No. 1-10-1075

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FIFTH DIVISION
June 30, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

AVISTA SOLUTIONS, INC., a South Carolina Corporation, Plaintiff-Appellant,	Appeal from the Circuit Court of Cook County.
v.	No. 08 CH 11525
RICHARD HATABURDA, PATRICIA HATABURDA, PATRICK HATABURDA, and ELITE CAPITAL MANAGEMENT, INC., an Illinois Corporation d/b/a ELITE CAPITAL MORTGAGE, Defendants-Appellees.	Honorable Martin S. Agran, Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Joseph Gordon concurred in the judgment.

ORDER

Held: The trial court did not err in granting summary judgment in favor of the defendants because the plaintiff failed to meet its burden of showing the defendants fraudulently transferred funds to avoid paying plaintiff's default judgment, there was unity of ownership to pierce the corporate veil of

United Pacific Funding Corporation (UPFC), and that Elite Capital is the successor corporation of UPFC.

Plaintiff Avista Solutions, Inc. (Avista), appeals from an order granting summary judgment in favor of the defendants Richard, Patricia and Patrick Hataburda, individually, and Elite Capital Management, Inc. (Elite Capital), on plaintiff's complaint to recover on an earlier default judgment against United Pacific Funding Corporation (UPFC). In its complaint, the plaintiff alleges: (1) the defendants engaged in fraudulent transfers of assets with the intent to hinder, delay or defraud plaintiff, (2) the trial court should pierce the corporate veil of UPFC because it was the alter ego of the individual defendants, and (3) Elite Capital is liable for plaintiff's default judgment because it is a mere continuation of UPFC. The circuit court found: (1) the defendants did not fraudulently transfer funds to avoid payment on Avista's default judgment, (2) there was no unity of ownership to pierce the corporate veil of UPFC, and (3) Elite Capital is not the successor corporation to UPFC. Plaintiff appeals, claiming the trial court erred because the evidence shows defendants committed fraud under the Illinois Uniform Fraudulent Transfer Act (740 ILCS 160/8(a)(1), (3)(C) (West 2008)), the evidence shows a unity of interest between UPFC and Elite Capital, and the evidence shows Elite Capital is the successor corporation to UPFC. We affirm for the reasons set forth below.

BACKGROUND

Avista filed a three count complaint against defendants Richard, Patricia and Patrick Hataburda and Elite Capital, seeking to enforce a default judgment from a prior lawsuit.

Plaintiff alleges in its complaint that it entered into a written contract with UPFC in June 2005. Under the contract, plaintiff agreed to develop and host a website for UPFC and to provide certain services in connection with the website.

The plaintiff alleges UPFC stopped making required payments under the contract in November 2005. The plaintiff filed a lawsuit in October 2006 and obtained a default judgment for $74,224.93 against UPFC in July 2007.

UPFC was a mortgage lender, incorporated in 1998, with Richard Hataburda as its sole shareholder. Avista alleges that Richard, his wife Patricia and son Patrick received weekly payroll checks from UPFC. Richard claimed in a written correspondence, contained in the record, that UPFC went out of business in July 2006. The plaintiff alleges that UPFC continued conducting business up until January 2007.

The plaintiff alleges the Hataburdas received excess non-payroll payments from UPFC in 2006, thereby converting corporate assets into personal assets. Patrick is the owner of Elite

Capital, a mortgage brokerage firm. The plaintiff alleges that the last business check from UPFC was written to Elite Capital in the amount of $2,500 on January 19, 2007. The plaintiff alleges that Elite Capital began its business operations in January 2007 with the $2,500 from UPFC. Also, former UPFC sales person Jan Mandel now works for Elite Capital and the company operates out of the same address as UPFC.

Under count I of its complaint, Avista alleges that UPFC fraudulently transferred funds to Elite Capital in violation of the Uniform Fraudulent Transfer Act (UFTA) (740 ILCS 160/1 *et seq.* (West 2008)). The plaintiff alleges that the non-business payments from UPFC to the defendants violated the UFTA because all the defendants were "insiders," as defined by UFTA, and UPFC was insolvent at the time the transfers were made. The plaintiff further alleges that the transfers were made with the intent to hinder, delay or defraud plaintiff as a creditor of UPFC.

In count II of its complaint, the plaintiff seeks to pierce the corporate veil of UPFC alleging that UPFC was a mere instrumentality or alter ego of the individual defendants and asks the court to hold these individuals personally liable to plaintiff on the default judgment.

In count III of its complaint, the plaintiff alleges that Elite Capital is a direct continuation of UPFC. The plaintiff alleges Elite Capital was formed to defraud the plaintiff and is liable for the debts and obligations of UPFC, including plaintiff's default judgment.

Patrick and Elite Capital filed a motion for summary judgment pursuant to section 2-1005(b) of the Code of Civil Procedure (735 ILCS 5/2-1005(b) (West 2008)) on January 5, 2010. Included with the motion is an affidavit of Patrick, articles of incorporation for Moxie Nutrition Corp. (Moxie), an amendment changing the name of Moxie to Elite Capital Management, Inc.; an application with the Secretary of State to adopt the assumed name Elite Capital Mortgage, a copy of Elite Capital's office lease, an application with the state for a residential mortgage license, Elite Capital's financial statements, depositions of Mark Phlieger (owner of Avista), and a copy of the contract between Avista and UPFC.

In the motion, the defendants claim neither Patrick nor Elite Capital were a party to the contract between Avista and UPFC. Patrick claims he did not receive any payment from UPFC other than salary and commission. He was never an officer, director or shareholder of UPFC.

Patrick began working at UPFC as a teenager and eventually became a loan underwriter at UPFC. To supplement his income from UPFC, he incorporated Moxie, where he sold nutritional supplements. In 2004, he changed Moxie to Elite Capital Management, Inc.

As UPFC was winding down its business in late 2006, Patrick helped oversee the closing of the final loans. In need of new employment, Patrick transformed his supplemental company into a full-time mortgage brokerage firm. In November 2006, Patrick applied for a mortgage broker license under Elite Capital and shortly thereafter began conducting business under the name Elite Capital Mortgage. In his motion for summary judgment, Patrick stated that the application process for a mortgage broker license required proof of capitalization. Patrick used funds from his personal equity line of credit to provide funding for Elite Capital, which received its state license in March 2007. Patrick claims UPFC did not provide any funding to Elite Capital.

When UPFC closed down, Patrick obtained a lease in the basement of the same building where UPFC operated. Before Elite Capital moved into its space, the landlord requested it temporarily occupy some of the space formerly used by UPFC. In his motion for summary judgment, Patrick claims Richard never held any position with Elite Capital and had no financial stake or managerial control of Elite Capital.

In respect to the piercing of the corporate veil count of Avista's complaint, Patrick claims he did not share any unity of interest and ownership in UPFC. Patrick claims he was an employee of UPFC and never had personal knowledge of UPFC's revenues, net income, or overall financial condition. Patrick claims he did not mix his assets with UPFC and never treated UPFC's assets as his own.

Richard and Patricia filed a motion for summary judgment on January 6, 2010. Included with the motion was the Phlieger deposition and affidavits from Richard and Patricia. In their motion, they claim that they were not parties to the underlying contract with Avista and there is no basis for piercing the corporate veil.

The plaintiff filed a response to the defendants' motions for summary judgment. Documents attached to the motion include a letter from Avista's attorney to Richard Hataburda, a copy of the summons served on UPFC, a copy of the default order, portions of the depositions of Patrick, Patricia, and Richard; credit card bills, Elite Capital's general ledger, and copies of UPFC's cancelled checks.

The trial court noted in its decision granting both motions for summary judgment that certain exhibits from plaintiff's response to the defendants' motions for summary judgment, such as Elite Capital's bank statements, were not considered because these items were not authenticated as required by Supreme Court

Rule 191 (Ill. S. Ct. R. 191 (eff. July 1, 2002)).

In its decision, the trial court noted that Richard Hataburda negotiated and signed the underlying contract with Avista's CEO Mark Phlieger. In 2006, UPFC was having trouble generating new business and it closed down in December when its license with the state expired. With permission from the state, UPFC continued to fund its final loans into early 2007. These loans were written prior to UPFC's demise.

UPFC had a company credit card used for business expenses. Patricia, a quality control employee at UPFC, possessed a card from the account and repaid any personal charges she made on the card. In their motion for summary judgment, Richard and Patricia claim Patricia loaned UPFC $180,000 and was repaid a portion of that loan in 2006, but is still owed $140,000.

While Avista claims Elite Capital received $60,000 from UPFC at the outset of Elite Capital's mortgage brokerage business, and the trial court mentions $60,000 in its order granting summary judgment, the Hataburdas claim UPFC did not deposit $60,000 into Elite Capital's bank account, rather UPFC transferred approximately $19,000 to Elite Capital as compensation for Mandel, who was owed salary and commissions from UPFC.

The trial court found that actual consideration was given by Elite Capital for each transfer from UPFC. The trial court found that transfers to the individual defendants from UPFC were either payroll related, repayment of business expenses incurred on the company credit card, or repayment of the loan Patricia made to UPFC. The trial court found that all three individual defendants worked for UPFC, the checks made out to them from the business can properly be considered payroll. The trial court found that there is no evidence that the transfers were made with the intent to hinder, delay, or defraud Avista. The trial court stated:

> "Avista can only muster a suggestion that the intent to defraud exists in these transfers, but without supporting documentation that suggestion 'does not create an issue of material fact precluding summary judgment.' " (Citation omitted).

The trial court found that all the transfers between UPFC and Elite Capital "appear to have been made without the intent to disturb, delay, hinder or defraud Avista, but rather simply made in the regular course of a business that eventually went under."

In granting summary judgment on the piercing of the corporate veil count of Avista's complaint, the trial court did not find that a unity of ownership existed because Patrick and Patricia were merely employees of UPFC and Avista's claim that Patrick was the *de facto* CEO of UPFC is unsupported by any evidence. In addition, there was no evidence of commingling of funds and Elite Capital did not use any of UPFC's equipment in conducting its business. The trial court did not find any evidence of fraud on part of UPFC's unpaid debt to Avista.

The trial court also granted summary judgment for the successor liability count in Avista's complaint. The trial court found that UPFC did not sell its assets to Elite Capital.

The trial court found Richard had no role in Elite Capital while Patrick was only an employee of UPFC and never held any shares of company stock. Thus, the officers between the two companies are entirely different. Avista appealed the trial court's order granting the defendants' motions for summary judgment.

ANALYSIS

Summary judgment is proper if, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2008). Our review of the trial court's grant of summary judgment is *de novo*. *Illinois State Chamber of Commerce v. Filan*, 216 Ill. 2d 653, 661 (2005).

Fraudulent Transfers

Under section 8 of the Illinois Uniform Fraudulent Transfer Act (UFTA), a creditor may obtain avoidance of a fraudulent transfer to the extent necessary to satisfy the creditor's claim or any other relief the circumstances may require. 740 ILCS 160/8(a)(1), (3)(C) (West 2008).

Illinois recognizes two categories of fraudulent transfers: (1) a "fraud in fact" transfer; and (2) a "fraud in law" transfer. *Regan v. Ivanelli*, 246 Ill. App. 3d 798, 803 (1993)

Section 5 of UFTA lays out the elements used to determine a "fraud in fact" transfer:

> "(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) with actual intent to hinder, delay or defraud any creditor of the debtor; or
>
> (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> (A) was engaged or was about to engage in a business or a transaction

from which the remaining assets of the debtor were unreasonably small in relation to the business or transaction: or

(B) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

(b) In determining actual intent under paragraph (1) of subsection (a), consideration may be given, among other factors, to whether:

(1) the transfer or obligation was to an insider;

(2) the debtor retained possession or control of the property transferred after the transfer;

(3) the transfer or obligation was disclosed or concealed;

(4) before the transfer was made or obligation was incurred, the debtor had been sued or

threatened with suit;

(5) the transfer was of substantially all the debtor's assets;

(6) the debtor absconded;

(7) the debtor removed or concealed assets;

(8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

(11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor." 740 ILCS 160/5 (West 2008).

A "fraud in law" transfer occurs when:

> "(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at the time or the debtor became insolvent as a result of the transfer or obligation.
>
> (b) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent." 740 ILCS 160/6 (West 2008

Under a "fraud in law" transfer, fraud is presumed and the transferor's actual intent is irrelevant. *Ivanelli*, 246 Ill. App. 3d at 804.

Avista claims fraudulent transfers occurred when: (1) UPFC transferred payroll payments to Patricia and Patrick; (2) Patricia used UPFC's credit card; and (3) when UPFC transferred $60,000 to Elite Capital.

Avista claims the trial court erred when it analyzed this case under "fraud in fact" and argues it was instead a case of "fraud in law." Patrick claims we need not consider a "fraud in fact" analysis since Avista argues in its appellate brief that the trial court should not have even applied such an analysis.

However, in making its determination on the defendants' motions for summary judgment, the trial court was required under section 2-1005(c) of the Code of Civil Procedure, to view the pleadings, depositions, admissions and affidavits on file as to whether there exists a genuine issue as to any material fact. 735 ILCS 5/2-1005(c) (West 2008). Avista clearly alleges "fraud in fact" under paragraph 36 of count I of its complaint when it alleges:

> "The transfers were made with the actual *intent* to hinder, delay or defraud [p]laintiff as a creditor of UPFC." (Emphasis added).

Thus, we cannot say that the trial court erred when it used a "fraud in fact" analysis in granting defendants motions for summary judgment. See 740 ILCS 160/5 (West 2008).

As a result, we begin our "fraud in fact" analysis by reviewing the factors to determine "intent" under the UFTA (740 ILCS 160/5 (West 2008)). We note that these factors are merely considerations. *Steel Company v. Morgan Marshall Industries, Inc.*, 278 Ill. App. 3d 241, 251 (1996).

Avista claims Patricia did not work for UPFC and that this issue alone is a question of fact that precludes summary judgment. In support of this claim, Avista cites *Steel Company.* In that case, Par Steel failed to pay plaintiffs for steel purchased from 1987 to 1989. Par Steel ceased operations in 1990. Par Steel's chief executive officer, president and sole shareholder, Phillip Rosenband, incorporated a second steel company Morgan Marshall just prior to the demise of Par Steel and sought to secure a loan with lender Uni-Fin with Par Steel's assets. *Id.* at 244-45. Uni-Fin placed a lien on Par Steel's assets, purchased the assets at a public sale, then sold Par Steel's assets to Morgan Marshall for $3.2 million. *Id.* at 245. Uni-Fin then lent Morgan Marshall $3.2 million. Under the loan agreement, Uni-Fin dispersed the loan proceeds to itself as Morgan Marshall's payment for Par Steel's assets.

Rosenband's wife Sandra was an 80% shareholder in Morgan Marshall and did not pay any consideration for her shares. *Id.* The plaintiffs filed suit against Morgan Marshall to recover the unpaid Par Steel bill, claiming Morgan Marshall was the successor to Par Steel. *Id.* at 241-46.

We found several instances of fraud, including: (1) when Uni-Fin placed a lien on Par Steel's assets even though it was not a creditor of Par Steel, (2) when Morgan Marshall sought a loan from Uni-Fin certifying it had good title to Par Steel's assets, (3) under the loan agreement where Uni-Fin agreed to sell Par Steel's assets to Morgan Marshall even though Uni-Fin had not yet purchased the assets, and (4) the fact that Uni-Fin financed Morgan Marshall's purchase of the Par Steel assets. *Id.* at 251-252.

The instant case is distinguishable because Richard and Patricia, unlike the defendant Rosenband in *Steel Company*, did not incorporate Elite Capital, were not shareholders of Elite Capital, and did not engage in a fraudulent loan to purchase UPFC's assets for Elite Capital. We cannot equate the paychecks received by Patricia to the $3.2 million in assets Morgan Marshall received from Par Steel through the facilitation of lender Uni-Fin.

The record shows that Patricia did indeed work for UPFC and was also owed a substantial sum resulting from a loan she made to UPFC. In addition, Avista presents no evidence to dispute the defendants' claim that the credit card purchases made by Patricia for her own use were paid back by Patricia. In respect to the $60,000 transfer, Richard and Patricia claim that UPFC transferred a little more than $19,000 to Elite Capital, not $60,000 as Avista claims, and the defendants' claim the money was a payment to employee Mandel for salary and commissions earned at UPFC.

In its appellate brief, Avista claims:

> "In addition to the $19,009.41 that was transferred from UPFC to Elite, another $41,028.13 is wholly unaccounted for by Elite ([d]efendant Patrick does not know where it came from) in its bank accounts for early 2007, and also appears to have come from UPFC."

Here, Avista is asking us to speculate that approximately $41,000 was transferred from UPFC to Elite Capital, even though Richard claims UPFC transferred approximately $19,000, and Patrick claims he was financing Elite Capital through his equity line of credit. Furthermore, the trial court reviewed the evidence contained in the record, other than the unauthenticated documents, and found that adequate consideration was given for the transfers in question. Plaintiff has not shown us any evidence in support of its claim that consideration was not given for these transfers. Moreover, this is not analogous to the *Steel Company* situation where the evidence showed Rosenband and Uni-Fin conspired to fraudulently transfer assets from Rosenband's failed company to his successor company for the purpose of avoiding creditors. The record here does not contain any evidence that Elite Capital is the successor company of UPFC, unlike in *Steel Company*, where Rosenband, the CEO and sole shareholder of Par Steel, incorporated Morgan Marshall, gave his wife the majority of the shares without any consideration and placed himself as CEO and continued to conduct the same business as Par Steel.

Here, Richard, the sole shareholder of UPFC, did not incorporate Elite Capital, his wife did not receive any shares of Elite Capital, and Elite Capital, a mortgage broker, did not conduct the same business as UPFC, a mortgage lender.

Avista claims that only one factor of intent under UFTA, or "badges of fraud" as they are referred to in *Steel Company*, is needed to entitle the plaintiff to relief. In support of this claim, Avista cites *Brandon v. Anesthesia & Pain Management Associates, Ltd.*, 419 F.3d 594 (7th Cir. 2005).

In *Brandon*, the plaintiff, a physician, obtained a $2.53 million judgment for retaliatory discharge against his former employer Anesthesia & Pain Management Associates (APM). *Id.* at

595-96. APM refused to pay the judgment. Plaintiff brought suit against the owners individually and learned that when he filed his initial suit, APM transferred its assets as cash bonuses to the three physician owners, totaling $1,178,000. The plaintiff claimed these were fraudulent transfers. *Id.* at 596.

The shareholders of APM formed a new corporation, St. Clair Anesthesia Ltd., on the day plaintiff obtained his retaliatory discharge judgment. St. Clair Anesthesia was named a defendant in plaintiff's collection lawsuit. Plaintiff claimed St. Clair was the successor to APM and liable for its debt. *Id.*

The 7th Circuit found that the bonuses paid to the individual defendants were fraudulent conveyances because there was no consideration for the transfer of the funds and there remained insufficient assets to satisfy the creditors. The payments were intended to prevent the plaintiff from collecting on his claim. The court found that APM simply changed its name and that a change in the name of the debtor does not defeat a creditor's claim. *Id.* at 598.

In making its determination, the 7th Circuit dismissed the "badges of fraud" as an "archaic term, an unfortunate legal cliche that like many such can exercise a mesmerizing force on lawyers and judges." The 7th Circuit did not use the "badges of fraud" in formulating its decision and found that the district court mistakenly relied on the number of “badges of fraud” present in the case. The 7th Circuit noted that the district court found five of 11 “badges” present in the case, short of a majority, thus, reasoned it needed more “badges” to prove fraud.

The 7th Circuit did not state that just one “badge” is enough to prove fraud, as plaintiff claims, rather it stated that certain badges alone are enough to show fraud such as “the debtor absconded” or as in the *Steel Company* situation where the debtor transferred the essential assets of the business to a lien holder who transferred the assets to an insider of the debtor.

Here, there is no evidence that the individual defendants absconded or that Richard transferred the assets of UPFC to a lien holder who transferred them back to Richard.

Furthermore, the physicians in *Brandon* systematically maneuvered APM’s finances to avoid paying the plaintiff’s retaliatory judgment. The defendants emptied APM’s bank account when the plaintiff filed his retaliatory discharge claim. On the day the plaintiff received his judgment, the shareholders formed a new corporation and ceased doing business under APM. They even kept APM as an active “shell” corporation to keep the plaintiff away from the assets of the new corporation. In the instant case, unlike *Brandon*, there is no evidence the defendants systematically maneuvered UPFC’s funds to avoid paying on

Avista's lawsuit. Rather, the record shows that when Avista filed its claim, UPFC was in the process of winding down its business. Richard testified, in a discovery deposition, that UPFC was unable to obtain new business and that he was financing the company, in part, through credit cards.

Moreover, unlike *Brandon*, where the physicians continued their business under a new name, Richard ceased operations of UPFC and was not involved in Elite Capital. Richard also went into a completely different line of work selling automobiles. The evidence shows that Patrick changed the focus of his management company to the mortgage brokerage business when he was about to lose his job at UPFC. As a result, unlike *Brandon*, we cannot say UPFC simply changed its name to defeat a creditor's claim.

Therefore, based on the record before us, we cannot say the trial court erred when it found that the defendants' did not intend to defraud Avista.

Piercing the Corporate Veil

A corporation is a legal entity separate and distinct from its shareholders, directors, and officers. *Semande v. Estes*, 374 Ill. App. 3d 468, 471 (2007). Generally, corporate officers and directors are not individually liable for the debts and obligations of the company. *Dismuke v. Rand Cook Auto Sales*, *Inc.*, 378 Ill. App. 3d 214 (2007). However, a court may disregard a corporate entity and pierce the veil of limited liability where the corporation is merely the alter ego or business conduit of another person or entity. *Fontana v. TLD Builders, Inc.*, 362 Ill. App. 3d 491 (2005). Piercing the corporate veil is an equitable remedy invoked to assist third parties who have been defrauded. *Semande*, 374 Ill. App. 3d at 471.

A party seeking to pierce the corporate veil has the burden of making a substantial showing that one corporation is really a sham for another. *Fontana*, 362 Ill. App. 3d at 500. Courts will pierce the corporate veil only reluctantly. *Id.*

We employ a two-prong test in order to determine whether to pierce the corporate veil: (1) there must be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist; and (2) circumstances must exist such that adherence to the fiction of a separate corporate existence would sanction a fraud, promote injustice, or promote inequitable consequences. *Id.* A reviewing court will not reverse the finding of the trial court regarding piercing the corporate veil unless it is against the manifest weight of the evidence. *Id.* A decision is against the manifest weight of the evidence when the opposite conclusion is clearly evident or where it is unreasonable, arbitrary, or not based on the evidence. *Id.* at 503.

Avista claims the trial court erred when it granted summary judgment on the piercing of the corporate veil count in its complaint because Patrick was the *de facto* CEO of UPFC.

Avista claims the evidence that Patrick was the *de facto* CEO of UPFC includes: (1) he was the most highly compensated employee at UPFC, earning approximately 50% more than Richard; (2) Richard only worked part-time at UPFC at the end of 2006, while Patrick worked full time; and (3) Patrick was able to persuade UPFC to transfer over $60,000 to his new mortgage business for little or no consideration.

Avista's claim are not persuasive because the evidence shows that Richard was in the process of winding down UPFC at the end of 2006 and that he had begun employment elsewhere selling automobiles. Patrick stayed on to handle the remaining loans before UPFC shut down. In addition, we cannot say the evidence shows that UPFC transferred $60,000 to Elite Capital, rather Richard maintains the transfer was closer to $19,000 and was payment to Mandel for worked performed at UPFC.

Patrick testified in his discovery deposition that he was not a shareholder of UPFC, he was not an officer, he had no management responsibilities, and he did not have a financial interest in UPFC. As a result, based on the record, we cannot say the trial court erred when it found that the evidence does not show that Patrick was the *de facto* CEO of UPFC.

Next, Avista claims Patricia had a unity of interest with UPFC because she was ghost payrolled, received unearned bonuses and payment of her personal credit card bills by UPFC.

Generally, in determining whether the "unity of interest and ownership" prong of the piercing the corporate veil test is met, a court will not rest its decision on a single factor, but will examine many factors, including: (1) inadequate capitalization; (2) failure to issue stock; (3) failure to observe corporate formalities; (4) nonpayment of dividends; (5) insolvency of the debtor corporation; (6) nonfunctioning of the other officers or directors; (7) absence of corporate records: (8) commingling of funds; (9) diversion of assets from the corporation by or to a stockholder or other person or entity to the detriment of creditors; (10) failure to maintain arm's length relationships among related entities; and (11) whether, in fact, the corporation is a mere facade for the operation of the dominant stockholders. *Id.* at 503. We cannot say any of these factors support a finding that Patricia had a unity of interest and ownership in UPFC, or that there was a diversion of assets from UPFC to Patricia to the detriment of creditors.

Patricia claims in her appellate brief that she was not ghost payrolled and worked at UPFC since its inception in 1998. Patricia claims that she received normal paychecks for work performed at UPFC. Patricia also claims that she did not receive unearned bonuses, rather she loaned UPFC money at its inception and received payments from UPFC on her outstanding debt.

Patricia claims that UPFC's payment for her personal credit card bills were for medical and gas purchases of which UPFC had a policy of making such payments for its officers. We cannot say the payment of Patricia's personal medical and gas expenses would support a finding that Patricia and UPFC no longer had separate personalities resulting in a unity of interest. *Fontana*, 362 Ill. App. 3d at 500.

Avista claims the Hataburdas had a unity of interest because they failed to present evidence to disprove the 11 unity of interest factors. However, as previously noted, a party seeking to pierce the corporate veil has the burden of proof, not the defendants. *Fontana*, 362 Ill. App. 3d at 500.

In respect to the second prong of the piercing the corporate veil test, *i.e.*, circumstances must exist such that adherence to the fiction of a separate corporate existence would sanction a fraud, promote injustice, or promote inequitable consequences; Avista claims such circumstances exist here and in support cites

Fontana.

In *Fontana*, the plaintiffs contracted with defendant TLD for the construction of a home. *Id.* at 494. In its complaint, the plaintiffs allege TLD failed to complete the construction of the home and abandoned the project. *Id.*

At the time the lawsuit was originally filed, TLD was named TLD Enterprises, Inc., but it changed its name to TLD Builders, Inc., following the filing of the lawsuit. In an amended complaint, the plaintiffs alleged defendant DiCosola was the alter ego of TLD and liable for the damages sought from TLD. The plaintiffs alleged that since the commencement of the lawsuit, DiCosola caused TLD to cease its business operations, emptying the corporation of funds and income. The plaintiffs alleged that adherence to the fiction of the separate corporate existence of TLD promoted injustice by denying them any recovery of the losses resulting from the direct actions of DiCosola. *Id.* at 495.

The trial court found that DiCosola is the alter ego of TLD and the corporation is a shell established to shield him from liability. *Id.* at 499.

The appellate court found that piercing the corporate veil was proper under both the first and second prongs of the test. *Id.* at 499-509. We will focus on the appellate court's analysis of the second prong because Avista claims its cause is similar to

Fontana under the second prong.

The appellate court in *Fontana* found that the trial court could reasonably conclude from the evidence presented at trial that DiCosola caused TLD to be incorporated and placed nominal ownership and control solely in the hands of his wife Theresa for the purpose of shielding himself personally from the liabilities to which his general contracting activities might expose him. *Id.* at 508.

In the instant case, we cannot say the same holds true for Richard. The evidence shows that Richard incorporated UPFC in 1998 for the purpose of conducting the business of a mortgage lender. Richard conducted such business until he was unable to obtain new business in 2006. Unlike DiCosola in *Fontana*, Richard did not place his wife as the sole shareholder and he did not begin to sell off UPFC's assets when Avista filed its lawsuit. The record shows that Richard was in the process of closing down UPFC when Avista filed its lawsuit. Furthermore, the record shows that UPFC had very little assets in 2006 when Avista filed its lawsuit. Richard testified in his deposition, that he was financing the company through credit cards. There is no evidence that UPFC started the year of 2006 with substantial assets, unlike TLD, which started the year 2002 with approximately $1.8 million in assets and ended the year with no assets. In sum, we cannot say the same inequitable circumstances that exist in *Fontana* exist in the instant case. As a result, we cannot say the trial court's decision that the evidence does not support a finding of piercing the corporate veil was against the manifest weight of the evidence.

Successor Corporation Liability

We review the trial court's decision of whether Elite Capital is the successor corporation to UPFC using a manifest weight of the evidence standard of review. *Ashley v. IM Steel, Inc.*, 406 Ill. App. 3d 222, 239 (2010).

In order to determine whether a company is a continuation of a preexisting corporation or a successor corporation, the court looks to whether there is a common identity of officers, directors, and stock between the selling and purchasing corporation. *Id.*

Here the record does not support a finding that there is a common identity of officers, directors and stock between UPFC and Elite Capital. Thus, we cannot say Elite Capital is the successor corporation to UPFC.

Avista, however, claims the trial court failed to look at the exceptions to the general rule of no liability for successor corporations under *Vernon v. Schuster*, 179 Ill. 2d 338, 345 (1997), or the factors used to establish a *de facto* merger under

Steel Company (*Steel Company*, 278 Ill. App. 3d at 248).

The instant case is distinguishable from both cases. In *Vernon*, the court was faced with a question of whether there can be successor liability in a sole proprietorship after the death of the original sole proprietor. *Vernon*, 179 Ill. 2d at 343. The supreme court found that successor liability does not attach to a successor sole proprietor after the death of the first proprietor. *Id.* Here, unlike *Vernon*, the businesses in question are corporations, not sole proprietors.

In formulating its decision in *Vernon*, our supreme court analyzed the rule of successor corporation nonliability. This rule developed as a response to the need to protect bonafide purchasers from unassumed liability and was designed to maximize the fluidity of corporate assets. *Id.* at 345.

We cannot say this rule applies here because the evidence does not support a finding that Elite Capital is the successor corporation of UPFC or that Elite Capital acquired the assets of UPFC.

However, assuming *arguendo*, that Elite Capital had somehow acquired the assets of UPFC, we still cannot say that successor liability attaches here.

Generally, when one corporation sells its assets to another corporation, the seller's liabilities do not become a part of the successor corporation absent an agreement providing otherwise. *Id.* There exist four exceptions to this general rule: (1) where there is an express or implied agreement of assumption; (2) where the transaction amounts to a consolidation or merger of the purchaser or seller corporation; (3) where the purchaser is merely a continuation of the seller; or (4) where the transaction is for the fraudulent purpose of escaping liability for the seller's obligations. *Id.* The second exception has been interpreted to include a *de facto* merger. *Steel Company*, 278 Ill. App. 3d at 248.

Under the first exception, the evidence here does not support a finding that there was an express or implied agreement of assumption between UPFC and Elite Capital, nor does Avista argue as such.

Under the second exception, Avista claims there was a *de facto* merger between UPFC and Elite Capital. In order to establish a *de facto* merger, the following factors need to be present: (1) there is a continuity of the business enterprise between seller and buyer, including continuity of management, employees, location, general business operations and assets; (2) there is a continuity of shareholders, in that shareholders of the seller become shareholders of the buyer so that they become a constituent part of the buyer corporation; (3) the seller ceases operations and dissolves as soon as possible after the transaction; and (4) the buyer assumes those liabilities and obligations necessary for the uninterrupted continuation of the seller's business. *Id.*

Avista claims there does not have to be a sale of any assets to find a *de facto* merger but fails to support this claim with any legal authority. However, even without the lack of sale of any assets, Avista claims the first factor of *de facto* merger is met because UPFC and Elite are virtually identical because the employees between the companies are the same, the address is the same, Elite Capital utilizes UPFC's furniture, computers, health insurance and bank.

Avista's claim is not persuasive. The evidence shows that Richard is the founder of UPFC, negotiated the contract with Avista, was in control and made the decisions up until he began winding down the business and took on employment elsewhere. Richard did not work at Elite Capital. Patrick became the main employee at UPFC only to oversee the final loans as the business closed down. The record shows, Patrick created his mortgage brokerage firm, as a new source of employment in response to the closing of UPFC. Furthermore, Mandel joined Elite Capital because he too was without employment once UPFC ceased operations.

In respect to the address, Patrick claims he did not occupy the same office as UPFC, that he was merely in the same building. He claims he did not utilize the same furniture and computers. Richard testified in his discovery deposition that he sold UPFC's furniture and computers in a "garage sale."

Furthermore, there is no evidence that Elite Capital assumed UPFC's health insurance policy or UPFC's bank accounts. As a result, we cannot say that since Elite Capital contracted with the same health insurance company as UPFC or that it conducted its banking at the same bank that there is *a de facto* merger between UPFC and Elite Capital.

In respect to the second factor, Avista claims there does not have to be a continuity of shareholders and in support cites *Steel Company*. However, in *Steel Company*, the shareholder of the first company incorporated the second company and placed his wife as majority shareholder and himself as CEO. In the instant case, unlike *Steel Company*, Richard did not incorporate Elite Capital and he did not place himself as CEO of Elite Capital. The record shows that Richard was not involved with Elite Capital.

Avista claims the third factor is supported by the fact that UPFC ceased operations at the end of 2006 while Elite Capital began operations in January 2007 with a major gift of cash from UPFC. Avista's claim is not persuasive because the evidence shows UPFC shut down because it could not obtain new business and did not have the finances to continue operations. Also, the corporation that eventually became Elite Capital began at least three years prior to the closing of UPFC. The evidence also shows that the funds transferred from UPFC to Elite Capital were compensation for Mandel for commissions earned while at UPFC. We cannot say the evidence supports a finding that UPFC gifted any assets to Elite Capital.

Moreover, based on the record before us, we cannot say the manifest weight of the evidence supports a finding that Elite Capital is the successor corporation to UPFC.

CONCLUSION

For the foregoing reasons, we affirm the trial court's judgment.

Affirmed.