FOURTH DIVISION
March 31, 2014

No. 1-13-2383

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

VINCENT DeMAURO, Plaintiff-Appellant, v. MTH ENTERPRISES LLC d/b/a MTH INDUSTRIES, Defendant-Appellee, and HILLSIDE INDUSTRIES, INC. f/d/b/a MTH INDUSTRIES, Defendant.	)	Appeal from the Circuit Court of Cook County. No. 11L7169 Honorable Margaret A. Brennan, Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Lavin and Epstein concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's order dismissing plaintiff's complaint for

retaliatory discharge is affirmed because the complaint failed allege facts to establish that defendant, a successor corporation, was liable based upon successor liability.

¶ 2 On February 19, 2013, the trial court entered a written order dismissing Count II of plaintiff Vincent DeMauro's amended complaint pursuant to section 2-619 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-619 (West 2012)), which alleged a claim of retaliatory discharge against MTH Industries based on the theory of successor liability. Plaintiff subsequently filed a motion to reconsider the February 19, 2013 order, and the trial court denied that motion. Plaintiff now appeals the trial court's rulings dismissing Count II of his amended complaint with prejudice and denying his motion to reconsider. For the reasons that follow, we affirm the trial court's rulings.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff was a steelworker employed by Hillside Industries, Inc. (Hillside) in 2009 when he was injured on the job, resulting in a workers' compensation claim. In August of 2010, plaintiff was terminated from Hillside. On July 11, 2011, plaintiff filed a retaliatory discharge complaint against MTH Industries (MTH). On August 23, 2012, plaintiff amended his complaint. The amended complaint, which is the subject of this appeal, was filed against two defendants: Hillside and MTH. Count I alleges a cause of action for retaliatory discharge against Hillside, and Count II alternatively alleges a cause of action for retaliatory discharge against MTH based on a theory of successor liability. The essence of plaintiff's amended complaint is that he was wrongfully terminated from Hillside on August 12, 2010 in retaliation for making a workers' compensation claim.

¶ 5 On April 11, 2011, MTH acquired certain assets and liabilities from Hillside. This purchase was memorialized in an Asset Purchase Agreement (the Agreement). Of relevance to

this appeal, section 2.2(a) of the Agreement states that as part of the purchase, MTH was to assume "the Assumed Liabilities," which are defined in the Agreement as follows:

> "'Assumed Liabilities' means all: (i) debenture obligations to shareholders of [Hillside]; (ii) capital and vehicle leases and accrued expenses properly recorded on [Hillside's] balance sheet for the year ended December 31, 2010."

Hillside's balance sheet for the year ended December 31, 2010 does not list any accrued liability related to plaintiff's termination.

¶ 6 Section 2.3 of the Agreement further provides:

> "Other than the Subordinated Note and Assumed Liabilities, [MTH] will neither assume nor be deemed to have assumed any other Liability of [Hillside]."

¶ 7 Section 3.1.6 of the Agreement states:

> "Undisclosed Liabilities. Except as set forth on Section 3.1.6 (Bank default), [Hillside] does not have any Liability (and there is no basis for any present or future action, suit, proceeding, hearing, investigation, charge, complaint, claim, or demand against any of them giving rise to any Liability), except for (i) Liabilities set forth on the face of the Financial Statements for the fiscal year ended as of December 31, 2010 (rather than in any notes thereto) and (ii) Liabilities which have arisen after the end of the 2010 fiscal year in the ordinary course of business (none of which results from, arises out of, relates to, is in the nature of, or was caused by breach of

contract, breach of warranty, tort, infringement, or violation of law). Further, Section 3.1.6 lists all agreements the Seller has entered into to perform services for which estimated costs equal or exceed estimate revenue by $___."

¶ 8 On January 28, 2013, a default judgment was entered against Hillside. On May 16, 2013, a prove up order was entered in favor of plaintiff and against Hillside. Hillside did not challenge this order within 30 days of its entry.

¶ 9 On November 16, 2012, MTH filed a motion to dismiss Count II of plaintiff's amended complaint pursuant to section 2-619 of the Code. 735 ILCS 5/2-619 (West 2012). Count II was the only remaining viable claim in the amended complaint following the judgment entered against Hillside. Count II of plaintiff's amended complaint is a retaliatory discharge claim against MTH. In its entirety, Count II states:

"**COUNT II**

(Retaliatory Discharge against MTH Enterprises, LLC)

28. Plaintiff Vincent DeMauro incorporates Paragraphs 1-27 herein as if fully pleaded in this Count II against MTH Enterprises, LLC.

29. Pleading in the alternative, in or about April 2011, MTH purchased both the assets and certain debts of Hillside. This purchase included the d/b/a 'MTH Industries.'

30. Either by its express acceptance of the liability associated with Hillside's actions or by operation of law, MTH is now legally responsible for the actions of Hillside described

herein."

Paragraphs 1-27 of plaintiff's amended complaint only discuss plaintiff's injuries, the events leading up to his discharge, and Hillside's potential liability in the matter; they do not discuss MTH's acquisition of Hillside.

¶ 10 On February 19, 2013, the trial court entered a written order dismissing Count II of the amended complaint because it found that MTH had not assumed liability for plaintiff's alleged injury because the Asset Purchase Agreement specifically stated which assets and liabilities MTH was assuming and that list did not include plaintiff's claim. The trial court further found that plaintiff's remaining argument that MTH had assumed liability for his claim by operation of law was not viable.

¶ 11 On March 20, 2013, plaintiff filed a motion to reconsider. The motion argued that plaintiff had been terminated on August 12, 2010, and not March 11, 2011 as stated by the trial court in its order, and that this fact was crucial because it was before the December 31, 2010 cut-off date for any liabilities that MTH would have assumed from Hillside in the acquisition. On June 26, 2013, the trial court denied plaintiff's motion to reconsider. Plaintiff now appeals the trial court's February 19, 2013 order granting MTH's motion to dismiss Count II with prejudice as well as the trial court's July 26, 2013 order denying plaintiff's motion to reconsider. For the reasons that following, we affirm the trial court's dismissal of Count II of plaintiff's amended complaint and denial of plaintiff's motion to reconsider.

¶ 12 II. ANALYSIS

¶ 13 Plaintiff argues that the trial court improperly granted MTH's motion to dismiss pursuant to section 2-619 of the Code. 735 ILCS 5/2-619 (West 2012). “The purpose of a section 2–619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of

litigation." *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003). "A section 2–619 motion admits as true all well-pleaded facts, along with all reasonable inferences that can be gleaned from those facts." *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 352 (2008). "[W]hen ruling on a section 2–619 motion to dismiss, a court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party." *Id*. Here, plaintiff appeals the trial court's dismissal of Count II of plaintiff's amended complaint. For the reasons that follow, we affirm the trial court's ruling.

¶ 14 A. Motion to Dismiss

¶ 15 Plaintiff's appellate brief argues that MTH should be held liable for plaintiff's claim because: (1) MTH expressly assumed liability for plaintiff's claim, and (2) MTH fraudulently purchased certain Hillside assets and liabilities in an effort to avoid liability for plaintiff's claim. MTH in turn argues that it cannot be held liable under the theory of successor liability because it did not expressly or impliedly assume liability for plaintiff's claim. MTH further argues that its purchase of certain assets and liabilities of Hillside did not constitute a merger, was not a *de facto* continuation of Hillside, and did not amount to a fraudulent transaction.

¶ 16 The generally accepted rule in Illinois is that a successor corporation which purchases the business assets of another corporation does not become liable for the debts of the seller in the absence of an express agreement to assume the seller's debts. *Myers v. Putzmeister, Inc.*, 232 Ill. App. 3d 419, 422 (1992). This traditional rule of non-liability for buyers "developed as a response to the need to protect *bona fide* purchasers from unassumed liability and was designed to maximize the fluidity of corporate assets." *Vernon v. Schuster*, 179 Ill. 2d 338, 345 (1994). However, although a successor corporation is generally not liable for the debts of another corporation, tort liability, like any other liability, may be impliedly assumed by a new

corporation which represents only a "new coat" for its previous owners. *Hoppa v. Schermerhorn & Co.*, 259 Ill. App. 3d 61, 64 (1994). Accordingly, a successor corporation can be found liable for a former corporation's liability if one of the following four exceptions applies: "(1) if there is an express or implied agreement of assumption; (2) if the transaction between the purchaser and the seller corporation is a consolidation or merger; (3) if the purchaser is a continuation of the seller; or (4) if the transaction is an attempt to escape liability for the seller's obligations." *Diguilio v. Goss International Corp.*, 389 Ill. App. 3d 1052, 1060 (2009). Plaintiff argues that liability should be imposed upon MTH because two of the above successor liability exceptions apply: the express assumption exception and the fraud exception. The trial court found that plaintiff failed to state a cause of action under both exceptions, and we agree.

¶ 17 i. Express Assumption Exception to Successor Liability

¶ 18 Plaintiff argues that MTH expressly assumed his retaliatory discharge claim because the Agreement between MTH and Hillside states that MTH assumed all of Hillside's "[a]ccrued liabilities as of [December 31, 2010]." Plaintiff argues that his tort claim was an assumed liability because he was terminated on August 12, 2010, which is before the December 31, 2010 year-end cut-off date. Plaintiff further argues that even without his claim being listed on Hillside's December 31, 2010 balance sheet, his claim was still an accrued liability because: (1) MTH should have determined by December 31, 2010 that it was probable that plaintiff would file a lawsuit against Hillside since he was terminated in August of 2010, and (2) MTH should have determined that it was probable that Hillside would have had to award damages to plaintiff as a result of his retaliatory discharge claim.

¶ 19 MTH in turn argues that the Agreement between MTH and Hillside is clear and specifically states which assets and liabilities MTH purchased from Hillside, and plaintiff's claim

was not included as one of those purchases, especially given that there was no mention of plaintiff's termination in Hillside's December 31, 2010 year-end balance sheet. MTH further argues that it could not have anticipated plaintiff's claim prior to the December 31, 2010 year-end closing date because plaintiff did not file his lawsuit until July of 2011. Thus, not only was plaintiff's claim nowhere to be found on Hillside's December 31, 2010 year-end balance sheet, but there was no way for MTH to know about the claim until it was filed in July of 2011, which was well after the December 31, 2010 cut-off date for liabilities that MTH agreed to acquire.

¶ 20 Based upon the clear language in the Agreement, we find that MTH did not expressly assume liability for plaintiff's claim. *Jewel Companies, Inc. v. Serfecz*, 220 Ill. App. 3d 543, 549 (1991) ("When the terms of an agreement are clear and unambiguous, they will be given their natural and ordinary meaning, and the intent of the parties must be determined from the language of the agreement alone."). Section 2.2 of the Agreement specifically identifies any "Assumed Liabilities" as those "accrued expenses properly recorded on [Hillside's] balance sheet for the year ended December 31, 2010." Both parties acknowledge that plaintiff's claim was nowhere to be found on Hillside's balance sheet for the year ended December 31, 2010. Further, section 2.3 goes on to state that "[o]ther than the Subordinated Note and Assumed Liabilities, [MTH] will neither assume nor be deemed to have assumed any other Liability of [Hillside]." Thus, not only does plaintiff's claim not fit within the Agreement's definition of assumed liabilities acquired by MTH, but the Agreement goes on to state that any assumed liabilities not listed in the Agreement would not be acquired by MTH. And, to further clarify the clauses in sections 2.2 and 2.3, section 3.1.6 states that with respect to any present or future legal actions, "[]there is no basis for any present or future action, suit, proceeding, hearing, investigation, charge, complaint, claim, or demand against any of them giving rise to any Liability[], except for [] Liabilities set forth on the

face of the Financial Statements for the fiscal year ended as of December 31, 2010." As such, because plaintiff's claim is not included in the Agreement as an assumed liability and because plaintiff's claim is absent from Hillside's balance sheet for the year ended December 31, 2010, MTH did not expressly assume liability for plaintiff's claim. In this way, our finding comports with the principals behind successor liability and the exceptions to successor liability, which are "to protect *bona fide* purchasers from unassumed liability" and "to maximize the fluidity of corporate assets" (*Vernon*, 179 Ill. 2d at 345), because MTH would have had no way of knowing about plaintiff's unfiled lawsuit at the time it purchased Hillside as it was not filed and not made known by Hillside in any of the relevant documents.

¶ 21 While we recognize the rather argument made by plaintiff as to when a liability "accrues," we find that given the clear and unambiguous language of the Agreement, this argument is irrelevant here. The Agreement specifically states that any liabilities assumed by MTH in the transaction will be listed as expenses in the balance sheet for the year ended December 31, 2010, and plaintiff's claim is absent from that list. As such, plaintiff's arguments regarding the definition of "accrue" has no bearing on our finding that MTH did not expressly assume liability for plaintiff's claim in its acquisition of Hillside.

¶ 22 ii. Fraudulent Transaction Exception to Successor Liability

¶ 23 Plaintiff argues a number of facts in his appellate brief in support of his fraud claim. In summary, plaintiff argues that two people with the same last name were involved on each side of the Hillside/MTH transaction, that the transfer was of substantially all Hillside's assets, that Hillside had been notified prior to the acquisition that it was in default on a loan, and that there was suggestion that Hillside no longer had any assets to meet other obligations or to continue to generate income. However, none of those facts appear in his amended complaint. Count II of

the amended complaint merely alleges:

> "28. Plaintiff Vincent DeMauro incorporates Paragraphs 1-27 herein as if fully pleaded in this Count II against MTH Enterprises, LLC.
>
> 29. Pleading in the alternative, in or about April 2011, MTH purchased both the assets and certain debts of Hillside. This purchase included the d/b/a 'MTH Industries.'
>
> 30. Either by its express acceptance of the liability associated with Hillside's actions or by operation of law, MTH is now legally responsible for the actions of Hillside described herein."

Thus, there are no facts alleged in the amended complaint to show or even create an inference as to how MTH's acquisition of Hillside was fraudulent,[1] regardless of whether a heightened pleading standard was required. Furthermore, although we know from plaintiff's appellate briefs that the allegation in his amended complaint that MTH assumed the liability for his claim "by an operation of law" refers to the fraud exception, nowhere is the fraud exception even specified in

[1] Plaintiff cites *to Steel Co. v. Morgan Marshall Industries*, 278 Ill. App. 3d 241 (1996) to discuss the 11 factors that are to be considered when determining whether a transaction gives rise to a presumption of fraud: (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. However, again, it is of note that not a single fact that might potentially support these factors is contained within plaintiff's amended complaint.

his amended complaint. The amended complaint merely states: "Either by its express acceptance of the liability associated with Hillside's actions or by operation of law, MTH is now legally responsible for the actions of Hillside described herein." Simply put, there is no mention or inference of fraud in the amended complaint.

¶ 24 Moreover, even if the facts mentioned by plaintiff in his appellate briefs were contained within his amended complaint, none of those facts would support the allegation that MTH bought Hillside's assets fraudulently in an effort to avoid liability for plaintiff's claim. The facts recited by plaintiff in his appellate briefs seem to suggest that there was some overlapping in family members in the companies involved in the Hillside/MTH acquisition and that Hillside was not in good financial condition at the time of the transaction. However, these facts do not show that a fraudulent transaction was made in an effort to avoid liability for plaintiff's claim. The leap between the facts presented by plaintiff and evidence of a fraudulent transaction undertaken to avoid liability for plaintiff's claim is simply far too great. As such, and for all the reasons stated above, plaintiff's fraud claim fails to state a claim for retaliatory discharge under the fraud exception to successor liability.

¶ 25 B. Leave to File Second Amended Complaint

¶ 26 Plaintiff suggests in his appellate briefs that he should have been granted leave to file a second amended complaint. However, there is no evidence in the record that plaintiff ever requested leave to file a second amended complaint, any alleged error on the part of the trial court for failing to grant plaintiff leave to amend was never made an issue in plaintiff's motion to reconsider, and there is no proposed second amended complaint in the record for us to review. As such, because we cannot consider issues that were not presented to the trial court, we do not have jurisdiction to grant leave to file a second amended complaint at this juncture. *Burgdorff v.*

International Business Machines Corp., 74 Ill. App. 3d 158, 162 (1979) ("An argument cannot be considered on appeal where it was never raised by the appellant in the trial court.").

¶ 27 C. Motion to Reconsider

¶ 28 The purpose of a motion to reconsider is to alert the court of newly discovered evidence that was unavailable at the time of the hearing, changes in the law, or errors in the court's application of the law. *Duresa v. Commonwealth Edison Co.*, 348 Ill. App. 3d 90, 97 (2004). Generally, a trial court's ruling on a motion to reconsider is reviewed under the abuse of discretion standard. *Id.* Where a motion to reconsider only asks the trial court to reevaluate its application of the law to the case as it existed at the time of judgment, as is the case here, the standard of review is *de novo*. *Belluomini v. Zaryczny*, 2014 IL App (1st) 122664, ¶ 20. Because we find that the trial court did not err in dismissing Count II of plaintiff's amended complaint, we further find that the trial court did not err in denying plaintiff's motion to reconsider, which merely requested the trial court reevaluate its application of the facts to the law in this matter.

¶ 29 III. CONCLUSION

¶ 30 For the above reasons, we affirm the trial court's order dismissing Count II of plaintiff's amended complaint.

¶ 31 Affirmed.