SIXTH DIVISION
March 29, 2013

No. 1-11-2105

Ostrolenk Faber LLP, Plaintiff-Appellant, v. Genender International Imports, Inc.; Genender International, Inc.; Gennco International, Inc.; George Stoner Commercial Credit Company; High Ridge Partners, Inc.; Patrick D. Cavanaugh; Scott N. Schreiber; Stahl Cowen Crowley LLC; Jerry Kushnir; Ken Genender; Amy Genender; Danny Genender; Chicago Title Land Trust Company, an Illinois Corporation, as trustee under the provisions of a certain trust agreement dated September 18, 1986 and known as trust number 100055-02; and other co-conspirators to be named; Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County No. 2010 L 1266 Honorable Allen Goldberg, Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Lampkin and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err when it dismissed plaintiff's complaint on all counts under sections 2-615 and 2-619 of the Code of Civil Procedure (735 ILCS 5/2-615, 2-619 (West 2010)).

¶ 2 Plaintiff Ostrolenk Faber LLP (Ostrolenk), a New York law firm, appeals from the circuit court's order dismissing its complaint pursuant to sections 2-615 and 2-619 of the Code of Civil

Procedure (735 ILCS 5/2-615, 2-619 (West 2010)) (Code) against defendants Genender International Imports, Inc. and Genender International, Inc. (collectively GII); Gennco International, Inc. (Gennco); George Stoner Commercial Credit Company (Stoner); High Ridge Partners, Inc. (High Ridge); Patrick D. Cavanaugh (Cavanaugh); Scott N. Schreiber (Schreiber); Stahl Cowen Crowley LLC (Stahl); Jerry Kushnir (Kushnir); Ken Genender; Amy Genender; Danny Genender; Chicago Title Land Trust Company, an Illinois Corporation, as trustee under the provisions of a certain trust agreement dated September 18, 1986 and known as trust number 100055-02 (Land Trust); and other co-conspirators to be named. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 This appeal stems from a dispute regarding attorneys fees resulting from litigation in which Ostrolenk represented GII in intellectual property matters in various courts. Ostrolenk sought to recover over $400,000 in attorneys fees from GII. Subsequently, certain of GII's owners incorporated Gennco and Stoner. Stoner held a note and a mortgage, dated March 11, 2009, and secured by real property owned by GII. GII then assigned its assets to Cavanaugh and High Ridge Partners as Assignee pursuant to a "Trust Agreement and Assignment for the Benefit of Creditors" (ABC) on March 18, 2009. In conjunction with the ABC, the Assignee agreed to sell GII's assets, except its real property, which consisted of a building located in Wheeling (the Wheeling property), to Gennco for an amount that would pay down GII's secured lender, Stoner, and Gennco's payment of wage claims and associated payroll taxes against GII, and its assumption of certain other GII liabilities. The Assignee sent a notice to GII's creditors,

including Ostrolenk, on March 18, 2009, of the ABC and the proposed sale, by auction, of GII's assets to Gennco. The notice described Gennco as a "related party" of GII. The auction took place on April 7, 2009, with Gennco as the sole bidder. Gennco paid the Assignee $1.8 million to purchase GII's assets. After the sale, GII's sole asset was the Wheeling property. Pursuant to the ABC, the Assignee made a payment to Stoner, as the only secured creditor, however the payment was insufficient to satisfy the balance of the loan. Stoner subsequently foreclosed on the Wheeling property and received title to the property.

¶ 5 Ostrolenk subsequently filed a first amended complaint against defendants in the circuit court of Cook County in October 2010. The eight-count amended complaint generally alleged that defendants had committed fraud by executing the ABC, which resulted in no additional assets to pay Ostrolenk. The circuit court granted defendants' motions to dismiss pursuant to sections 2-615 and 2-619 of the Code with prejudice, and Ostrolenk now appeals.

¶ 6 ANALYSIS

¶ 7 On appeal Ostrolenk asserts the circuit court erred in granting defendants' motions to dismiss pursuant to sections 2-619 and 2-615 of the Code. A motion to dismiss pursuant to section 2-619 of the Code admits the legal sufficiency of a plaintiff's complaint but raises defects, defenses, or other affirmative matters that appear on the complaint's face or that are established by external submissions acting to defeat the complaint's allegations. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115 (1993); *Russell v. Kinney Contractors, Inc.*, 342 Ill. App. 3d 666, 670 (2003). A section 2-619 dismissal resembles the grant of a motion for summary judgment; we must determine whether a genuine issue of material fact should have

precluded the dismissal or, absent such an issue of fact, whether the dismissal was proper as a matter of law. *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 254 (2004). A motion to dismiss brought under section 2-615 of the Code attacks the legal sufficiency of a complaint by alleging defects on the face of the complaint. 735 ILCS 5/2-615 (West 2010); *Vitro v. Mihelcic*, 209 Ill. 2d 76, 81 (2004). When ruling on a section 2-615 motion, the relevant question is whether, taking all well-pleaded facts as true, the allegations in the complaint, construed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted. *Canel v. Topinka*, 212 Ill. 2d 311, 317 (2004). A motion to dismiss should not be granted "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). Illinois is a fact-pleading state; conclusions of law and conclusory allegations unsupported by specific facts are not deemed admitted. *Time Savers, Inc. v. LaSalle Bank, N.A.*, 371 Ill. App. 3d 759, 767 (2007). We review an order granting a section 2-615 motion to dismiss *de novo*. *Beacham v. Walker*, 231 Ill. 2d 51, 57 (2008). We address each of the eight counts of Ostrolenk's first amended complaint separately below.

¶ 8 Count I - Breach of Fiduciary Duty

¶ 9 Count I alleged breach of fiduciary duty against defendants Cavanaugh and High Ridge Partners with respect to the ABC. Defendants' motion to dismiss alleged the complaint should be dismissed for failure to state a claim pursuant to section 2-615 of the Code. The circuit court granted the motion, finding that the complaint was "replete with conclusory allegations," and failed to allege sufficient facts to establish a cause of action for breach of fiduciary duty.

¶ 10 On appeal, Ostrolenk contends that Cavanaugh and High Ridge (collectively the Assignee) breached their fiduciary duty to Ostrolenk, as a creditor of GII, by "actively participat[ing] in a scheme to defraud creditors by aiding and abetting GII's misuse of the ABC to destroy the interest of its legitimate creditors while preserving the interests of GII's ownership." Specifically, Ostrolenk alleged in its complaint that the Assignee failed to: (1) conduct any meaningful inventory or valuation of GII or the assets assigned; (2) take any reasonable action to obtain the highest price for GII, including failing to take any action reasonably calculated to seek out another buyer for GII; (3) alert the creditors of GII that Stoner had been formed only days before the assignment; (4) alert the creditors of GII that Stoner had become a putative senior secured creditor of GII only days before the assignment; (5) alert the creditors of GII that Stoner was a related entity and not a *bona fide* arm's length creditor of GII; (6) alert the creditors of GII that the Wheeling property had been mortgaged to secure a $1.8 million loan on March 11, 2009, one week before he accepted the assignment; (7) alert the creditors of GII that Gennco had purportedly excluded the Wheeling property from the assets of GII that it purchased at the assignment sale "solely as a ruse" to justify an arbitrary reduction of $50,000 of the sale price; and (8) alert the creditors of GII of the collusive foreclosure initiated by Stoner against GII after the purchase price paid by Gennco for GII's assets was arbitrarily reduced by $50,000 at the sale. Ostrolenk further alleged in its complaint that it suffered damages as a proximate result of the assignment including its *pro rata* share of the "actual value that GII would have fetched" in a true arm's length sale, "instead of the hurried and collusive sale" that occurred.

¶ 11 An assignment for the benefit of creditors is "a voluntary transfer by a debtor of [its]

property to an assignee in trust for the purpose of applying the property or proceeds thereof to the payment of [its] debts and returning the surplus, if any, to the debtor." *Illinois Bell Telephone Company v. Wolf Furniture House, Inc.*, 157 Ill. App. 3d 190, 194-95 (1987). A debtor may choose to make an assignment for the benefit of creditors, which is an out-of-court remedy, rather than to petition for bankruptcy, because assignments are less costly and completed more quickly. *First Bank v. Unique Marble and Granite Corporation*, 406 Ill. App. 3d 701, 707 (2010). An assignment for the benefit of creditors is a trust arrangement in which the assignee holds property for the benefit of a special group of beneficiaries, the creditors, and owes a fiduciary duty to the creditors. *Illinois Bell*, 157 Ill. App. 3d at 195; *First Bank*, 406 Ill. App. 3d at 707. Absent some defect in the creation of the assignment itself, an assignment passes legal and equitable title to the debtor's property from the debtor to the assignee, and the assignment is valid without the consent of any of the debtor-assignor's creditors. *First Bank*, 406 Ill. App. 3d at 707.

¶ 12 To state a claim for breach of fiduciary duty, a plaintiff must allege the existence of a fiduciary duty, the breach of that duty, and damages proximately caused therefrom. *Neade v. Portes*, 193 Ill. 2d 433, 444 (2000). Here, the allegations in Ostrolenk's amended complaint that the Assignee breached its fiduciary duty are conclusory and insufficient to state a cause of action for breach of fiduciary duty. Ostrolenk generally alleged that the Assignee failed to properly value GII's assets, sold it below value in a "sham" transaction and as a result, Ostrolenk suffered damages. Though Ostrolenk makes a long list of the actions the Assignee "failed" to do, never does Ostrolenk state why these "failures" are breaches of a fiduciary duty. Ostrolenk's

conclusory statements fail to allege any specific facts supporting its allegations. Without any specific facts, Ostrolenk's claim against the Assignee for breach of fiduciary duty cannot survive a section 2-615 motion to dismiss. We conclude that the circuit court properly dismissed count I of Ostrolenk's amended complaint.

¶ 13 Count II - Breach of Fiduciary Duty

¶ 14 Count II alleged breach of fiduciary duty against defendants Ken Genender, Amy Genender, Danny Genender, Jerry Kushnir and GII. Ostrolenk alleged that defendants, as officers and directors of GII, owed fiduciary duties to the creditors of GII when GII became insolvent. Defendants' motion to dismiss pursuant to sections 2-615 and 2-619 of the Code alleged that Amy Genender, Danny Genender and Jerry Kushnir were neither officers, directors nor shareholders of GII, and therefore owed no fiduciary duty to Ostrolenk. The motion was supported by an affidavit from Ken Genender averring that the sole officers of GII were himself and Ann Genender. The motion further alleged that the allegations in the complaint were vague and conclusory and should be dismissed. The circuit court dismissed count II as to Amy Genender, Danny Genender and Jerry Kushnir pursuant to section 2-619 on the basis that they were neither officers, directors nor shareholders. As to defendants Ken Genender and GII, the court dismissed count II pursuant to section 2-615 on the basis that the allegations in the complaint were vague and conclusory.

¶ 15 On appeal, Ostrolenk contends that defendants Amy Genender, Danny Genender and Jerry Kushnir owed Ostrolenk a fiduciary duty because each acted "under the color or authority of GII." Ostrolenk further contends that the allegations in count II of its complaint sufficiently

alleged a cause of action for breach of fiduciary duty. Specifically, Ostrolenk points to the allegations that defendants: (1) failed to conduct a meaningful valuation of GII's assets before its sale; (2) failed to take reasonable actions to secure the highest possible price for GII's assets, including seeking out an additional buyer; (3) failed to alert creditors to the fact that Stoner was an insider who had become a putative senior secured creditor of GII by receiving a "sham mortgage" in the Wheeling property; (4) aided and abetted the use of the "shill Stoner mortgage" and "collusive foreclosure" to wipe out creditor interests; and (5) failed to act in good faith as they permitted or participated in a sale of GII's assets to a related party for a payment to another related party.

¶ 16 We first consider Ostrolenk's contention that defendants Amy Genender, Danny Genender and Jerry Kushnir owed Ostrolenk a fiduciary duty because each acted "under the color or authority of GII." Ostrolenk relies on *PharMerica Chicago, Inc. v. Meisels*, 772 F. Supp. 2d 938, 960-61 (N.D. Ill. 2011) for the proposition that "*de facto* officers or directors owe fiduciary duties to their corporation and, under appropriate circumstances, to the corporation's creditors." However, Ostrolenk fails to argue how each of these defendants acted "under the color or authority of GII" or what actions, if any, they took evidencing any specific role they might have had in the daily management of GII. We find no error in the circuit court's dismissal of count II against defendants Amy Genender, Danny Genender and Jerry Kushnir.

¶ 17 We next address Ostrolenk's contention that count II of its complaint sufficiently alleged a cause of action for breach of fiduciary duty. Similar to count I, the allegations in count II generally alleged that defendants failed to properly value GII's assets, sold it below market value

in a "sham" transaction to wipe out creditors' interests and, as a result, Ostrolenk suffered damages. However, Ostrolenk failed to allege any specific facts supporting its allegations. The allegations in count II of Ostrolenk's amended complaint that defendants breached their fiduciary duty are conclusory and insufficient to state a cause of action for breach of fiduciary duty. Without any specific facts, Ostrolenk fails to state a cause of action for breach of fiduciary duty against defendants. We conclude that the circuit court properly dismissed count II of Ostrolenk's amended complaint.

¶ 18 Count III - Inducement of Breach of Fiduciary Duty

¶ 19 Count III alleged inducement of breach of fiduciary duty against defendants Ken Genender, Amy Genender, Danny Genender, Jerry Kushnir, Scott Schreiber and Stahl Cowen. Ostrolenk alleged that defendants induced the Assignee to breach its fiduciary duty. Defendants' motion to dismiss pursuant to sections 2-615 and 2-619 of the Code alleged that Ostrolenk failed to state a cause of action for inducement of breach of fiduciary duty and that since there was no breach of fiduciary duty, there can be no inducement of breach of fiduciary duty. The circuit court dismissed count III on the basis that the allegations in the complaint were vague and conclusory.

¶ 20 On appeal, Ostrolenk contends that defendants Ken Genender, Amy Genender, Danny Genender, Jerry Kushnir, Scott Schreiber and Stahl Cowen induced the Assignee to breach its fiduciary duty by using the ABC to deprive GII's creditors of an opportunity to recover their debts. Specifically, Ostrolenk points to the allegations that: (1) Gennco was incorporated to bid on GII's assets in the ABC; (2) Stahl Cowen and Scott Schreiber worked with Ken Genender to

form Stoner, to provide the illusion that GII's shareholder was in fact an arms-length creditor; (3) defendants colluded in the execution of the Stoner note and mortgage to create the appearance that Stoner was an arms-length, senior secured creditor; and, (4) defendants colluded in the Assignee's agreement to sell the assets of the ABC to Gennco, and induced the Assignee's failure to disclose that Ken Genender owned or controlled Stoner, and that the payment from Gennco to Stoner for the assigned assets was a payment from Ken Genender to himself, a fiction used to wipe out the rights of legitimate creditors.

¶ 21 Illinois courts recognize a cause of action for a third party's inducement of a breach of fiduciary duty. *Village of Wheeling v. Stavros*, 89 Ill. App. 3d 450, 454 (1980). A third party who colludes with a fiduciary in committing a breach of duty, induces or participates in such breach, and obtains the benefits therefrom is directly liable to the aggrieved party. *Village of Wheeling*, 89 Ill. App. 3d at 455. In order to state a cause of action for inducement of a breach of fiduciary duty, a plaintiff must allege that a third party: (1) colluded with the fiduciary in committing a breach of duty; (2) induced or participated in such breach; and (3) obtained the benefits resulting from the breach of duty. *Village of Wheeling*, 89 Ill. App. 3d at 455.

¶ 22 Here, the allegations in Ostrolenk's amended complaint that defendants induced the Assignee to breach its fiduciary duty are conclusory and insufficient to state a cause of action for inducement of breach of fiduciary duty. Ostrolenk alleged generally that defendants colluded in the execution of the Stoner note and mortgage and in the Assignee's agreement to sell the assets of the ABC to Gennco. However, the allegations do not specifically allege how or what defendants did to collude with the Assignee. Ostrolenk also generally alleged that defendants

induced the Assignee to breach its fiduciary duty to the creditors. Again, however, the allegations do not allege any specific actions taken by defendants as to how they induced such a breach. Without specific facts, Ostrolenk fails to state a claim for inducement of breach of fiduciary duty. We conclude that the circuit court properly dismissed count III of Ostrolenk's amended complaint.

¶ 23 Count IV - Fraudulent Conveyance

¶ 24 Ostrolenk's amended complaint contained Count IV twice. The first Count IV alleged fraudulent conveyance against defendants GII and Gennco, alleging defendants transferred GII's assets to Gennco for inadequate consideration, which constituted a fraudulent conveyance. The second Count IV alleged fraudulent conveyance against Chicago Title Land Trust Company (Land Trust), alleging the Wheeling property was transferred to the Land Trust for inadequate consideration, which constituted a fraudulent conveyance. Defendants' motion to dismiss pursuant to section 2-615 of the Code alleged Ostrolenk failed to specifically allege whether it was pleading "fraud in law" or "fraud in fact" under the Illinois Uniform Fraudulent Transfer Act (740 ILCS 160/1 *et seq*. (West 2010)) (Act), and further, the allegations were insufficient to state a claim for fraudulent conveyance. The circuit court granted the motion, finding the pleading was "replete" with conclusory allegations and set forth the elements of a claim rather than pleading "supporting well-pled facts" that would show the elements of the claims were met.

¶ 25 On appeal, Ostrolenk does not distinguish between its first and second Count IV. Rather, Ostrolenk generally contends Count IV in its amended complaint stated a cause of action for both "fraud in fact" and "fraud in law." Ostrolenk alleged in its first Count IV against GII and

Gennco, alleging GII's "business operations, assets, and goodwill were fraudulently transferred first to Cavanaugh, and then to Gennco, without adequate consideration, inasmuch as the only consideration paid was a payment from Gennco to [Ken Genender], in the guise of Stoner." Ostrolenk further alleged the transfer of GII's assets to Gennco "was a transfer to insiders" and the circumstances of the transfer were not disclosed to GII's creditors. Ostralenk alleged in its second Count IV against the Land Trust that the transfer of the Wheeling property was without adequate consideration "inasmuch as no consideration was actually paid to GII." Ostrolenk further alleged the transfer of the Wheeling property "was a transfer to insiders" and the circumstances of the transfer were not disclosed to GII's creditors.

¶ 26 The Uniform Fraudulent Transfer Act provides that:

> "[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 for 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. 740 ILCS 160/5 (West 2010).

¶ 27 Further, Illinois courts have divided fraudulent conveyance cases into the categories of fraud in fact and fraud in law. *Casey National Bank v. William R. Roan*, 282 Ill. App. 3d 55, 59 (1996). Proof of fraud in fact requires a showing of an actual intent to hinder creditors, while fraud in law presumes a fraudulent intent when a voluntary transfer is made for no or inadequate consideration and directly impairs the rights of creditors. *Id.* at 59. Fraud in law requires proof of: (1) a voluntary transfer for inadequate consideration; (2) an existing indebtedness against the donor; and (3) retention by the donor of insufficient property to satisfy the indebtedness. *Id.*

¶ 28 Here, the allegations in Ostrolenk's amended complaint do not state sufficient facts to support a claim for either fraud in fact or fraud in law under the Act. As to the latter, the amended complaint generally alleges the transfer was made "with inadequate consideration, inasmuch as the only consideration paid was a payment from Gennco to KJG [Ken Genender], in the guise of Stoner." However, the allegations do not specifically allege how GII or Cavanaugh retained insufficient property to satisfy the indebtedness. Without specific facts, Ostrolenk fails to state a claim for fraud in law.

¶ 29 Ostrolenk further fails to state a cause of action for fraud in fact. There are no facts in the amended complaint which specifically allege defendants' intent to hinder creditors. Additionally, no facts are alleged as to what the reasonable value of GII's assets, real property, and intellectual

property were worth. Lastly, there are no facts in the amended complaint which allege defendants intended to incur, or reasonably believed they would incur, debts beyond their ability to pay them as they became due.

¶ 30 Further, as defendants noted in the circuit court as well as on appeal, Ostrolenk failed to separate the counts for fraud in law and fraud in fact, as both are contained in count IV of its amended complaint. Section 2–613(a) of the Code of Civil Procedure states: "Parties may plead as many causes of action, counterclaims, defenses, and matters in reply as they may have, and each shall be separately designated and numbered." 735 ILCS 5/2–613(a) (West 2010). Count IV of Ostrolenk's amended complaint, therefore, is formally defective. We find the circuit court did not err in dismissing count IV of the amended complaint.

¶ 31 Count V - Successor Liability

¶ 32 Count V alleged successor liability against Gennco, specifically that Gennco is merely a continuation of GII's prior business and is therefore liable for GII's debts. Defendants' motion to dismiss alleged the complaint should be dismissed for failure to state a claim pursuant to section 2-615 of the Code. The circuit court granted the motion, finding the facts alleged were insufficient to state this claim.

¶ 33 On appeal, Ostrolenk contends Gennco performs the same business functions that GII used to perform and is also under the same ownership. Ostrolenk points to the allegations that: (1) defendants undertook a scheme that employed a collusive ABC and mortgage to wipe out GII's liabilities; (2) Gennco now performs with the same officers, directors, employees, client base, assets, inventory, warehouse, offices, and business operations, the same business functions

that GII used to preform; and (3) ownership of Gennco is the same as the ownership of GII. Ostrolenk further contends when a successor corporation is a mere continuation to the predecessor company, it creates an exception to the doctrine of successor liability and sufficient facts were alleged in the amended complaint.

¶ 34 The mere transfer of the assets of one corporation to another corporation does not make the latter liable for the debts or liabilities of the first corporation. *Hoppa v. Schermerhorn & Co.*, 259 Ill. App. 3d 61 (1994). This general rule is subject to exceptions, imposing liability where: (1) an express or implied agreement of assumption exists; (2) where the transaction amounts to a merger of the seller into the buyer or a consolidation of the two; (3) where the buyer is a mere continuation of the seller, such as when the buyer comes into existence pursuant to a reorganization of the seller; or (4) the transaction is fraudulent in that it was entered into to allow the seller to escape its liabilities. *Consolidated Services and Construction, Inc. v. S.R. McGuire Builder and General Contractor, Inc.*, 367 Ill. App. 3d 324, 329 (2006).

¶ 35 "The continuation exception to the rule of successor corporate nonliability applies when the purchasing corporation is merely a continuation or reincarnation of the selling corporation." *Vernon v. Schuster*, 179 Ill. 2d 338, 346 (1997). In other words, the purchasing corporation maintains the same or similar management and ownership, but merely "wears different clothes." *Nilsson v. Continental Machine Manufacturing Company*, 251 Ill. App. 3d 415, 418 (1993). "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 * * *" *Vernon*, 179 Ill. 2d at 346.

¶ 36 As to the first two exceptions, Ostrolenk does not argue on appeal that either of these two exceptions to the rule of successor liability apply. Ostrolenk's amended complaint alleges no facts that establish that any contract for purchase or merger existed between any of the defendants and Gennco. Nor does the amended complaint allege any facts to support a merger between any of the defendants and Gennco. Thus, those two exceptions do not apply to the case at bar.

¶ 37 In regards to the third exception, whether the buy is a mere continuation of the seller, Ostrolenk does not allege any facts to support whether the corporate entity that owned GII is the same corporate entity that owns Gennco. The facts alleged in the amended complaint do not affirmatively assert who or what entity owned GII, nor does it allege who or what entity now owns Gennco. Instead, the amended complaint merely surmises "GII and Gennco are owned by KJG [Ken Genender] and/or various other members of the Genender family." Further, no facts are alleged as to the portion of similar GII shareholders as compared to the current shareholders of Gennco, and thus no facts are alleged as to who maintains a controlling interest. The same is true for the number of directors. Though a finding of mere continuation does not require complete identity between the shareholders of the former and successor corporations, there must be facts pleaded that indicate the owners of the predecessor company maintain a controlling interest. See *Workforce Solutions v. Urban Services of America, Inc.*, 2012 IL App (1st) 111410 ¶ 88; See also *Pielet v. Pielet*, 407 Ill. App. 3d 474, 510 (2010). Here, no facts are alleged to determine what entity, if any, had controlling interests in both GII and Gennco and whether those entities are the same.

¶ 38 Lastly, we find the fourth exception, that the transaction was fraudulent as an attempt for the seller to escape liability, is not sufficiently pleaded. As stated in our analysis of the sufficiency of counts IV, VII and VIII, which are all based on fraud, there are no sufficient facts to support an allegation of fraud pleaded in the amended complaint, therefore this count, too, under this exception is insufficient. For these reasons Ostrolenk has failed to establish a claim for successor liability.

¶ 39 Count VI - Alter Ego

¶ 40 Count VI alleged an "alter ego" claim against GII, Gennco, the Trust, and Ken, Amy, and Danny Genender. Defendants' motion to dismiss pursuant to section 2-615 of the Code alleged Ostrolenk failed to pled facts sufficient to state a claim and question if "alter ego" is even a proper cause of action. Defendants also allege it is impossible for three individuals to be alter egos of each other and therefore the count should be dismissed. The circuit court granted the motion, stating there were no well-pleaded facts contained in the amended complaint to support this claim.

¶ 41 Ostrolenk contends on appeal the amended complaint sufficiently pleaded a cause of action for fraud. Ostrolenk argues its amended complaint alleges: (1) GII, Gennco KJG, and Amy and Danny Genender are all alter egos of one another, as both Gennco and GII have their principal place of business at the same address; (2) Ken Genender is or was the president and shareholder of both Gennco and GII; (3) Amy and David Genender have the same positions they had at GII at Gennco; (4) and Gennco carries on the same business as GII. Further, Ostrolenk contends defendants conspired to use a fradulent ABC and collusive mortgage foreclosure to

allow the shareholders of GII to maintain their ownership and control of the company. Ostrolenk states in its brief on appeal that the "alter ego" claim is an attempt to pierce the corporate veil.

¶ 42 A court may disregard a corporate entity and pierce the veil where the corporation is merely the alter ego of another entity. *Peetoom v. Swanson*, 334 Ill. App. 3d 523, 527 (2002). This doctrine makes liable the entity that uses a corporation merely as an instrumentality to conduct that entity's business. *In re Rehabilitation of Centaur Insurance Co.*, 238 Ill. App. 3d 292, 300 (1992). Such liability arises from fraud or injustice perpetrated not on the corporation but on third persons dealing with the corporation. *Id.* at 300. The doctrine of piercing the corporate veil is an equitable remedy; it is not itself a cause of action but rather is a means of imposing liability on an underlying cause of action, such as a tort or breach of contract. Centaur, 238 Ill.App.3d at 300, 179 Ill.Dec. 459, 606 N.E.2d 291. To pierce the corporate veil, a plaintiff must allege: (1) there is such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist; and (2) circumstances are such that an adherence to the fiction of a separate corporate existence would promote injustice or inequitable consequences. *Fiumetto v. Garrett Enterprises, Inc.*, 321 Ill. App. 3d 946, 958 (2001).

¶ 43 Since piercing the corporate veil is an equitable remedy, in order to maintain this count, Ostrolenk must also state a sufficient claim for liability in a separate cause of action. We affirm on appeal the circuit court's decision to grant defendants' motions to dismiss on all counts alleged in the amended complaint, therefore this count cannot survive.

¶ 44 Count VII and VIII - Conspiracy to Defraud and Fraud

¶ 45 We will consider count VII which alleged conspiracy to defraud against all defendants

and count VIII which alleged fraud against all defendants together, as these two counts are argued together in Ostrolenk's brief on appeal and fraud is contained in both counts. Defendants' motions to dismiss pursuant to section 2-615 of the code argued Ostrolenk failed to state a cause of action for conspiracy to defraud and fraud. Defendants' motions to dismiss pursuant to 2-615 of the Code argued there can be no conspiracy to defraud if fraud is not sufficiently pled. In this instance not one element of the fraud count is alleged with specificity and neither causation or damages are alleged at all. Defendants further asserted no facts alleged in the amended complaint show the sale was improper as a matter of law. The circuit court granted defendants' 2-615 motions to dismiss as to count VIII, finding the plaintiff's complaint to be replete with conclusory allegations and "no specific allegations of fact to show fraud or conspiracy to defraud" were pleaded.

¶ 46 We will first consider whether the amended complaint sufficiently sets forth a cause of action for fraud. Ostrolenk contends on appeal the amended complaint sufficiently pleaded a cause of action for two instances of fraud. The first instance, Ostrolenk argues, occurred when defendants convinced Ostralenk to dismiss its first complaint because GII intended to undergo a restructuring so it could pay its creditors. GII then paid Ostralenk $50,000 to reduce the balance of the debt owed. As a result of relying on GII's statements, Ostrolenk was damaged by not being able to proceed with its pending collection action against GII. The second instance surrounds the acquisition of assets by Gennco through a "sham" ABC. Ostralenk asserts the amended complaint alleges statements were made by defendants through the ABC notice of sale indicating the proceeds from the sale would be used to pay the debts of GII. These statements were false

because the ABC was created for the purpose of transferring the assets to Gennco, a company owned by entities related to GII. The ABC notice did not disclose these relationships and also contained false statements regarding GII's assets. The false statements in the ABC were intended to dissuade other potential bidders from bidding at the public sale and Ostrolenk was damaged by not being able to recover the debts owed to it.

¶ 47 Defendants argue that the circuit court's decision is proper because Ostrolenk failed to sufficiently plead a cause of action for fraud in their amended complaint. We agree. To sustain a cause of action for fraud, a plaintiff must allege the following basic elements: (1) statements of material facts were made; (2) defendants must have known or believed such statements to be untrue; (3) plaintiffs had a right to rely or were justified in relying upon those statements; (4) the statements were made for the purpose of inducing plaintiffs to act or rely upon them; and (5) plaintiffs were damaged as a result of their reliance upon said statements. *Prime Leasing, Inc. v. Kendig*, 332 Ill. App. 3d 300, 309 (2002). "A successful common law fraud complaint must allege, with specificity and particularity, facts from which fraud is the necessary or probable inference, including what misrepresentations were made, when they were made, who made the misrepresentations and to whom they were made." *Connick v. Suzuki Motor Company, Ltd.*, 174 Ill. 2d 482, 496–97 (1996).

¶ 48 Here, Ostrolenk alleges two different fraud theories on appeal. As to the first, that fraud was committed when Amy Genender convinced Ostrolenk to voluntarily dismiss its action so GII could undergo a restructuring, no allegations are pleaded that indicate any of the defendants knew or believed these statements to be false. Further, no specific facts are pleaded as to what exactly

Amy Grenender's statement was, to whom it was made, or when it was made. This allegation of fraud, therefore, has not been pleaded sufficiently under the heightened standard required for fraud in Illinois.

¶ 49 The second fraud theory, that Gennco is a sham corporation created to defraud Ostrolenk of its lawfully obtained debt against GII, is also insufficiently pleaded. Ostrolenk alleges the false statements were contained in the ABC notice. There are, however, no allegations contained in the amended complaint of specific false statements made by any defendant to Ostrolenk. Instead, what the amended complaint alleges is merely a general theory that the ABC was created to cover up the transfer of GII's assets to Stoner. Further, there is no allegation that indicates to whom the statements contained in the ABC were specifically made. Additionally, no allegations are alleged in the amended complaint that indicate the author of the ABC knew or believed the statements contained within the ABC to be false. There is also no allegation in the amended complaint that states who the author of the ABC was. Lastly, there are no specific allegations contained in the amended complaint as to how Ostrolenk relied to its detriment on the statements contained in the ABC notice. For these reasons, we find the circuit court properly granted defendants' motions to dismiss pursuant to section 2-615 of the code.

¶ 50 Next, we will consider count VII, conspiracy to defraud, which is alleged against all defendants. To sufficiently state a claim for conspiracy to defraud, the following must be alleged: (1) conspiracy; (2) an overt act of fraud in furtherance of the conspiracy; and (3) damages to the plaintiff as a result of the fraud. *Bosak v. McDonough*, 192 Ill. App. 3d 799, 803 (1989). "In order to state a cause of action for conspiracy to defraud, a complaint must set forth

with particularity the facts and circumstances constituting the alleged conspiracy." *Metzger v. New Century Oil and Gas Supply Corp. Income and Development Program-1982*, 230 Ill. App. 3d 679, 693 (1992).

¶ 51 Since we have determined the circuit court properly granted defendants' motions to dismiss pursuant to section 2-615 of the code on the fraud allegation and an overt act of fraud is an element of conspiracy to defraud, count VII can not survive as pleaded. As previously stated, Illinois requires a heightened pleading standard for fraud. That heightened standard was not met in the amended complaint. Therefore, we need not consider whether the amended complaint sufficiently pleaded conspiracy.

¶ 52 CONCLUSION

¶ 53 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 54 Affirmed.