IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CENTRAL NATIONAL GOTTESMAN d/b/a LINDENMEYR MONROE	:	CIVIL ACTION
v.	:	
PEMCOR, INC., PEMCOR SOWERS, LLC, NICHOLAS C. BOZZI, AND FAYE GIVLER	:	No. 01-3203

MEMORANDUM

Ludwig, J. October 5, 2001

Defendants Pemcor, Inc. and Nicholas C. Bozzi move to dismiss the amended complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).[1] Jurisdiction is diversity. 28 U.S.C. § 1332.

This action for $221,383.72 for supplies of printing paper and goods, presents issues of corporate successor liability. The complaint alleges that in March, 2001, plaintiff Central National Gottesman d/b/a Lindenmeyr Monroe sold and delivered paper products to Steckel Printing, Inc.. The owner of over 99 percent of Steckel's shares of stock was defendant Faye Givler, who, also in March 2001, transferred her shares to defendant Pemcor, Inc., of which defendant Nicholas C. Bozzi is the sole shareholder.[2]

---

[1] Under Fed. R. Civ. P. 12(b)(6), the complaint's allegations are accepted as true, all reasonable inferences are drawn in the light most favorable to the plaintiff, and dismissal is appropriate only if it appears that plaintiff could prove no set of facts that would entitle her to relief. Brown v. Philip Morris, Inc., 250 F.3d 789, 796 (3d Cir. 2001).

[2] According to the complaint, Faye Givler and Steckel also

(continued...)

I. Count I: De Facto Merger - Denied.

Count I alleges that Pemcor is continuing to operate Steckel's business, and, as a result of a *de facto* merger, Pemcor is responsible for Steckel's debt to plaintiff. Amend. Cmplt. ¶¶ 24-31. Under Pennsylvania law, where there has been a *de facto* merger, a company may be liable for debts incurred by a predecessor. Philadelphia Electric Co. v. Hercules, 762 F.2d 303, 310 (3d Cir. 1985). While defendants contend that the necessary Philadelphia Electric Co. elements for imputing liability to a successor company are missing, these elements need not be established at this early stage. Brown v. Philip Morris, Inc., 250 F.3d 789, 796 (3d Cir. 2001). Therefore, as to this point, the motion will be denied.

II. Count II: Continuity of enterprise - Granted.

The doctrine known as "continuity of enterprise" is not applicable to this action.[3] An exception to the rule of successor liability, it has generally been utilized

---

[2](...continued)
transferred assets to Pemcor. Amd. Cmplt. ¶¶ 24-25; 28-29; 56-62.

[3]See generally Philip I. Blumberg, "The Continuity of Enterprise Doctrine: Corporate Successorship in U.S. Law," 10 Fla. J. Int'l L. 365, 379 (1996) ("Reflecting the radical nature of the continuity of the enterprise doctrine of successor liability overriding traditional principles of corporation law, the courts adopting the doctrine typically have attempted to restrict its application to situations in which the plight of the injured party is most compelling. In a manner of speaking, the doctrine is strong medicine to be used only in extremis when the law would otherwise be unable to provide any remedy to an innocent victim.")

in tort cases[4] and those that involve issues of grave public concern.[5] Our Court of Appeals has rejected this theory in the products liability context,[6] and it is not a viable basis for imputing successor liability in the contract dispute at issue here.

III. Counts III and IV: Piercing the corporate veil and alter ego - Denied.

Piercing the corporate veil and alter ego liability are easier said than done. See e.g., Kaplan v. First Options of Chicago, Inc., 19 F.3d 1503, 1521 (3d Cir. 1994). Nevertheless, invoking these theories in a complaint and proceeding on them is not the proper subject of a dismissal motion.

---

[4] Fletcher Cyclopedia of the Law of Private Corporations, §7123.20, at 279 (perm ed. rev. 1999) ("It has been suggested that the expansion of the 'mere continuation' exception is appropriately limited to those cases involving personal injury resulting from the use of the predecessor's corporation's products. . . The suggestion is that the traditional corporate approach is incompatible with the circumstances involved in tort cases and that the appropriate form of analysis is the continuity of enterprise approach, at least for those torts in which the interests of public policy are reflected by a tradition of strict liability." (Citations omitted)).

[5] In this circuit, it has been applied in the context of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Atlas Minerals & Chemicals, 824 F. Supp. 46, 49 (E.D.Pa. 1993). ("[T]he continuity of enterprise theory should be applied only when the application of traditional corporate law principles would frustrate the remedial goals of CERCLA.")

[6] Polius v. Clark Equipment Co., 802 F.2d 75, *75 (3d Cir. 1986) ("We conclude that this continuity of enterprise theory, adopted by a minority of jurisdictions, is an unsound exception to the general rule of corporate successor liability.")

IV. Count VII: Fraudulent transfer - Denied.

The claim against Pemcor and Bozzi for fraudulent transfer[7] is not vitiated merely because the complaint refers to a transfer of shares of stock and not specific assets. Defendants' mot. at 15. According to the complaint, when Steckel was insolvent, it transferred its assets to Pemcor for one dollar, in order to hinder, delay, or defraud plaintiff. Amend. Cmpl. ¶¶56-62. A recitation of additional factual details is unnecessary.[8] Plaintiff's fraudulent transfer claim against Pemcor and Bozzi is sufficient to withstand this motion.[9]

Edmund V. Ludwig, J.

[7] The Pennsylvania Fraudulent Conveyance Act states 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 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. . ." 12 Pa.C.S.A. §5104(a).

[8] Brown v. Philip Morris, Inc., 250 F.3d 789, 796 (3d Cir. 2001).

[9] Fletcher Cyclopedia of the Law of Private Corporations, §7125, at 305 (perm. ed. rev. 1999) ("[I]f the transfer constitutes, either in fact or as a matter of law, a fraud upon the creditors of the other corporation, the creditors defrauded by the transfer may, in equity, follow the property into the hands of the new corporation, and subject it to the satisfaction of their claims, or hold the new corporation liable to the extent of its value.")

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CENTRAL NATIONAL GOTTESMAN d/b/a LINDENMEYR MONROE	:	CIVIL ACTION
v.	:	
PEMCOR, INC., PEMCOR SOWERS, LLC, NICHOLAS C. BOZZI, AND FAYE GIVLER	:	No. 01-3203

ORDER

AND NOW, this day of October, 2001, the motion to dismiss of defendants Pemcor, Inc. and Nicholas C. Bozzi, Fed. R. Civ. P. 12(b)(6), is ruled on as follows:

1. Counts I, III, IV and VII - Denied.

2. Count II - Granted.

A memorandum accompanies this order.

Edmund V. Ludwig, J.