, trust, or other specific account.

party claiming civil theft did not allege the deprivation of specific funds. Similarly, in *Rhino Fund, LLLP v. Hutchins*, 215 P.3d 1186, 1195 (Colo. App. 2008), a civil theft claim was successful because there was an agreement that required "all proceeds from the sale" to be placed in an escrow account, which established specifically identifiable funds and, therefore, a property interest.

¶ 51 In this case, the Settlement Agreement provided a formula for determining the amount, if any, owed to Million on the sales of the designated properties. It did not identify a specific amount of money payable to Million. Under no circumstances were *all* of the proceeds of the sales of the properties for Million's benefit. As this litigation well demonstrates, due to imprecisions in the parties' Settlement Agreement, it was not possible at the time Grasse distributed the funds to determine what amount was owed to Million. A term that would appear on its face to be plain — "third parties liens" — led to a trial court judgment in favor of Million after applying the piercing doctrine and now a partial appellate reversal.

¶ 52 Because the net proceeds were not either specifically identifiable funds or funds from a specifically identifiable account,

Million did not have a sufficient proprietary interest in the money, precluding a civil theft claim.

¶ 53 We therefore conclude that the trial court correctly dismissed the civil theft claim.[6]

IV. Attorney's Fees

¶ 54 Grasse requests an award of attorney fees and costs under the prevailing party provision of the Settlement Agreement. We decline that request because the parties' dispute is not finally resolved. Only after the trial court enters a judgment on remand will prevailing party status be determinable. *See Bedard v. Martin*, 100 P.3d 584, 593 (Colo. App. 2004) (trial court's determination of prevailing party was premature where further proceedings were required on plaintiff's claim for damages).

V. Disposition

¶ 55 The money judgment in favor of Million is reversed. The trial court's partial summary judgment order dismissing Million's civil

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[6] We note that Million raised several arguments for the first time on appeal concerning the elements of theft. We decline to address these arguments because they are unpreserved. *See Melendez*, 102 P.3d at 322. In any event, even if Million was successful on any of these arguments, it would not disturb our conclusion that the trial court correctly dismissed the civil theft claim.

theft claim is affirmed. The case is remanded to the trial court to redecide the case without reliance on the piercing doctrine and to enter an appropriate judgment.[7] The case is also remanded to the trial court to enter an appropriate award of attorney fees and costs to the prevailing party, as determined by the trial court, both in the trial court and on appeal.

JUDGE YUN concurs.

JUDGE KUHN concurs in part and dissents in part.

[7] The trial court has discretion to take additional evidence and hear additional argument but need not do so.

JUDGE KUHN, concurring in part and dissenting in part.

¶ 56 For the reasons aptly articulated by the majority, I agree that the trial court did not err in its grant of partial summary judgment dismissing Million's civil theft claim. Accordingly, I join Parts III and IV of the majority opinion in full.

¶ 57 However, I must disagree with the majority's conclusion that the trial court erred in entering its money judgment in favor of Million. Even if the trial court may have overextended in its application of the veil piercing doctrine, I don't think it erred in its alternative analysis or final conclusion. Therefore, I would affirm the trial court's money judgment. I respectfully dissent from the majority's reversal and remand in Part II of the majority opinion.

I. Standard of Review

¶ 58 Contract interpretation is a question of law that we review de novo, and we need not defer to a lower tribunal's interpretation of a contract. *Ad Two, Inc. v. City & Cnty. of Denver*, 9 P.3d 373, 376 (Colo. 2000). The primary goal of contract interpretation is to determine and give effect to the intent of the parties. *Id.*

¶ 59 We review the contract in its entirety to determine that intent. *Pres. at the Fort, Ltd. v. Prudential Huntoon Paige Assocs.*, 129 P.3d

1015, 1017 (Colo. App. 2004). If the contract's meaning is clear and unambiguous, we enforce it as written. *Id.* If, however, it's susceptible of more than one reasonable interpretation, it is ambiguous, and its meaning must be determined as an issue of fact. *Id.* Whether a contract is ambiguous is a question of law we review de novo. *Id.*

¶ 60 If an ambiguity exists and cannot be resolved by reference to other contractual provisions, the trial court must consider extrinsic evidence to determine the mutual intent of the parties at the time of contracting. *Pepcol Mfg. Co. v. Denver Union Corp.*, 687 P.2d 1310, 1314 (Colo. 1984). This extrinsic evidence may include any pertinent circumstances attendant upon the transaction, including the conduct of the parties under the agreement. We defer to the trial court's findings of fact if they are supported by the record. *See id.* at 1315.

II. Analysis

¶ 61 The trial court found that Nugae and Rose Valley were Grasse's alter egos and that it was equitable to pierce the corporate veil to prevent their liens from being subtracted from the sales price

of the Sixth Street Property. The majority concludes that the veil piercing doctrine does not apply in this context.

¶ 62 Here, Million is the debtor and seeks to pierce the LLCs' veils to ensure that his lienholders are not treated as "third party liens" for the purposes of the Settlement Agreement. It's true that this is not the conventional use of the veil piercing doctrine, which is traditionally used to hold shareholders liable for the obligations of a corporation. *E.B. Roberts Constr. Co. v. Concrete Contractors, Inc.*, 704 P.2d 859, 866 (Colo. 1985). Instead, it is more of an "inverse veil piercing." The trial court used this variation of the doctrine to allow Million (a debtor) to reach Grasse as the shareholder of a creditor LLC.

¶ 63 Regardless of whether this use was correct, I conclude that we do not need to decide if the doctrine applies here. I would instead affirm the trial court's judgment based on its alternative analysis. *See City of Aurora v. Dep't of Revenue*, 2023 COA 17, ¶ 11 (noting we may affirm on any ground supported by the record).

¶ 64 The dispute in this case centers on the meaning of the term "net proceeds" from the Settlement Agreement. The agreement says that the term means "selling price minus commission costs, costs,

fees, third parties liens and obligations." The Settlement Agreement was entered into between Million as plaintiff and Chalfont Rock, LLC and Grasse as defendants. Chalfont Rock is one of Grasse's LLCs. The dispute arose when Grasse claimed that Nugae and Rose Valley were third parties because they weren't named in the Settlement Agreement.

¶ 65 Like the majority, and reviewing this contract term de novo, I conclude that the phrase "third parties liens" is ambiguous. *See Pres. at the Fort, Ltd.*, 129 P.3d at 1017. It is not immediately apparent from this phrase whether it means the liens of all nonparties to the Settlement Agreement or something else.

¶ 66 I also agree that the trial court didn't explicitly label this phrase as ambiguous. But as the court noted in its alternative analysis, the rest of the Settlement Agreement sheds light on the meaning of the term. The Settlement Agreement required Grasse and Chalfont Rock to sell the Sixth Street Property and the Dakota Property to finance the settlement. The agreement also provided that it

> shall resolve all claims, pled or unpled, known or unknown, between all named or potential parties to the litigation arising from joint

> business transactions between [Million] and [Grasse and Chalfont Rock], including, but not limited to, real estate properties located at [the Highland Property], . . . , [the Dakota Property], . . . , and [the Sixth Street Property], all in Boulder County and as described in Boulder County Case No. 18CV264.

¶ 67 Considering this language, the court noted that — even setting aside the alter ego question — it would have reached the same conclusion regarding the liens:

> Additionally, even if the Court had not found that Nugae and Rose Valley were alter egos of Ms. Grasse, the Settlement Agreement language, resolving . . . *"all claims, pled or unpled, known or unknown, between all named or potential parties to the litigation arising from joint business transactions between [Million] and [Grasse and Chalfont Rock,"]* encompasses the Promissory Notes and Deeds of Trust held by Nugae and Rose Valley since such documents represented joint business transactions between [Million] and [Grasse and one of her LLCs] and involved known claims between the parties at the time of the mediation. Further, since the [Sixth] Street property, owned by Chesed at the time, was specifically identified in the Settlement Agreement and the Notes from Rose Valley and Nugae were to Chesed, the parties to the Settlement Agreement had to include the Notes to Chesed ([Sixth] Street) from Rose Valley and Nugae as claims that were being resolved in the mediation.

¶ 68 This conclusion was premised on the trial court's following factual findings in its order:

- Grasse is the sole member of Chesed and Nugae.
- Chesed was the owner of the Sixth Street Property.
- Grasse was also the sole member of Rose Valley, which is now dissolved.
- Chesed, through Grasse, entered into three promissory notes with Rose Valley for $25,000, $125,000, and $425,000. Chesed also entered into two financing agreements with Nugae for $35,000 and $50,000.
- Prior to the sale of the Sixth Street Property, Nugae and Rose Valley released their liens. Neither was listed on the settlement statement for the sale, and neither received any proceeds from the sale.

¶ 69 The essence of the trial court's alternative analysis is that "third parties liens" can't include the liens from Rose Valley and Nugae to Chesed under these circumstances and the language of the agreement. Critically, although the agreement required Grasse to sell the Sixth Street Property, she didn't own it. Chesed did. So, the court concluded, the liens between Grasse's LLCs — Chesed,

Rose Valley, and Nugae — fell into the language covering "named or potential parties to the litigation arising from the joint business transactions between" Million and Grasse.

¶ 70 It is on this basis that I part ways with the majority. I think the trial court's alternative analysis adequately conveyed its determination of the parties' actual intent. The court's factual findings have record support, and I would not disturb them. *Pepcol Mfg. Co.*, 687 P.2d at 1315. And I agree with its interpretation of "third parties liens" given the rest of the Settlement Agreement and those factual findings. *Id.* at 1314.

¶ 71 Thus, the trial court's conclusion that "the parties to the Settlement Agreement had to include the Notes to Chesed ([Sixth] Street) from Rose Valley and Nugae" supports its contract award to Million. I therefore disagree with the majority that the trial court's money judgment must be reversed. I would hold that the trial court did not err by concluding that the liens and claims held by Nugae and Rose Valley were resolved through the Settlement Agreement. And I would therefore affirm the trial court's judgment.