



ENTERED

TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
ON THE COURT'S DOCKET

The following constitutes the order of the Court.

Signed January 20, 2005.

United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
NETWORK STAFFING SERVICES, INC.,	§	CASE NO. 02-35608-SAF-11
DEBTOR.	§	
	§	
NETWORK STAFFING SERVICES,	§	
INC. LIQUIDATING TRUST,	§	
PLAINTIFF,	§	
	§	
VS.	§	ADVERSARY NO. 04-3386
	§	
BAY VIEW COMMERCIAL FINANCE	§	
GROUP, INC., et al.,	§	
DEFENDANTS.	§	

MEMORANDUM OPINION AND ORDER

Goodman Factors, Ltd., one of the defendants, moves for summary judgment dismissing the complaint of Network Staffing Services, Inc. Liquidating Trust, the plaintiff. The trust opposes the motion. The court conducted a hearing on the motion on December 16, 2004.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with

the affidavits, if any, and other matters presented to the court show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby Inc., 477 U.S. 242, 250 (1986); Washington v. Armstrong World Indus. Inc., 839 F.2d 1121, 1122 (5th Cir. 1988). On a summary judgment motion the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Anderson, 477 U.S. at 255. A factual dispute bars summary judgment only when the disputed fact is determinative under governing law. Id. at 250.

The movant bears the initial burden of articulating the basis for its motion and identifying evidence which shows that there is no genuine issue of material fact. Celotex, 477 U.S. at 323. The respondent may not rest on the mere allegations or denials in its pleadings but must set forth specific facts showing that there is a genuine issue for trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986).

Network Staffing Services, Inc. (NSSI), provided temporary and permanent staffing services to its clients. According to the trust's amended complaint, NSSI would subcontract the staffing demands of larger companies, such as MCI, to various other staffing vendors. In conjunction with those services, the

vendors retained NSSI to bill and collect receivables from the larger companies for whom staffing services had been provided.

NSSI entered factoring agreements with certain factoring companies, whereby NSSI factored the receivables of its vendors.

On July 1, 2002, NSSI filed a petition for relief under Chapter 11 of the Bankruptcy Code. On December 5, 2003, this court confirmed the Fourth Amended Plan of Liquidation of NSSI. The plan created the trust to be the successor to the bankruptcy estate's causes of action.

On June 30, 2004, the trust filed this adversary proceeding against the factoring companies, contending that they participated in wrongful transactions involving the receivables of NSSI's vendors. In essence, the trust contends that the factoring companies knew that the receivables did not belong to NSSI, yet the factoring companies agreed to factor the receivables.

In its amended complaint, the trust alleges ten claims for relief against Bay View Commercial Finance Group, Inc., and Goodman Factors, Ltd. The trust refers to these two defendants as the "Goodman Entities." The trust alleges that they conspired to commit breaches of fiduciary duty by NSSI's officers and directors (count 1); aided and abetted breaches of fiduciary duty by NSSI's officers and directors (count 2); conspired to commit fraud with NSSI's officers and directors against NSSI's vendors

(count 3); aided and abetted fraud by NSSI's officers and directors against NSSI's vendors (count 4); tortiously interfered with NSSI's contracts with its vendors (count 5); received avoidable constructively fraudulent transfers under federal and Texas law (counts 6, 7 and 8); received avoidable preferential transfers (count 9); and hold property of the bankruptcy estate subject to turnover (count 10).

The defendant, Goodman Factors, Ltd., contends that it did not exist prior to the NSSI bankruptcy case and that it did no business with NSSI post-petition. The trust responds that Goodman Factors, Ltd., assumed the liabilities of Bay View Commercial Finance Group, Inc., and has successor liability for any wrongful acts by Bay View. However, the trust, in its amended complaint, does not allege that Goodman Factors, Ltd., is liable as successor to Bay View. Rather, it lumps Bay View and Goodman Factors, Ltd., together as the "Goodman Entities," without alleging specific acts of Goodman Factors, Ltd.

There is no genuine dispute as to the following facts:

In January 2002, NSSI entered a factoring agreement with Bay View Commercial Finance Group, Inc., doing business as Goodman Factors, Inc. In March, April and May 2002, NSSI sold receivables to Bay View. Bay View purchased the last account from NSSI in May 2002. On July 1, 2002, NSSI filed its bankruptcy petition.

On September 27, 2002, the Secretary of the State of Texas issued a certificate for limited partnership, creating Goodman Factors, Ltd. Goodman Factors, Ltd., had and has no common ownership with Bay View.

On December 20, 2002, Goodman Factors, Ltd., entered an asset purchase agreement (APA) with Bay View. Pursuant to that agreement, Goodman Factors, Ltd., purchased the assets of the Goodman Factors' division of Bay View. On December 31, 2002, Bay View and Goodman Factors, Ltd., closed the sale. Bay View assigned no NSSI contracts or accounts to Goodman Factors, Ltd. On December 31, 2002, the sales documentation reflected that Bay View held no balance in NSSI's suspense account, held no balance in NSSI's client reserve account and carried no liability owing for NSSI.

Goodman Factors, Ltd., did no business with NSSI either before or after the execution of the asset purchase agreement.

As a result of these undisputed facts, Goodman Factors, Ltd., engaged in no acts with NSSI or its officers or directors to support any of the claims alleged in the trust's amended complaint. Counts one through five all involved pre-petition events. Goodman Factors, Ltd., did not exist before September 27, 2002.

Counts six through ten involve pre-petition transfers for which Goodman Factors, Ltd., could conceivably be a subsequent

transferee. With regard to count ten, turnover, the undisputed facts establish that Goodman Factors, Ltd., did not receive any NSSI contracts or accounts and did not receive any reserve NSSI suspense or client reserve account or any other account or fund balance in which NSSI could assert an interest.

Assuming the trust could successfully avoid a transfer by NSSI to Bay View under count six, seven, eight or nine, then the trust could seek a judgment under 11 U.S.C. § 550(a). But, NSSI made no transfer to Goodman Factors, Ltd. Consequently, to recover a judgment against Goodman Factors, Ltd., the trust must establish that Goodman Factors, Ltd., is an "immediate or mediate transferee of [Bay View]." 11 U.S.C. § 550(a)(2). The trust would have to establish that the property transferred by NSSI to Bay View had, in turn, been transferred by Bay View to Goodman Factors, Ltd.

Under the asset purchase agreement, Bay View agreed to sell substantially all of the assets and "certain liabilities" of "one of its factoring divisions," known as Goodman Factors, to Goodman Factors, Ltd. See APA, preliminary statement. Bay View transferred assets of the Goodman Factors' division "free and clear of all Liens other than the Assumed Liabilities." APA, par. 2.1(a). "Assumed Liabilities" has the meaning set forth in § 2.4 of the agreement. APA, Art. I, definitions. Section 2.4 provides:

2.4 Assumption of Liabilities. Buyer shall assume obligations and liabilities of Seller related to the Targeted Division [Goodman Factors' division], including, (i) the obligations and liabilities under the Contracts and the Lease, copies of which have been delivered by Seller to Buyer, (ii) the Targeted Division Suspense Account of the Seller, (iii) the Client Reserves and (iv) the liabilities of the Seller listed on Schedule 2.4(a) (collectively, the "Assumed Liabilities").

APA, § 2.4.

The assignment and assumption of contract and other agreements executed pursuant to the asset purchase agreement listed no NSSI contracts, with no accounts receivable balances for NSSI and no reserve balances for NSSI purchased by Goodman Factors, Ltd. Accordingly, Goodman Factors, Ltd., assumed no Bay View liabilities under § 2.4(i) of the agreement.

There was no balance in NSSI's suspense account and there was no client reserve for NSSI. Accordingly, Goodman Factors, Ltd., assumed no Bay View liabilities under § 2.4 (ii) or (iii) of the agreement.

Schedule 2.4(a) list "none" for liabilities to NSSI. Accordingly, Goodman Factors, Ltd., assumed no Bay View liabilities under § 2.4(iv).

Bay View transferred no NSSI contracts or accounts to Goodman Factors, Ltd. Bay View transferred no NSSI reserve balance or NSSI client reserve to Goodman Factors, Ltd. Goodman Factors, Ltd., assumed no liability attributable to any NSSI account. There is no summary judgment evidence that Bay View transferred any funds to Goodman Factors, Ltd., attributable to

any NSSI account or transaction. There is, therefore, no genuine issue of material fact that Bay View did not transfer avoidable property to Goodman Factors, Ltd. As a result, as a matter of law, the trust cannot obtain a judgment against Goodman Factors, Ltd., under § 550.

Nevertheless, the trust argues that it may obtain a judgment against Goodman Factors, Ltd., as successor to Bay View. In support of that contention, the trust observes that § 2.4 does not limit the assumed liability of Goodman Factors, Ltd., to the four subsections of that provision. Section 2.4 states that Goodman Factors, Ltd., "shall assume obligations and liabilities of Seller . . . [relating to the Goodman Factors' division] . . . including" the four subsections. The agreement defines "including" to mean "including, without limitation." APA, Art. I, definitions. Consequently, Goodman Factors, Ltd., may have assumed other Bay View liabilities regarding the Goodman Factors' division besides liability connected to the four subsections.

While there is no genuine issue of material fact that § 2.4 does not limit assumed liabilities to the four subsections of that provision, there is no summary judgment evidence that Bay View transferred any funds to Goodman Factors, Ltd., that would make it a transferee under § 550. There is no summary judgment evidence that would support a construction of § 2.4 to reach tort liability of Bay View for aiding and abetting fraud, conspiring

to commit fraud, aiding and abetting breaches of fiduciary duty or conspiring to commit breaches of fiduciary duty. Goodman Factors, Ltd., purchased "assets" of "one of [Bay View's] factoring divisions"; it did not purchase the entire factoring business of Bay View. The agreement states that Goodman Factors, Ltd., "desires" to acquire only "certain liabilities" of Bay View's Goodman Factors division. Goodman Factors, Ltd., did not, therefore, agree to acquire all of Bay View's liabilities for its Goodman Factors' division, let alone all of Bay View's liability for its factoring business. Furthermore, the agreement and implementing documents contain the entire agreement of the parties. APA, § 11.4.

Under the agreement, the word "including" in § 2.4 must be read in the context of that section and the agreement as a whole. Goodman Factors, Ltd., purchased assets of a part of Bay View's factoring business and assumed only certain, but not all, of the liabilities for the assets purchased. The liabilities relate to the factoring assets, account balances, client reserves, outstanding receivables and the like. The implementing documents reveal that Goodman Factors, Ltd., acquired no contracts or accounts regarding NSSI. If the court expanded the evidence considered beyond the agreement and implementing documents, then the record also shows that Goodman Factors, Ltd., never did any business with NSSI. A trier of fact could reach but one

reasonable inference, Goodman Factors, Ltd., did not succeed to all of Bay View's liability for the conduct of its factoring business.

The Texas Business Corporations Act governs the liability of an acquiring corporation. It provides that the purchase of all or substantially all of the property or assets of the seller corporation "does not make the acquiring [entity] responsible or liable for any liability or obligation of the selling corporation unless the acquiring entity expressly assumes the liability or obligation, or unless another statute expressly provides to the contrary." Lockheed Martin Corp. v. Gordon, 16 S.W.3d 127, 134-35 (Tex.App.--Houston [1st Dist.] 2000, pet. denied)(citing Tex. Bus. Corp. Act Ann. art. 5.10(B)(2) (Vernon Supp. 2001) (emphasis added)). "Texas strongly embraces the non-liability rule. To impose liability for a predecessor's torts, the successor corporation must have expressly assumed liability." Lockheed, 16 S.W.3d at 139.

The plaintiff must plead successor liability. Owners Ass'n of Pecan Square, Inc. v. Capri Lighting, Inc., 1992 WL 186261, *3 (Tex.App.--Dallas,1992)("[S]uccessor liability is a form of vicarious liability that the plaintiff, not the defendant, must plead.") Pleadings of successor liability are subject to the lenient pleading requirements of Fed. R. Civ. P. 8, and not the more rigorous standards of Rule 9(b). Old Republic Ins. Co. v.

Hansa World Cargo Serv., Inc., 170 F.R.D. 361, 376 (S.D.N.Y. 1997).

The complaint does not allege that Goodman Factors, Ltd., is liable for the obligations of Bay View under a theory of successor liability. Rather, the complaint alleges that the "Goodman Entities" committed acts that make them liable under each of the counts. The trust only raises the issue of successor liability in its opposition to the motion for summary judgment. But the trust presents no summary judgment evidence to support a reading of the asset purchase agreement that would extend "including" to reach beyond the assets acquired to torts allegedly committed by Bay View. Goodman Factors, Ltd., is entitled to summary judgment dismissing the complaint itself. Even if the court considers the successor liability theory, although not plead, Goodman Factors, Ltd., is still entitled to summary judgment.

Order

Based on the foregoing,

IT IS ORDERED that Goodman Factors, Ltd.'s amended motion for summary judgment is **GRANTED**.

IT IS FURTHER ORDERED that the complaint against Goodman Factors, Ltd., is **DISMISSED**.

###END OF ORDER###