2015 IL App (2d) 140333-U
No. 2-14-0333 & 2-14-0701 cons.
Order filed April 1, 2015
Modified upon denial of rehearing May 18, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MILLBROOK IV, LLC, Plaintiff and Cross-Defendant and Third-Party Citation Petitioner-Appellee, v. PRODUCTION SERVICES ASSOCIATES, LLC, Defendant (PSA-MHF Acquisition, LLC, Third-Party Citation Respondent-Appellant; Madison Capital Funding, LLC, Intervenor).	)	Appeal from the Circuit Court of Lake County. No. 12-L-498 Honorable Michael B. Betar, Judge, Presiding.

MILLBROOK IV, LLC, Plaintiff and Cross-Defendant and Third-Party Citation Petitioner-Appellant and Cross-Appellee, v. PRODUCTION SERVICES ASSOCIATES, LLC, Defendant (PSA-MHF Acquisition, LLC, Third-Party	)	Appeal from the Circuit Court of Lake County. No. 12-L-498

Citation Respondent-Appellee and Cross-Appellant; Madison Capital Funding, LLC, Intervenor-Appellee and Cross-Appellant).	)))	Honorable Michael B. Betar, Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not err in finding that newly-formed company which acquired the assets of an existing company was a successor that was potentially liable for existing company's debt, but contract prevented creditor from collecting that debt from new company.

¶ 2 Shortly before the plaintiff and cross-defendant, Millbrook IV, LLC (Landlord) obtained a judgment of $889,197.56 against the defendant, Production Services Associates, LLC (PSA or Oldco[1]), all of the defendant's assets were acquired by another company, PSA-MHF Acquisition, LLC (PSA-MHF or Newco). Thereafter, Landlord sought to recover its judgment from Newco, asserting that it was the successor to Oldco and was liable for Oldco's debts. Madison Capital Funding, LLC (Lender), a senior secured creditor as to Oldco's assets and an owner of Newco, intervened, arguing that Landlord had entered into a contract with Lender in which Landlord agreed not to assert any claim against Oldco's assets (which were now in Newco's hands). In two separate rulings, the circuit court of Lake County held that: (1) Newco was the successor to Oldco and Landlord could seek to recover the judgment against Oldco from Newco; and (2) the agreement between Landlord and Lender prevented Landlord from collecting

[1]Our use of the terms "Oldco" and "Newco" is not intended as a prejudgment of the successor liability issue raised in this appeal; the terms are simply short forms adopted for ease of reference that reflect the time period during which each company operated, similar to "Company 1" and "Company 2."

that judgment until Lender's senior security interests in Oldco's assets were satisfied. Newco appealed from the first ruling and Landlord appealed from the second ruling. We affirm both rulings.

¶ 3 BACKGROUND

¶ 4 PSA (Oldco) was in the business of producing greeting cards and producing and mailing direct marketing advertisements. The company was founded by two brothers, Richard and Gerald Biller (d/b/a BEG Mail, Inc.). In October 2006, a private equity firm, Norwest Equity Partners VIII, LP (NEP), acquired a majority of Oldco's shares in return for an investment of $55 million. Under the LLC agreement as amended at that time, there were five members of Oldco's board of managers, three of whom were chosen by NEP. (The remaining managers were the Biller brothers.) One of the three NEP managers was designated as a "special manager" who had three votes; the remaining managers had one vote each. Thus, NEP's managers controlled the board.

¶ 5 In February 2007, Oldco entered into a lease with Landlord for a large office space. The rent was $70,000 per month.

¶ 6 Madison Capital Funding (Lender) was in the business of providing senior secured loans to entities in which NEP invested. In May 2007, it loaned Oldco $15 million in return for a security interest in all of Oldco's assets. At the same time, Lender and Landlord entered into an agreement titled "Collateral Access Agreement" (CAA). In the CAA, Landlord acknowledged that Lender had "a security interest in and lien upon all or substantially all of [Oldco's] tangible and intangible property *** including, without limitation, all of [Oldco's] cash, cash equivalents, goods, inventory, machinery, equipment, furniture and trade fixtures." Landlord "acknowledge[d] [Lender's] lien on the Collateral" and agreed that, "until such time as the obligations of [Oldco] to Lenders *** [were] indefeasibly paid in full, Landlord waive[d] any

interest in the Collateral and agree[d] not to distrain or levy upon the Collateral or any part thereof or to assert any landlord lien, right of distraint or other claim against the Collateral for any reason." The CAA further provided that Lender had the right to enter upon the premises leased to Oldco to inspect, remove, or sell the collateral. The CAA provided that it would remain in effect until all of Oldco's obligations and liabilities to Lender was satisfied in full.

¶ 7 In 2008, Oldco's direct mail advertising business dropped off dramatically. James Cyze was brought in as Oldco's new president and chief executive officer in April 2008, and he discovered almost immediately that Oldco was struggling financially. It continued to struggle as its direct mail business decreased.

¶ 8 On August 12, 2011, the special manager of Oldco emailed Paul Hicks, the chief credit officer and managing director of Lender, stating that Oldco's board had met the day before and "as we have discussed we want to make an orderly transition of the board *** to the lenders." Accordingly, the NEP-appointed members planned to resign. One member was resigning immediately. The number of board members would be lowered to four and those four would stay on until a transition was made. Thereafter, both NEP and BEG Mail, Inc. submitted letters to Oldco in which they stated that they were "abandoning" their interests in Oldco. NEP further stated that it was relinquishing not only its ownership interest but also any rights it might have by virtue of that interest, including voting rights and the right to receive distributions. BEG Mail, Inc. asked that the LLC agreement be amended to reflect that it was no longer a member. At the time, NEP (including one of the NEP-appointed board members) had a 64% interest in Oldco, and BEG Mail, Inc. owned approximately 35% of in Oldco. The remaining one percent of Oldco was owned in almost equal shares by Lender and two other lenders, one of whom was Husky Loan Company (Husky).

¶ 9 Thereafter, Lender (which acted as an agent for a consortium of individual lenders whose funds were loaned to Oldco) solicited suggestions for "independent" board members (*i.e.*, board members not affiliated with NEP) to be appointed to Oldco's board. Hicks collected the suggestions and, along with another lender representative, interviewed and selected the candidates who were then introduced to the remaining lenders for approval. After that, Lender forwarded its recommended candidates to NEP. The candidates were Cyze, Robert Louzan, Joseph Duncan, and Thomas Dougherty. In October 2011, these four became Oldco's board through an amendment to the LLC agreement signed by one of NEP's partners.

¶ 10 The abandonment of interests by NEP and BEG Mail, Inc. was never ratified or otherwise formally acted upon by the board of Oldco. Cyze testified that this was because of tax implications: Oldco wanted to ensure that any business losses would be shared by all of the previous owners. However, it is undisputed that NEP and BEG Mail, Inc. took no part in running Oldco after November 2011.

¶ 11 William Daw testified that he worked for Argus Management, doing restructuring of companies that were in financial difficulties. He began working with Oldco in October 2011. In February 2012, the lenders brought him in as chief financial officer of Oldco.

¶ 12 In May 2012 Oldco defaulted on its lease with Landlord and moved all of its belongings out of the leased premises. Landlord filed a forcible detainer action against Oldco, seeking legal possession of the premises and back rent. The trial date was set for December 7, 2012.

¶ 13 Daw presented Oldco's new board with an analysis of four possible options for the company's future: status quo (doing nothing), an assignment for the benefit of creditors, a sale of assets under article 9 of the Uniform Commercial Code (UCC), and a bankruptcy under chapter 11 of the federal bankruptcy code. The board decided to proceed with the article 9 sale of assets. Some of the emails between Oldco board members or officers and other parties

reflected an awareness of the trial date in Landlord's action against Oldco, and a desire that the sale be completed before then.

¶ 14 In anticipation of the article 9 sale, Lender formed a new entity, Newco. The ownership of Newco was as follows: Lender, 28.3%; Husky, 23.7%; and 24% each owned by two other entities, Malamute Loan Company, LLC, and Stark PSA Corporation. Hicks testified that the lenders hoped to sell Oldco's assets to a third party in order to maximize returns, but if no third party submitted a bid, Newco would acquire Oldco's assets in return for a transfer of debt. Lender and Oldco gave notice of the sale to several possible buyers. They did not give Landlord notice of the sale. Hicks testified that this was because Oldco's management did not believe that Landlord was a potential purchaser.

¶ 15 The sale of assets took place on December 3, 2012. Oldco did not receive any acceptable bids, and thus its assets were sold to Newco. The sale price was a transfer of debt: Lender (as foreclosing seller of Oldco) forgave Oldco's debts in the amount of $20 million, and Newco assumed $18 million in debt previously held by Oldco. The managing board of Newco consisted of the same four people that had been on the board of Oldco. Cyze continued as president and chief executive officer of Newco, and Daw continued as chief financial officer. The Asset Purchase Agreement (APA) by which Newco acquired Oldco's assets reflected that Newco voluntarily assumed the compensation and retention bonus agreements of Cyze and other key managers of Oldco, as well as certain identified debts owed to suppliers and vendors with whom Newco wished to continue doing business. The APA did not provide for the assumption of Oldco's debt to Landlord. Hicks signed the APA on behalf of both Lender (as foreclosing seller) and Newco (as president and secretary).

¶ 16 Four days later, on December 7, 2012, the trial court found in favor of Landlord in its action against Oldco and entered judgment in the amount of $889,197.56. On December 11,

2012, Landlord served Oldco with a citation to discover assets. On December 13, 2012, $815,522.39 was transferred from a bank account held by Oldco to Newco. Thereafter, Landlord served Newco with a citation to discover assets, contending that it was a successor to Oldco and should be liable for the judgment against Oldco. Newco disputed this assertion.

¶ 17 In October 2013, Lender was permitted to intervene in the citation proceeding. It filed a cross-complaint against Landlord, seeking a declaratory judgment that, for various reasons including the CAA, Landlord could not enforce its judgment against Newco.

¶ 18 On February 21 and March 7, 2014, the trial court held an evidentiary hearing on the issues of successor liability and Newco's liability to Landlord, at which Cyze, Daw and Hicks testified. At the close of the second day of the hearing, the trial court ruled that Newco was the successor to Oldco based upon two theories: Newco was a "mere continuation" of Oldco, and the sale of Oldco's assets to Newco had sufficient indicia of fraud that it constituted a fraudulent transfer. Newco took an immediate appeal from this ruling (docketed in this court as appeal no. 2-14-0333).

¶ 19 The parties then briefed and argued the issue of whether the CAA barred Landlord from enforcing its judgment against Newco. On June 27, 2014, the trial court issued its final judgment, ruling that Landlord could not enforce its judgment against Newco because of the CAA. Landlord appealed from this judgment (docketed as appeal no. 2-14-0701), and Lender and Newco cross-appealed, raising the same arguments raised in the first appeal. We ordered the two appeals consolidated for disposition.

¶ 20 ANALYSIS

¶ 21 Case No. 2-14-0333

¶ 22 In this appeal, Newco appealed from the trial court's March 7, 2014, ruling that it was the successor to Oldco and was potentially liable for Landlord's judgment against Oldco. Although

neither of the parties to this appeal raised the issue of our jurisdiction, a reviewing court has a duty to consider *sua sponte* whether it has jurisdiction and to dismiss an appeal if it lacks jurisdiction. *In re Marriage of Link*, 362 Ill. App. 3d 191, 192 (2005). Here, Newco asserts that we have jurisdiction over the appeal pursuant to Supreme Court Rule 304(b)(4) (eff. Sept. 20, 2006), which permits an appeal from a "final judgment or order entered in a proceeding under section 2-1402 of the Code of Civil Procedure" (Code) (735 ILCS 5/2-1402 (West 2012)). (Section 2-1402 relates to supplementary proceedings such as the citation proceeding from which this appeal arose.) However, the order entered by the trial court was not a final order. Thus, we lack jurisdiction to hear this appeal.

¶ 23 "A final order is one that 'disposes of the rights of the parties either with respect to the entire controversy or some definite and separate portion thereof.' " *In re Estate of Yucis*, 382 Ill. App. 3d 1062, 1069 (2008), quoting *Arachnid, Inc. v. Beall*, 210 Ill. App. 3d 1096, 1103 (1991). Here, the trial court's order of March 7, 2014, was not a final order because it was not a complete determination of Newco's rights or liabilities. Although the trial court resolved one issue—the issue of Newco's potential liability as the successor to Oldco—it left open the issue of whether Landlord would be permitted to enforce its judgment against Newco. On its own, this March 7, 2014, order was not a complete determination of the parties' rights and thus was neither enforceable nor appealable. Accordingly, we lack jurisdiction over appeal no. 2-14-0333 and must dismiss it. However, the parties' arguments on the correctness of the March 7, 2014, ruling remain before us, as the same arguments were raised in the cross-appeals of case no. 2-14-0701.[2]

[2]Landlord filed a motion to dismiss the cross-appeals (from the trial court's March 7, 2014, ruling) on the the ground that they were untimely. We took that motion with the case and now deny it, as the March 7, 2014, order was not a final and appealable order.

¶ 24 Case No. 2-14-0701

¶ 25 In analyzing the issues raised in this appeal and cross-appeal, we begin, as the trial court did, with the question of successor liability. If Newco is not at least potentially liable for the judgment against Oldco as Oldco's successor then we would not need to address the second issue, the effect of the CAA. Thus, we address successor liability—the issue raised in the cross-appeal—first.

¶ 26 Successor Liability

¶ 27 "The well-settled general rule is that a corporation that purchases the assets of another corporation is not liable for the debts or liabilities of the transferor corporation." *Vernon v. Schuster*, 179 Ill. 2d 338, 344-45 (1997). However, there are four exceptions to this general rule. *Id*. at 345. Successor liability will be found: "(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*. In this case, the trial court found that Landlord had proved the existence of the third and fourth exceptions, "mere continuation" and fraudulent purpose. We review this finding deferentially insofar as it rests on factual matters, and will not reverse unless it is contrary to the manifest weight of the evidence. *Dearborn Maple Venture, LLC v. SCI Illinois Services, Inc.*, 2012 IL App (1st) 103513, ¶ 34. To the extent that Newco raises purely legal arguments, however, our review is *de novo*. *Advocate Financial Group, LLC v. 5434 North Winthrop, LLC*, 2014 IL App (2d) 130998, ¶ 22.

¶ 28 We begin with the "mere continuation" exception. The touchstone of successor liability based on mere continuation is control of the corporation: whether the purchasing entity "maintains the same or similar management and ownership" as the selling entity. *Vernon*, 179

Ill. 2d at 346. " '[C]ourts considering this exception emphasize a common identity of officers, directors, and stock between the selling and purchasing corporation' " as the key elements in finding that one company is a continuation of another. *Id*., quoting *Tucker v. Paxson Machine Co.*, 645 F.2d 620, 625-26 (8th Cir. 1981). Here, the officers and directors of Oldco and Newco were the same, and two of the three effective owners of Oldco at the time of the sale—Lender and Husky—also owned a majority (52%) of Newco. "[T]he continuity of shareholders necessary to a finding of mere continuation does not require complete identity between the shareholders of the former and successor corporations." *Park v. Townsend & Alexander, Inc.*, 287 Ill. App. 3d 772, 775 (1997). Thus, the trial court's determination that Newco was a "mere continuation" of Oldco was not against the manifest weight of the evidence.

¶ 29 The cross-appellants argue that there was less than a 1% overlap of ownership between Oldco and Newco because, under the LLC agreement and applicable Delaware LLC laws, the abandonment by NEP and BEG Mail, Inc. of their collective 99% interest in Oldco was not legally effective unless formally approved at a meeting of the board. Thus, they assert, Lender and Husky were not controlling owners of Oldco and there is no continuity between the two entities.

¶ 30 Apart from a general citation to one section of the Delaware statutes regarding LLCs, the cross-appellants offer no legal support for this argument. In particular, they fail to offer any authority for the proposition that a court may look only to the nominal holders of interests in a corporation rather than those who actually exercise control over that corporation. Rather, the existing legal authority is to the opposite effect. See, *e.g.*, *Dearborn Maple Venture*, 2012 IL App (1st) 103513, ¶ 39 (taking into account not only shares of successor company owned by owner of predecessor company but also his wife's ownership of shares of successor); *Pielet v. Pielet*, 407 Ill. App. 3d 474, 510 (2010) (continuity of ownership was shown where owner of

former company controlled companies that controlled successor company); *Steel Co. v. Morgan Marshall Industries, Inc.*, 278 Ill. App. 3d 241, 249 (1996) (finding a continuity of shareholders 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).

¶ 31 Moreover, "[t]he doctrine of successor liability is equitable in both origin and nature." *Milliken & Co. v. Duro Textiles, LLC*, 887 N.E.2d 244, 257 (Mass. 2008). "Under principles of equity, a court will consider a transaction according to its real nature, looking through its form to its substance and intent." *Id.*; see also *Glynwed, Inc. v. Plastimatic, Inc.*, 869 F. Supp. 265, 275 (D. N.J. 1994) (collecting cases for the proposition that "in successor liability cases the courts should not elevate form over substance"). The cross-appellants' argument regarding the effectiveness of NEP and BEG Mail, Inc.'s abandonment of their interests in Oldco elevates form over substance. Under the LLC agreement, NEP controlled five of the seven votes exercised by Oldco's board members. Thus, NEP's relinquishment of its ownership was *de facto* effective, in that it could not be prevented. Under these circumstances, the failure to vote on the relinquishment at a board meeting was a matter of form only, without practical significance.

¶ 32 Further, the evidence unquestionably showed that, despite Hicks' testimony that Lender generally did not seek or exercise operational control over the businesses it made loans to, Lender (with Husky and another lender) in fact controlled Oldco prior to the sale. NEP and BEG Mail, Inc. voluntarily relinquished their entire interests in Oldco (and the attendant right to control it) in 2011. Although in November 2011 a representative of NEP signed an amendment to Oldco's LLC agreement that named new "independent" board members, those members were interviewed and selected by the lenders without any input by NEP. And this was NEP's last act with respect to Oldco: it is undisputed that NEP and BEG Mail, Inc., took no part in the

oversight or operational control of Oldco from that point through Oldco's sale to Newco in December 2012. Daw, the chief financial officer of both Oldco and Newco, testified that he was brought into Oldco in February 2012 and that he served as a liaison between Oldco's new board and its lenders as they prepared for the sale of Oldco's assets. In light of this evidence, we reject the cross-appellants' assertion that there was no continuity of ownership between Oldco and Newco.

¶ 33 Having found that Newco was a successor to Oldco under the "mere continuation" test, we need not consider whether it could also be found to be a successor under the fourth, "fraudulent purpose," test. We therefore turn to the question of whether the CAA prevents Landlord from enforcing its judgment against Newco, as the trial court found.

¶ 34 Legal Effect of the CAA

¶ 35 This issue turns on the interaction between the UCC and a contract, the CAA, and requires us to construe that contract. We review *de novo* purely legal matters such as the interpretation and proper application of statutes and contracts. *Gallagher v. Lenart*, 226 Ill. 2d 208, 219 (2007).

¶ 36 We begin by outlining the relevant facts regarding the relationship of Landlord and Lender to Oldco and to each other, both before and after the sale of Oldco's assets to Newco. In February 2007, Oldco entered into a lease with Landlord. In May 2007, Lender loaned $15 million to Oldco—a loan secured by all of Oldco's assets (the collateral). Lender and Landlord executed the CAA. Under the CAA, Landlord recognized Lender's security interest in the collateral and agreed that, "until such time as the obligations of [Oldco] to Lenders *** [were] indefeasibly paid in full, Landlord waive[d] any interest in the Collateral and agree[d] not to distrain or levy upon the Collateral or any part thereof or to assert any landlord lien, right of distraint or other claim against the Collateral for any reason."

¶ 37 In December 2012, Lender (as a foreclosing creditor) forced the sale of Oldco's assets under article 9 of the UCC. Under section 9-617(a) of Illinois' UCC (810 ILCS 5/9-617(a) (West 2010)), "[a] secured party's disposition of collateral after default *** discharges the security interest under which the disposition [was] made *** and *** discharges any subordinate security interest or other subordinate lien." Newco purchased Oldco's assets at the sale in return for a transfer of $18 million in debt. The APA acknowledged that Lender's secured interest in Oldco (along with all junior interests) had been extinguished by the sale. However, it also set out various liabilities of Oldco that were voluntarily assumed by Newco and thus survived the sale. (The debt to Landlord was not among them.) As noted above, Lender is one of the owners of Newco. Lender is also a creditor of Newco, as reflected in the notes transferred to Newco in the UCC sale.[3]

¶ 38 A few days after the sale, Landlord obtained a judgment against Oldco (which no longer had any assets), thereby becoming a judgment creditor of Oldco. Landlord filed citation proceedings against both Oldco and Newco. The trial court eventually ruled that Newco was a successor to Oldco, a ruling that we have affirmed here. Accordingly, Landlord may look to Newco satisfy its judgment against Oldco. The question is whether the terms of the CAA currently prevent Landlord from enforcing its judgment lien against Newco.

[3] It seems likely that Lender asserted a security interest in Newco's assets as a condition of its continued financing of Newco. However, the parties have not discussed Lender's status as a secured or unsecured creditor with respect to Newco's assets in their briefs or provided citations to the record that would shed further light on this. Thus, we do not make any finding with respect to whether Lender has a secured interest in Newco's assets.

¶ 39 Lender argues that, in the CAA, Landlord agreed to assume a subordinate position to Lender and agreed not to pursue any claim against the assets of Oldco (now in Newco's hands) until Lender was paid in full. Lender notes that the CAA states that it does not terminate until the obligation to Lender is fully paid. At the UCC sale, this obligation was transferred to Newco. Lender argues that it has not yet been paid in full, because the debt that was transferred from Oldco to Newco remains unsatisfied. (It appears that this may not be a permanent state of affairs: the record shows that Newco is doing sufficiently well that it was able to repay $2 million of the debt in 2014.)

¶ 40 Landlord argues that Lender's reading of the CAA is overbroad, and that the CAA was intended only to prevent Landlord from exercising the traditional means of self-help available to landlords when the rent is not paid, such as the right to seize tenants' possessions that are on the premises. Landlord points out that the CAA focuses on Landlord's ability to "distrain or levy upon the Collateral or *** to assert any landlord lien, [or] right of distraint *** against the Collateral," and also contains multiple clauses designed to ensure that Landlord will not prevent Lender from gaining access to the assets of Oldco located on the leased premises. In light of these provisions, Landlord argues that the CAA should not be read so broadly that it bars any and all claims against Oldco, including legal claims for unpaid rent. Landlord further states that it would make no financial sense for it to have entered into an agreement that prevented it from seeking unpaid rent. Finally, Landlord argues that, as Lender's secured interest in the collateral was extinguished when Oldco's assets were sold, Oldco's obligations to Lender should be considered "fully satisfied" and the CAA terminated.

¶ 41 When faced with the task of construing a contract, "[t]he primary objective *** is to give effect to the intent of the parties." *Gallagher*, 226 Ill. 2d at 232. The language of a contract, given its plain and ordinary meaning, is the best indication of the parties' intent. *Id*. at 233.

"Moreover, because words derive their meaning from the context in which they are used, a contract must be construed as a whole, viewing each part in light of the others." *Id.* When construing contracts, courts attempt to give effect to every provision, if possible, because it must be assumed that every provision was intended to serve a purpose. See *Valley Forge Insurance Co. v. Swiderski Electronics, Inc.*, 223 Ill. 2d 352, 362 (2006).

¶ 42 In reading all of the provisions of the CAA together, we find that its plain language reflects the intent of the parties as to several issues, including Landlord's acknowledgement of Lender's status as a secured creditor; Landlord's agreement not to utilize its traditional remedies of self-help, distraint, or landlord's lien (in essence, Landlord thereby consented to assume the status of an ordinary unsecured creditor); and Landlord's promise to allow Lender to access Oldco's assets on the leased premises. Many of these terms support the interpretation urged by Landlord. However, Landlord ignores certain other provisions of the CAA: those in which Landlord agreed not to assert "any *** other claim against the Collateral" until Oldco's indebtedness to Lender was repaid in full, and agreed that the CAA would not terminate until that time. These provisions reflect a continuing agreement by Landlord to subordinate to Lender its rights with respect to Oldco's assets. These provisions are clear and definite, and we cannot read them out of the CAA as Landlord requests. *Id.*

¶ 43 As for whether it made financial sense for Landlord to agree to subordinate its future claims in this way, we cannot say. Perhaps Landlord's motivation was based on a recognition that Lender's loan to Oldco increased Oldco's financial health, thereby enhancing its ability to keep paying rent. Perhaps Landlord simply did not read the CAA carefully. Either way, however, the benefit to Landlord is not dispositive. Parties enter into agreements all the time that are not necessarily in their best financial interests; unless consideration is lacking or the agreement is so one-sided or oppressive that it is unconscionable (and Landlord has not raised

either of those arguments here), the fact that its benefits inure more to one party does not render the agreement unenforceable. See *Rohr Burg Motors, Inc. v. Kulbarsh*, 2014 IL App (1st) 131664, ¶ 48.

¶ 44 Landlord argues that the CAA no longer constrains Landlord's actions, because the CAA related only to Oldco's assets (the Collateral identified in the CAA), and Oldco no longer has any assets. Further, it argues, even if the CAA would bar Landlord from asserting a claim against those of Oldco's assets that are now in Newco's hands, that is not what Landlord is attempting to do in this action. Rather, Landlord (through the citation proceeding and the finding of successor liability) is asserting a claim against Newco itself, not against the assets that Newco acquired from Oldco. Landlord asserts that the CAA does not bar such a claim.

¶ 45 Landlord is correct that, under the doctrine of successor liability, its claim is against Newco generally, not against any particular subset of its assets. See *Continental Ins. Co. v. Schneider, Inc.*, 873 A.2d 1286, 12 (Pa. 2005) (plaintiff's claim did not seek to recover proceeds from UCC sale of old company's assets; rather, plaintiff asserted that new company was a successor to the old company and was liable for old company's debts); *Glynwed*, 869 F. Supp. at 273-74 (creditor's claim against new company based upon successor liability was distinct from an attempt to enforce a lien on the former company's assets). However, Landlord is incorrect in its assertion that the CAA does not affect its right to collect the judgment against Oldco from Newco.

¶ 46 In the CAA, Landlord agreed to subordinate its claims for payment to the interest in the collateral that Lender took in order to secure its loan to Oldco. Landlord's judgment arises from just such a claim for payment. In the sale of Oldco's assets to Newco, the debt owed by Oldco was not paid off; rather, it was simply transferred to Newco, which now owes Lender the same debt (albeit slightly reduced). Accordingly, the CAA still applies, and Landlord's right to

payment remains subordinate to Lender's right to repayment of its loan. If the UCC sale did not extinguish the debt owed to Landlord (see *Ed Peters Jewelry Co., Inc. v. C & J Jewelry Co., Inc.*, 124 F.3d 252, 267 (1st Cir. 1997) ("although foreclosure by a senior lienor often wipes out junior-lien interests in the same collateral [citation], it does not discharge the debtor's underlying obligation to junior lien creditors")), neither did it allow Landlord to step to the front of the line of creditors.

¶ 47 We note that, in some cases, a judgment creditor such as Landlord might have priority over some other types of creditors. In this case, however, Landlord agreed in the CAA to subordinate its claim to the obligation owed to Lender. The express terms of the CAA state that this agreement will not terminate until Lender is repaid in full. Accordingly, while Landlord has a valid lien against Newco's assets in the amount of its judgment (see 735 ILCS 5/2-1402(m) (West 2012) (when citation is served against a third party who is a successor to the judgment debtor, a lien in the amount of the judgment arises that may be asserted against any assets currently held or subsequently received by the successor)), that interest is subordinate to Lender's right to receive repayment from Newco of its loan (see *id*. ("The lien established in this Section does not affect the rights of citation respondents in property prior to the service of the citation upon them")). Accordingly, the trial court did not err in holding that the CAA barred Landlord from enforcing its judgment against Newco, at least for the moment. Once Newco has finished repaying the $18 million debt it took on from Oldco, Landlord may enforce its lien against Newco's assets.[4]

[4] In its petition for rehearing, Lender argues that we should have addressed (as the trial court did) the issue of whether Newco should be found to be a successor of Oldco on the additional basis that the UCC sale was undertaken for a fraudulent purpose. Had we done so, it

¶ 48 CONCLUSION

¶ 49 For the foregoing reasons, appeal no. 2-14-0333 is dismissed. As to appeal no. 2-14-0701, Landlord's motion to dismiss the cross-appeal is denied, and the judgment of the circuit court of Lake County is affirmed.

¶ 50 No. 2-14-0333, Dismissed.

¶ 51 No. 2-14-0701, Affirmed.

---

argues, we could have gone on to find that the CAA did not apply to limit Landlord's ability to immediately enforce its judgment against Newco because, it asserts, a contract's terms may not be read to excuse or limit liability for fraud. We reject this argument. The terms of the CAA that establish lien priority are not exculpatory clauses that improperly shield willful and wanton conduct, so as to be contrary to public policy. See *Kleinwort-Benson North America, Inc. v. Quantum Financial Services, Inc.*, 285 Ill. App. 3d 201, 216 (1996). Moreover, even if we had found that the UCC sale was done for a fraudulent purpose, the sale did nothing to alter the relative lien priorities of the parties; nor (as we have held) did it shield Newco from successor liability for Landlord's judgment. Thus, the UCC sale did not fraudulently alter the lien priorities Landlord previously agreed to in the CAA.