THIRD DIVISION
December 28, 2016

No. 1-15-3389

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MICHAEL PILOLLA,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 14 L 1231
	)	
MERIT ELECTRIC, LLC,	)	Honorable
	)	Patrick J. Sherlock,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Lavin concurred in the judgment.

O R D E R

¶ 1 *Held*: Section 2-615 dismissal order affirmed; plaintiff's amended complaint failed to allege sufficient facts to establish either the mere-continuation exception or the fraudulent intent exception to the Illinois rule of successor corporate nonliability.

¶2 Plaintiff Michael Pilolla (plaintiff) appeals from the circuit court's order dismissing with prejudice his amended complaint pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2014)). Plaintiff, a judgment creditor of defunct Lid Electric, Inc. (Lid), filed a lawsuit seeking to impose liability against its alleged successor company, Merit Electric, LLC (Merit). Plaintiff contends that the circuit court's dismissal order was erroneous because his

amended complaint adequately stated a cause of action under two exceptions to the successor corporate nonliability rule: mere continuation and fraudulent attempt to escape liability. We affirm.

¶ 3 In 2013, plaintiff obtained a $326,284.70 default judgment against Lid, an electrical contractor, but was unable to collect the judgment from Lid which had ceased doing business in September 2011. Plaintiff filed a lawsuit seeking to hold Merit, as alleged successor company to Lid, responsible for Lid's debt. Plaintiff filed an amended complaint alleging one cause of action, successor liability, which Merit moved to dismiss pursuant to section 2-615. The amended complaint alleged that Merit was responsible for Lid's debt as "the successor of Lid. In essence there was a change in form without a significant change in substance," and that Lid and Merit "share substantially the same management, business purpose, operations, customers and supervision." The amended complaint asserted the following allegations. Lid was a commercial and residential electrical construction contractor. Lid's sole shareholder and supervising electrician was Martin Schuett. In December 2005, plaintiff loaned the corporation $100,000 to finance Lid's electrical construction projects. In July 2008, plaintiff loaned Lid an additional $100,000. Lid remitted interest payments but never repaid the principal amounts on the loans totaling $200,000. Lid terminated business operations in September 2011. On January 22, 2012, Schuett filed for Chapter 7 bankruptcy.[1] Plaintiff filed an action against Lid seeking recovery of

[1] The amended complaint did not specify which Schuett, Martin or Mark, filed for bankruptcy, or whether he did so individually or on behalf of the company. The circuit court's dismissal order indicates that the court believed Martin and Mark were one and the same person.

the loans and interest thereon. On September 7, 2012, plaintiff obtained a $326,284.70 default judgment against Lid.

¶ 4 The amended complaint also alleged that after Lid ceased performing electrical work, a new entity named Merit Electric, LLC, was formed in September 2011 by Peter Maris, the sole owner of Merit and a former project manager for Lid. Merit's principal place of business was in Chicago. Martin Schuett loaned Merit $50,000 to fund its initial operations. The amended complaint asserted that "Peter Maris was substantially involved in the business management operations of Lid" in that "he negotiated contracts, was responsible for securing Lid project payments, negotiated project close out documents and debts due Lid and was represented to be a project manager of Lid." Mark Schuett, who had also worked at Lid as a project manager, joined Merit and maintained the same duties that he had with Lid, serving as a project manager at Merit, preparing bids and take-offs, securing negotiated contracts, monitoring labor manpower to ensure the project was proceeding on schedule, ordering project materials, and calculating Merit's change order labor and material packing for Merit's invoices. In 2007, when Lid was experiencing financial difficulties, Mark Schuett made verbal and written representations to Lid customers that Peter Maris was his Lid business partner. Mark Schuett's name and the goodwill he created through Lid carried over to Merit which allowed Merit to secure jobs from the former customers of Lid. Jessica Schuett was a corporate officer of Lid and a *de facto* corporate officer of Merit in that she held herself out as vice president of Merit. Both Lid and Merit applied to the City of Chicago for a certificate of registration, citing Martin Schuett, Lid's former sole shareholder and supervising electrician, as the supervising electrician of Merit.

¶ 5 The amended complaint further alleged that Lid was a signatory to a collective bargaining agreement with the International Brotherhood of Electrical Workers Local Number 134 (union), and that Lid ceased business operations and Lid's field employees ceased performing work covered by the agreement in September 2011. In that same month, in order to allow Merit to continue doing work for Lid customers and to further allow Lid's union field employees' employment to be transferred over to Merit, Merit became signatory to a collective bargaining agreement with the union. In November 2011, Merit informed the union that all former employees of Lid were now employees of Merit. Merit paid Lid's past-due union fund contribution reports. All of Lid's other field management employees who went to work for Merit assumed the same field management duties they had with Lid.

¶ 6 The complaint concluded that Merit's actions indicated it assumed some of Lid's financial and contractual obligations that it had the ability to fund and/or perform. Merit used its own employee to complete work on a Lid project under which Merit had no contract. Merit began performing work with Lid's former employees and for the former customers of Lid. Merit

> "billed for and was paid for work performed by Lid. On another project where Lid was having difficulty honoring its contractual obligations to secure a payment bond, Peter Maris, on behalf of Lid met with the developer and devised a scheme whereby he would form a new electrical entity which would secure the payment bond. In the event the newly formed entity could secure a payment bond, Maris wanted assurances the developer would assign Lid's electrical contract to the new entity."

There was no allegation in the amended complaint that this scheme was ever implemented.

¶ 7 The amended complaint alleged that the goodwill, employees, and receivables of Lid were transferred to Merit for no consideration "and was a fraudulent attempt to escape liability from Lid's obligations." The dissolution of Lid and immediate creation of Merit was a transparent attempt to escape the liabilities incurred by Lid.

¶ 8 Merit filed a section 2-615 motion to dismiss the amended complaint. The circuit court granted Merit's motion and dismissed the complaint with prejudice, finding that it was "abundantly clear that plaintiff can never state a cause of action against Merit based on an exception to the no-liability rule. The facts of his case are simply not actionable under settled Illinois law."

¶ 9 On appeal, plaintiff contends that his amended complaint was improperly dismissed because it stated a cause of action under two exceptions to the doctrine of successor corporate nonliability: mere continuation and fraudulent purpose. First, plaintiff asserts that Merit was a mere continuation of Lid and must be held responsible for Lid's debts.

¶ 10 A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent on its face. *Beacham v. Walker*, 231 Ill. 2d 51, 57 (2008). An order granting or denying a section 2-615 motion is reviewed *de novo*, with the reviewing court accepting as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. *Id.* 57-58. The allegations in the complaint are construed in the light most favorable to the plaintiff. *Beacham*, 231 Ill. 2d at 58. A cause of action should not be dismissed pursuant to a section 2-615 motion unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief. *Tedrick v. Community Resource Center, Inc.*, 235 Ill. 2d 155, 161 (2009).

However, the plaintiff must allege facts sufficient to bring a claim within a legally recognized cause of action. *Id.* A court cannot accept as true mere conclusions that are unsupported by specific facts. *In re Estate of Powell*, 2014 IL 115997, ¶ 12.

¶ 11 The doctrine of successor corporate nonliability states that when a corporation purchases the assets of another corporation, the purchaser generally is not liable for the debts or liabilities of the seller. *Workforce Solutions v. Urban Services of America, Inc.*, 2012 IL App (1st) 111410, ¶ 86. There are four exceptions to the doctrine: where (1) there is an express or implied agreement of assumption of liability; (2) the transaction amounts to a consolidation or merger of the purchaser or seller corporation; (3) the purchaser is merely the continuation of the seller; or (4) the transaction is for the fraudulent purpose of escaping liability for the seller's obligations. *Vernon v. Schuster*, 179 Ill. 2d 338, 345. These exceptions are equally recognized in most American jurisdictions. *Id.* Plaintiff asserts that the last two exceptions are applicable here.

¶ 12 The mere-continuation exception to the rule of successor nonliability applies "when the purchasing corporation is merely a continuation or reincarnation of the selling corporation." *Id.* 346. "In determining whether one corporation is a continuation of another, the test used in the majority of jurisdictions is whether there is a continuation of the *corporate entity of the seller*--not whether there is a continuation of the *seller's business operation*." (Emphasis in original.) *Id.* The majority of courts considering the continuation exception emphasize a common identity of officers, directors, and stock between the selling and purchasing corporation as the key element of a continuation. *Id.* 346-47. "The test is not whether the seller's business operation continues in the purchaser, but whether the seller's corporate entity continues in the purchaser." *Advocate Financial Group, LLC v. 5434 North Winthrop, LLC* [*Advocate* I], 2014 IL App (2d) 130998, ¶

26, citing *Vernon*, 179 Ill. 2d at 346. *Vernon* and its progeny define the mere-continuation exception in terms of a seller and a purchaser. "The traditional rule of successor corporate nonliability 'developed as a response to the need to protect bonafide purchasers from unassumed liability.' " *Vernon*, 179 Ill. 2d at 345, quoting *Tucker v. Paxson Machine Co.*, 645 F.2d 620, 623 (8th Cir. 1981).

¶ 13 In dismissing plaintiff's amended complaint, the circuit court found that when Lid went out of business, a former Lid employee started a new company, Merit, "to take advantage of the vacuum and 'scoop up' the laid-off employees and former customers." We conclude, as did the circuit court, that while the complaint alleged a transfer of assets from Lid to Merit occurred, it lacked specific facts as to the nature of the alleged transfer by Lid or its sole shareholder, Martin Schuett. The complaint did not state Lid's address or allege that Merit later conducted business at the same address where Lid had been located. The complaint indicated only that when Lid shut down its operations, Maris seized the opportunity and formed Merit, taking on employees and customers of the defunct Lid to perform the same type of electrical contracting work. Plaintiff concedes that a *bona fide* sale of assets did not take place, but he argues that through a bogus transaction, Lid's assets, including its employees, customers, goodwill, receivables and existing electrical contracts, were transferred to Merit for no consideration. The amended complaint's allegation that a transfer existed is conclusory, and the lack of specific facts as to how the alleged transfer was brought about renders plaintiff unable to recover. *Sutherland v. Illinois Bell*, 254 Ill. App. 3d 983, 988 (1993).

¶ 14 Plaintiff contends, however, that there was a common ownership between Lid and Merit where Mark Schuett, Jessica Schuett, and Peter Maris moved to Merit upon Lid's dissolution and

assumed the same roles they had with Lid. The flaw in plaintiff's argument, however, is that none of the three was an owner or shareholder of Lid, although Mark Schuett and Peter Maris appear to have been key employees of Lid. Martin Schuett, the former sole shareholder of Lid, had no controlling interest in Merit. The amended complaint did not allege that he was an owner, director, or officer of Merit or had an active role in the management of Merit. This court has consistently held that, before imposing successor liability under the continuation exception, the most important factor is the identity of the ownership of the new and former corporations. *Villaverde v. IP Acquisition VIII, LLC*, 2015 IL App (1st) 143187, ¶ 55, citing *Vernon*, 179 Ill. 2d at 346-47. As continuity of shareholders is a key factor in the determination of successor corporate liability (*Hoppa v. Schermerhorn & Company*, 259 Ill. App. 3d 61, 66 (1994)), the circuit court correctly ruled here that Merit was not a continuation of Lid.

¶ 15 Plaintiff acknowledges that Illinois law, as stated in *Vernon*, requires common identity of ownership between the former and new company, but he portrays it as a harsh bright-line rule applied even in instances where the facts evidence a scheme to escape liability or where a *bona fide* sale of assets is missing. Plaintiff argues that the requirement of continuity of ownership, even in the face of a substantial continuity of business operations, negates the purpose of the exceptions to successor nonliability and "provides a simple roadmap for a corporate entity to escape creditors." In support of his claim, plaintiff relies heavily on *Lincoln National Life Insurance Co. v. Nicklau, Inc.*, 2000 WL 656683 (N.D. Ill. 2000) (unpublished order). Being an unpublished federal district court opinion, *Nicklau* specifically has been held to have no precedential value in the Seventh Circuit. *LM Insurance Corp. v. Spaulding Enterprises Inc.*, 533 F.3d 542, 553 (7th Cir. 2008). Moreover, given that federal interpretations of Illinois law are not

binding on Illinois courts, this court need not consider *Nicklau* as anything other than persuasive authority. *Pielet v. Pielet*, 2012 IL 112064, ¶ 39; *Greer v. Advanced Equities, Inc.*, 2012 IL App (1st) 112458, ¶ 14.

¶ 16 Aside from the fact that the unpublished decision in *Nicklau* is of no precedential value, it is readily distinguishable on its facts from the case at bar. In *Nicklau*, the plaintiff filed an action in federal court seeking to collect on an outstanding state court judgment; the defendants were brothers Dan and Tuan Nguyen and Nicklau, Inc., d/b/a Pasteur. Initially, Dan and Tuan co-owned two Vietnamese restaurants, both named Pasteur. The first, incorporated in 1985, was destroyed by a fire in 1995; the second was incorporated in 1992. Kim Nguyen, Dan's wife, assumed a significant managerial role at both restaurants. In February 1996, plaintiff filed a forcible entry and detainer action against Pasteur-Sheridan and ultimately was awarded a judgment. After plaintiffs' state court suit was filed, Kim Nyugen incorporated another Vietnamese restaurant (Pasteur-Broadway) as Nicklau, Inc., d/b/a Pasteur. Kim was the sole director and shareholder, and she also served as its president and secretary. Kim and Dan Nguyen owned the building where the restaurant was located. Dan Nguyen worked there 50 to 60 hours a week, maintaining the books, cooking, and paying the bills; Tuan Nguyen worked there 50 hours a week, managing the cash register, overseeing the cleaning crew, and on many occasions issued personal checks, for which he was later reimbursed, to pay for Pasteur-Broadway's financial obligations.

¶ 17 The district court noted that after plaintiffs' state court suit was filed, Nicklau, Inc., d/b/a Pasteur, was incorporated with Kim Nguyen as the sole officer and shareholder of the third Pasteur restaurant. The court concluded this was a ruse, "a transparent attempt to escape the

liabilities about to be incurred by the old Pasteurs." The court cited the holding of *Vernon*, 179 Ill. 2d at 347, that one corporation is deemed to be a continuation of another where there exists a common identity of officers, directors, and/or shareholders. The court concluded that "[r]egardless of whether they officially served as owners, directors, or officers, Dan, Tuan and Kim Nguyen were substantially intertwined in the operation of all three Pasteur restaurants."

¶ 18 *Nicklau* did not abandon the continuation exception to successor corporate nonliability, an exception which emphasizes a common identity of officers, directors, and stock between the selling and purchasing corporation. Rather, *Nicklau* found common identity of ownership where the same three family members shared the positions of officer, director and shareholder in all three companies by switching their titles.

¶ 19 Here, plaintiff proposes a parallel between the trio of Mark Schuett, Jessica Schuett, and Peter Maris in the instant case and the trio of Dan, Tuan and Kim Nguyen in *Nicklau*. However, the facts of *Nicklau* are not sufficiently similar to those of the instant case to command a like result. *Nicklau* did not reject the ownership-identity requirement; it recognized that the same three family members merely switched roles while continuing their ownership and control of the Pasteur name. In the instant case, Martin Schuett was the sole shareholder of Lid, but the amended complaint did not allege that he had any ownership interest or managerial role in Merit. Peter Maris, who founded Merit, had been a key employee of Lid as a project manager, but Maris and Mark Schuett, also a project manager at Lid, were not alleged to have had an ownership interest in Lid. Jessica Schuett was asserted to be a corporate officer of Lid who allegedly held herself out as vice president of Merit, though there was no allegation as to what office she held in Lid or that she was actually an officer, director, or stockholder of Merit, and no

specific facts were alleged as to the circumstances in which she held herself out as Merit's vice president. As *Nicklau* is clearly distinguishable on its facts, we decline to use it as persuasive authority in support of plaintiff's claim.

¶ 20 While identity of ownership is a key element in establishing the mere-continuation exception, we recognize that the continuity of shareholders does not require complete identity between the shareholders of the former and successor corporations. *Workforce Solutions*, 2012 IL App (1st) 111410, ¶ 88. However, a change of shareholders is consistent with the mere-continuation exception only where the former owners retain a controlling interest in the successor entity. *Id*. Thus, in *Nicklau*, it was not the continuity of business that was the deciding factor in establishing successor liability; it was that the three principals in the first two Pasteur restaurants were the same three principals in the third restaurant, under different titles. Similarly, in *Steel Co. v. Morgan Marshall Industries, Inc.*, 278 Ill. App. 3d 241, 249 (1996), this court found a continuity of shareholders and successor liability where, although the sole shareholder of the predecessor company was not a shareholder of the successor company, his wife had an ownership interest in the successor company and he acted as chief executive officer of the successor company and managed the company until stocks were issued, after which his wife obtained an 80% interest in the shares of the successor company. In *Hoppa*, 259 Ill. App. 3d at 66, this court held that Schermerhorn & Company, incorporated on July 1, 1985, was successor corporation to J.P. Schermerhorn & Company which was voluntarily dissolved on the same day. The two companies were licensed real estate brokers responsible for managing the same property; they conducted business from the same address using the same telephone number; they employed the same staff and maintained the same bank accounts. Significantly, the sole

shareholders of J.P. Schermerhorn & Company were joint tenants John and Claire Schermerhorn, whereas the stockholders of Schermerhorn & Company included John who owned 2% of the stock, Claire who owned 49%, and their son Daniel who owned an undisclosed percentage. As John and Claire Schermerhorn together exercised a controlling share in both corporations, the two companies shared continuity of stock ownership. The court concluded that Schermerhorn & Company was a continuation of the dissolved J.P. Schermerhorn & Company and was liable for the torts of the dissolved company.

¶ 21 The instant case is readily distinguishable from these authorities and from *Nicklau*, where the facts alleged in plaintiff's amended complaint did not adequately allege a common ownership or close relationship between Martin Schuett, sole shareholder of the predecessor corporation, and Peter Marin, the sole owner of the successor corporation. This case more closely resembles *Green v. Firestone Tire & Rubber Company, Inc.*, 122 Ill. App. 3d 204, 207, 210 (1984), holding that a finding of continuation was not warranted where no present or former stockholders, directors or officers of the transferee company, Sensation Corporation had ever been stockholders, directors or officers of the transferor, Sensation Mower, Inc.

¶ 22 Plaintiff asserts that the amended complaint establishes continuity by the fact that the business operations of Lid survived in the newly-formed Merit. This was the same continuation-of-business argument advanced by the plaintiff in *Green*, who argued that "the same name, land, inventory and type of manufactured product were continued from the predecessor corporation." This court rejected the plaintiff's argument and held that "in order to find a merger exception to the rule of nonliability, there must be continuity of shareholders." *Id.* 210. In *Diguilio v. Goss International Corp.*, 389 Ill. App. 3d 1052 (2009) , the plaintiff argued that the continuity of

ownership came from the fact that Goss International produced the same product lines, continued to do business with the same customers and kept the same phone numbers as Goss Graphic. In rejecting the plaintiff's claim, this court held: "We see no reason to depart from our court's consistent rejection of the product line approach." *Id.* 1063-64.

¶ 23 In the instant case, the facts alleged in plaintiff's amended complaint established merely a smooth transition of operations and key employees from one electrical contractor to another, but the businesses retained their separate identities where ownership changed. The complaint lacked sufficient facts identifying a sale or transfer of Lid assets to Merit; it made no allegation that the former owner of Lid held any ownership or controlling interest in Merit; and its allegation of a carry-over of Lid's electrical contracting business by Merit did not state a cause of action under the mere-continuation exception so as to enable imposition of successor liability.

¶ 24 Plaintiff's second contention is that successor liability attached under the alternate ground of the fraudulent purpose exception to the successor corporate nonliability doctrine. Plaintiff asserts that the dissolution of Lid and immediate transfer of all of Lids assets--employees, goodwill, contracts, customers, and receivables--to newly-formed Merit carried no consideration and was a fraudulent attempt to escape liability from Lid's obligations to its creditors. Plaintiff relies on the factors outlined in the Uniform Fraudulent Transfer Act (UFTA) (740 ILCS 160/1 *et seq.* (West 2014)), which sets out eleven "badges of fraud" to consider in determining actual intent to defraud: "(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 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(b) (West 2014).

¶ 25 Plaintiff asserts that four of the eleven badges of fraud are present here: (1) the value of the consideration received by Lid was not equivalent to the value of the assets; (2) the transfer was of substantially all of Lid's assets; (3) Lid concealed its assets from creditors; and (4) Lid kept its assets out of reach of creditors by transferring them to Merit. However, as noted above in our discussion of the mere-continuation claim, the amended complaint contained no specific facts supporting plaintiff's claim that when Lid went out of business, it transferred any assets to Merit. In dismissing the amended complaint, the circuit court found that "[t]he facts alleged in this case do not support a conclusion that Lid transferred or 'passed' its employees, goodwill, customers or receivables to Merit, *gratis* or not."

¶ 26 The chronology of this case does not suggest any intent by Lid's ownership to defraud its creditors. The default judgment entered in plaintiff's favor was based on Lid's failure to repay the substantial sums loaned to Lid in 2005 and 2008 to finance Lid's electrical construction projects. Lid went out of business in 2011. Thereafter, Merit opened under new ownership. In 2012, plaintiff filed a cause of action, and in September 2013, plaintiff obtained a default judgment against Lid. The timing of these events does not command an inference that the termination of

Lid's operations and subsequent establishment of Merit in 2011 was an attempt to avoid repayment of loans made to Lid years earlier and two years before plaintiff had obtained a judgment against Lid.

¶ 27 For the reasons set forth above, we conclude that plaintiff's amended complaint failed to establish a claim for successor corporate liability, and it was properly dismissed pursuant to Merit's section 2-615 motion. The judgment of the circuit court of Cook County is affirmed.

¶ 28 Affirmed.