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Re: Mason v. Network of Wilmington, Inc., et al.
C.A. No. 19434-NC
Date Submitted: March 29, 2005

Dear Counsel:

Plaintiff Rebecca L. Mason ("Mason") successfully pursued an employment discrimination claim against Network Personnel, Inc. ("Personnel"), a Delaware corporation owned solely by Defendant Barry Schlecker ("Schlecker"). Mason has been unable to collect on the judgment against Personnel, in part, because

Schlecker caused Personnel to transfer its assets. Schlecker, approximately two years later, formed Defendant Network of Wilmington, Inc. ("Network"), another Delaware corporation.

Mason, through this action, seeks to hold Schlecker personally liable for payment of her judgment against Personnel by "piercing the corporate veil" and by demonstrating that the transfer of Personnel's assets was fraudulent. She also asks the Court to require Network to pay the judgment under a theory of successor liability.

The parties have filed cross-motions for summary judgment.[1] For the reasons set forth below, Mason's motion is denied, Network's motion is granted, and Schlecker's motion is granted in part and denied in part.

I. BACKGROUND

For more than thirty years Schlecker has been involved in the employee-placement business.[2] Schlecker's occupation can best be described as a

[1] Mason moved for partial summary judgment on her "piercing the corporate veil" claim against Schlecker. Her briefing may only be read as seeking summary judgment comprehensively.
[2] Schlecker Dep., at 16:10-11.

"headhunter,"[3] as he, and the businesses with which he is associated, are recruiters of personnel, both temporary and long-term.[4]

In 1990, Schlecker incorporated, and became the sole shareholder of, Personnel.[5] Personnel was primarily in the business of providing temporary employees, but, to a lesser extent, it also provided permanent placement services. In 1994 and 1995, Mason was employed by Personnel. Mason's employment was terminated on April 5, 1995. Mason alleged that she was unjustly terminated due to her pregnancy, and, following favorable review by the Equal Employment Opportunity Commission ("EEOC"), she filed her employment discrimination action in the United States District Court for the District of Delaware on April 29, 1998. On January 17, 2002, the District Court entered judgment in favor of Mason and against Personnel for $313,019.

While Mason was proceeding with her claims, Personnel entered into the Asset Purchase Agreement under which it would sell virtually all of its assets to

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[3] *See* http://www.hyperdictionary.com/dictionary/headhunter (defining the informal meaning of "headhunter" as "a recruiter of personnel (especially for corporations)") (last visited June 30, 2005).
[4] Schlecker Dep., at 1-6.
[5] Network Personnel, Inc., Cert. of Inc. (Ex. A to Defs.' Resp. to Pl.'s Mot. for Part. Summ. J. & Cross-mot. for Summ. J. (hereinafter "Defendants' Brief")).

Temps & Co., Inc. ("Temps") on February 20, 1998.[6] The vast majority of consideration supporting this transaction was Temps' assumption of Personnel's debts.[7] Schlecker acquired a minority interest in Temps.[8]

On May 17, 2000, Schlecker incorporated Network.[9] Schlecker is the sole shareholder of Network.[10] Network is focused on providing permanent placement services. Network operates in the same building, but in different office space, as did Temps (which operated in the same office space as Personnel).[11] Additionally, Network uses Personnel's former phone number.[12]

In June of 2000, Temps was sold to Randstad North America, Inc. ("Randstad"). Schlecker is not alleged to have participated in the management of Randstad or to have possessed any ownership interest in Randstad.

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[6] Asset Purchase Agreement (Feb. 20, 1998) (Ex. A3 to Ex. A of Pl.'s Mot. for Part. Summ. J. (hereinafter "Plaintiff's Opening Brief")).

[7] According to the Asset Purchase Agreement, Personnel was to receive "up to $625,500." This amount included assumption of: $332,000 of debt owed to Beneficial National Bank; $104,916.67 of debt owed to Steven D. Ettridge, the majority owner of Temps; and $12,500 of debt owed to Eve Slap; and payment of $80,000 to Gary Newcomb upon proof that it was owed. Additional payments included payments on Schlecker's car; $27,000 payable to Schlecker as consideration for Ancillary Business; and the possibility of future payments of up to $170,000 if the balance in the repayment of debt was less than $625,000. *See id*. at ¶ 1.04.

[8] Mason does not argue that Schlecker's acquisition of an interest in Temps, as such, provides a basis for her claim.

[9] Network of Wilmington, Inc., Cert. of Inc. (Ex. C to Defendants' Brief).

[10] Aff. of Schlecker, at ¶ 1 (Ex. B to Defendants' Brief).

[11] *Id.* at ¶ 5.

[12] This is true even though Personnel's phone number was scheduled to be purchased by Temps. *See* Schlecker Dep., at 25-26.

Mason has been unable to collect on her judgment against Personnel which does not have sufficient assets to pay Mason.

II. CONTENTIONS

Mason contends that Personnel was under-funded and failed to follow corporate formalities and is a mere alter ego of Schlecker; thus, this Court should pierce the corporate veil and hold Schlecker personally liable for Mason's judgment against Personnel. In addition, Mason argues that Network is obligated to pay her judgment under the successor liability doctrine.

The Defendants oppose Mason's motion for summary judgment.[13] Furthermore, Schlecker argues that he is entitled to summary judgment on Mason's piercing the corporate veil claim since no fraud occurred, Personnel was not under-capitalized, and Personnel is not an alter ego of Schlecker. Network seeks summary judgment on the successor liability claim because the doctrine of successor liability cannot be applied against Network under Delaware law and because Mason's claim does not satisfy the evolving test under federal law for successor liability in employment discrimination cases, if the question is governed

[13] Mason brought this action against four other defendants: Temps, Randstad, David Schlecker, and Stephen D. Ettridge (the interests of whom were subsequently represented by his executor). Her claims against them have all been dismissed.

by federal law. Finally, Schlecker asserts a right to summary judgment on Mason's fraudulent transfer claim because she has not adduced any facts to show that a fraudulent transfer occurred.

III. ANALYSIS

A. *Applicable Standards*

Motions for summary judgment are evaluated under Court of Chancery Rule 56.[14] If there are no genuine, material issues of fact, a party may obtain summary judgment if it is entitled to judgment as a matter of law.[15] When assessing a motion for summary judgment, this Court must view the facts in the light favorable to the nonmoving party.[16]

> In order to withstand a motion for summary judgment, the plaintiff is required to present some evidence, either direct or circumstantial, to support all of the elements of the claim. A motion for summary judgment is properly granted against a plaintiff who fails to make a showing sufficient to establish the existence of an element essential to the plaintiff's case, and on which the plaintiff will bear the burden of proof at trial.[17]

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[14] The pending motions were filed before adoption of Court of Chancery Rule 56(h).
[15] DEL. CH. CT. RULE 56(c).
[16] *Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977).
[17] *Watson v. Taylor*, 2003 WL 21810822, at *2 (Del. Aug. 4, 2003) (footnotes omitted), 829 A.2d 936 (TABLE).

Also, "[o]nce the moving party presents evidence that if undisputed would entitle it to summary judgment, the burden then shifts to the opposing party to dispute the facts by affidavit or proof of similar weight."[18] Here, the material facts are generally not in dispute,[19] and, except for one claim, the rational inferences to be drawn from those facts lead to but one conclusion.

B. *Piercing the Corporate Veil*

Although Mason's predicament is unfortunate and piercing the corporate veil is appropriate when equity so requires, the facts of this case do not support application of that doctrine.

"[P]ersuading a Delaware Court to disregard the corporate entity is a difficult task. The legal entity of a corporation will not be disturbed until sufficient reason appears."[20] Corporate form will be disregarded and individuals will be held personally liable "in the interest of justice, when such matters as fraud,

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[18] *Fleet Fin. Group, Inc. v. Advanta Corp.*, 2001 WL 1360119, at *1 n.4 (Del. Ch. Nov. 2, 2001).
[19] Defendants' Brief contained only small disagreements (and mostly clarifications) with Plaintiff's assertions of fact. *See* Defendants' Brief, at 1-4. In her Reply Brief, Plaintiff did not disagree with any of the facts set forth in the Defendants' Brief. *See* Pl.'s Resp. Br., at 1 (hereinafter "Plaintiff's Reply Brief") (noting that "certain facts adduced by Defendants bear repeating" and repeating these facts, without challenging any of the Defendants' factual statements). The only "facts" that Plaintiff disputes in her Reply Brief are characterizations of behavior. *See id.* at 2 (summarizing the "uncontroverted facts" in a self-serving and conclusory manner by alleging that it is uncontroverted that Schlecker "now controls the entity that is the alter ego of Personnel").
[20] *David v. Mast*, 1999 WL 135244, at *2 (Del. Ch. Mar. 2, 1999) (internal quotations omitted).

contravention of law or contract, public wrong, or where equitable consideration among members of the corporation require it, are involved."[21] This analysis is often described as the "alter ego"[22] analysis, because, in substance, the Court is examining whether there are legally distinct entities. The United States District Court for the District of Delaware, applying federal common law, described this analysis:

> [A]n alter ego analysis must start with an examination of factors which reveal how the corporation operates and the particular defendant's relationship to that operation. These factors include whether the corporation was adequately capitalized for the corporate undertaking; whether the corporation was solvent; whether dividends were paid, corporate records kept, officers and directors functioned properly, and other corporate formalities were observed; whether the dominant shareholder siphoned corporate funds; and whether, in general, the corporation simply functioned as a facade for the dominant shareholder.[23]

In this analysis, no single factor is dominant.[24] Delaware Courts have built on this analysis and require an element of fraud to pierce the corporate veil.[25] As this Court articulated in *Wallace v. Wood*: "Piercing the corporate veil under the alter

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[21] *Pauley Petroleum Inc. v. Continental Oil Co.*, 239 A.2d 629, 633 (Del. 1968).
[22] *See, e.g., Trustees of the Village of Arden v. Unity Constr. Co.*, 2000 WL 130627 (Del. Ch. Jan. 26, 2000).
[23] *United States v. Golden Acres, Inc.*, 702 F. Supp. 1097, 1104 (D. Del. 1988).
[24] *See id.*
[25] *See, e.g., Wallace ex rel. Cencom Cable Income Partners II, Inc., L.P. v. Wood*, 752 A.2d 1175, 1184 (Del. Ch. 1999).

ego theory requires that the corporate structure cause fraud or similar injustice. Effectively, the corporation must be a sham and exist for no other purpose than as a vehicle for fraud."[26]

In her motion for partial summary judgment, Mason contends that this Court should ignore Personnel's status as a corporation because (1) Personnel was insolvent, (2) corporate formalities were ignored,[27] and (3) Network and Personnel were alter egos of Schlecker. Each of these contentions will be addressed in turn.

1. Insolvency

Mason asserts that Network should be viewed as an alter ego of Personnel because Personnel "could not meet its obligation [sic] as they became due."[28] Though the Defendants dispute Personnel's insolvency,[29] the disagreement is not material because Mason misconstrues the insolvency prong of the alter ego analysis.

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[26] *Id.* (footnote and internal quotations omitted).
[27] This point is divided into two separate arguments in Plaintiff's Opening Brief. *See* Plaintiff's Opening Brief, at 5. Mason asserts that "(ii) Mr. Schlecker was unclear as to whether Personnel was, in fact, properly organized; [and] (iii) there seemed to be no formal functioning of corporate officers." *Id.* (citations omitted). Essentially both of these claims boil down to the single claim that corporate formalities were viewed as unimportant and were not being followed.
[28] *Id.*
[29] *See* Defendants' Brief, at 5.

Clearly, mere insolvency is not enough to allow piercing of the corporate veil. If creditors could enter judgments against shareholders every time that a corporation becomes unable to pay its debts as they become due, the limited liability characteristic of the corporate form would be meaningless. Thus, the insolvency inquiry must have a different purpose. Instead, insolvency is one factor to be considered in assessing whether the corporation engaged in conduct that unjustly shields its assets from its creditors. If so, and especially if particular shareholders benefited from and controlled that conduct, then justice would require the piercing of the corporate veil in order to hold the benefiting shareholders responsible. This concept may also be applicable as the inability to pay creditors becomes imminent and the corporation enters the "zone of insolvency."[30]

In this case, an arguably insolvent company (Personnel) that was owned by a sole shareholder (Schlecker) sold its assets to another company (Temps). Personnel's assets were sold for relatively little cash, but the majority of the consideration was in the form of assumption of debts. There are no facts that show that this transaction was not an arm's length transaction. Therefore, even if

[30] *See, e.g., Geyer v. Ingersoll Publications Co.*, 621 A.2d 784 (Del. Ch. 1992).

Personnel was insolvent, there is no evidence in the record demonstrating that its assets were transferred in an attempt to avoid its creditors (or potential creditors).

In addition to the insolvency argument, Mason also contends that Personnel was under-capitalized. However, Mason asserts no facts that show that Personnel was under-funded (for example, a comparison of capitalization of similar firms in the industry),[31] except for allegations that Personnel was insolvent. However, as set forth above, insolvency, with nothing more, is not sufficient to warrant the piercing of the corporate veil.

In summary, even assuming that Personnel was insolvent, insolvency by itself does not warrant piercing the corporate veil. In addition, there is no evidence that Personnel was under-capitalized.

2. Corporate Formalities

Mason next asserts that Personnel and Network did not follow corporate formalities, which, in turn, should lead to the inference that these companies were alter egos of Schlecker.[32] However, Mason provides no evidence that corporate

[31] Furthermore, one is tempted to assume that firms in the temporary employment industry are not highly capitalized, as firms in that line of business are not burdened with substantial fixed costs.

[32] Plaintiff's Opening Brief, at 5. I note that the Plaintiff's Reply Brief only superficially discusses this argument and I am not clear if it being pursued. *See* Plaintiff's Reply Brief, at 3-4.

formalities were not followed. All the Plaintiff points to is a part of Schlecker's deposition (taken in September of 2002) when he had difficulty recalling the names of the companies he was involved with, the dates when they were sold, and the acquirer of the companies.[33] While this may not reflect managerial diligence, it surely does not demonstrate a lack of regard for corporate formalities.[34]

In conclusion, there is no material evidence that Personnel or Schlecker disregarded corporate formalities.

3. Alter ego

Mason argues that this Court should pierce the corporate veil because Personnel and Network are alter egos of Schlecker. In support of this argument Mason points out that Schlecker was the sole shareholder of both Personnel and Network, Network uses the same office building as Personnel once did, and Network uses the same phone number as Personnel once used. These facts, with nothing more, do not support any inference reaching the "vehicle for fraud" standard discussed above. Being the sole shareholder of two different legal

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(discussing that the piercing the corporate veil inquiry involves an analysis of (1) a company being under-funded; (2) the failure to observe corporate formalities; or (3) the alter ego inquiry, and then arguing that the corporate veil should be pierced because of Schlecker's under-funding of his companies and because they are his alter egos).

[33] Schlecker Dep., at 6-7.

[34] Personnel and Network were duly incorporated.

entities, housed in the same office building and possessing the same phone number at separate (and not sequential) times does not constitute a sham that "exist[s] for no other purpose than as a vehicle for fraud."[35]

* * * *

In sum, one may be sympathetic to Mason's problems in collecting her judgment, but a corporation has "no body to kick and no soul to damn."[36] Although, in the proper case, the corporate veil may be pierced, Mason has not shown that such relief is appropriate here.[37] She has not demonstrated that Personnel was under-capitalized or that corporate formalities were not met. Schlecker's running of two separately incorporated enterprises—at separate and discrete periods of time—in the same office building and with the same phone number, does not show fraud or sham (or support any inference to that effect). Therefore, Mason is not entitled to pierce the corporate veil to impose personal liability upon Schlecker. His motion for summary judgment is granted as to this claim (Count II of the Complaint).

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[35] *Wallace*, 752 A.2d at 1184.
[36] *See* John C. Coffee, Jr., '*No Soul to Damn: No Body to Kick*': *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 386 (1981).
[37] This conclusion is reached after evaluating the totality of Mason's various challenges to Personnel's and Schlecker's corporate conduct.

C. *Plaintiff's Successor Liability Claim*

In addition to requesting relief against Schlecker, Mason seeks that judgment be entered against Network under the successor liability theory. Network, however, is not a successor of Personnel; it is, therefore, inappropriate to impose responsibility for Mason's claim upon it.

Absent unusual circumstances "a successor corporation is liable only for liabilities it expressly assumes."[38] However, "the rule whereby a purchasing corporation is obligated to only those liabilities which it expressly assumes is not absolute,"[39] as "in some limited situations where an avoidance of liability would be unjust, a purported sale of assets for cash or other consideration may be found to transfer liabilities of the predecessor corporation."[40]

This instance is not an appropriate case for successor liability because, simply put, Network is not a successor of Personnel.[41] Following the sale to Temps of Personnel's assets, the business of Personnel was continued by Temps. Though Mason is correct in her assertion that Network somewhat resembles

[38] *Corp. Prop. Assoc. 8, L.P. v. Amersig Graphics, Inc.*, 1994 WL 148269, at *4 (Del. Ch. Mar. 31, 1994). No claim is made that Network assumed Personnel's liabilities.
[39] *Id.*
[40] *Fell v. S.W.C. Corp.*, 433 F. Supp. 939, 945 (D. Del. 1977).
[41] Mason chose not to pursue her successor liability claim against Temps or Randstad.

Personnel, the doctrine of successor liability, as it might be applied here, involves asset purchasers or, perhaps, the entity that picks up the business of the entity burdened (or likely to be burdened) by the creditor's claim. Network did not purchase the assets of Personnel or of any successor corporation. Additionally, Schlecker's operation of the two companies is separated by two years and the companies were engaged in somewhat different businesses.[42] In conclusion, since there is a significant separation between Network and Personnel, the doctrine of successor liability does not control the present dispute.[43] Network, accordingly, is

[42] Personnel was primarily focused on temporary employee placement while Network is primarily focused on permanent placement services.

[43] The parties have been unhelpful in their advocacy over the question of whether the Court is to apply Delaware law or federal law. Delaware courts, and the United States District Court of Delaware, interpreting Delaware law, have imposed successor liability upon asset-acquirers in product liability cases. *Amersig Graphics*, 1994 WL 148269, at *4 ("None of the cases cited by plaintiffs or defendants expressly state nor even focus on the fact that the exceptions to a successor corporation's assumption of liabilities are applicable only to liabilities related to defective products."). The doctrine of successor liability has been expanded by the federal courts to include employment discrimination claims. *See, e.g.*, *Rego v. ARC Water Treatment Co. of Pa.*, 181 F.3d 396 (3d Cir. 1999). The Third Circuit held that "in the context of employment discrimination, the doctrine of successor liability applies where the assets of the defendant employer are transferred to another entity," *id.* at 401, and noted the following three factors that a court should consider when analyzing successor liability in an employment discrimination context:

(1) continuity in operations and work force of the successor and predecessor employers;
(2) notice to the successor employer of its predecessor's legal obligations; and
(3) ability of the predecessors to provide adequate relief directly.

Id. at 402 (internal quotations omitted). The Third Circuit's analysis in *Rego* was elaborated upon in *Brzozowski v. Correctional Physician Servs., Inc.*, 360 F.3d 173 (3d Cir. 2004).

entitled to summary judgment on Mason's successor liability claim (Count III of the Complaint).

D. *Fraudulent Transfer*

Mason alleged that Personnel's asset sale to Temps was a fraudulent transfer under the Delaware Fraudulent Transfer Act.[44] A transfer—whether made before or after a creditor's claim arose—is fraudulent if it was made (1) "[w]ith actual intent to hinder, delay or defraud any creditor of the debtor,"[45] or (2) "[w]ithout receiving a *reasonably* equivalent value in exchange for the transfer or obligation, and the debtor . . . [i]ntended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due."[46]

Mason decided not to pursue her fraudulent conveyance claim against Temps. She continues to maintain, however, that Schlecker received assets from Personnel without paying equivalent value for them. While, in fairness to

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Since Network did not purchase any assets from Personnel, is separated by approximately two years, and has significant operational differences, I need not decide whether Delaware would recognize successor liability in the employment discrimination context or whether federal law governs the present inquiry. Even under the federal test, successor liability would not be imposed on Network.

[44] 6 *Del. C.* §§ 1304, 1307; *see Kulp v. Timmons*, 2002 WL 1824909 (Del. Ch. July 30, 2002).

[45] *Id.* at § 1304(a)(1).

[46] *Id.* at § 1304(a)(2) (emphasis added).

Schlecker, this argument was not briefed thoroughly, the Complaint does allege that "[t]he property and assets of [Personnel] were fraudulently transferred to . . . Barry Schlecker."[47] There are sufficient facts in the record to infer rationally that, with regard to Personnel's assets (however limited) remaining after the sale to Temps, Schlecker obtained those assets without providing equivalent (or any) consideration to Personnel. For example, with regard to Personnel's former phone number that was scheduled to be sold to Temps,[48] Network uses this phone number and a reasonable inference from Schlecker's deposition is that the phone number, although scheduled to be sold, was not actually transferred to Temps[49] (and thus remained an asset of Personnel) and was later transferred to Schlecker from Personnel without consideration. Other assets—perhaps office furniture and an automobile—may fall in that category as well. As to the *mens rea* aspect of the Fraudulent Transfer Act,[50] Schlecker knew of the Mason's claim against his corporation and whether Personnel was, or was about to become, insolvent presents an issue of material fact. Therefore, Schlecker's motion for summary

[47] Complaint, at ¶ 20. This is incorporated into Count I of the Complaint through Paragraph 25.
[48] The fact that it was scheduled to be sold leads the Court to infer that it had some value. This was also confirmed by Schlecker in his deposition. *See* Schlecker Dep., at 25:21-26:2.
[49] *See id.* at 26:13-18.
[50] *See supra* text accompanying note 46.

judgment as to the claim of fraudulent transfer of assets to him is denied (Count I of the Complaint).[51]

IV. CONCLUSION

For the foregoing reasons, summary judgment is entered in Network's favor (Count III of the Complaint). Summary judgment is also granted in favor of Schlecker on the piercing the corporate veil claim (Count II of the Complaint). Schlecker's motion is denied as to the fraudulent transfer claim (Count I of the Complaint) which challenges the distribution of Personnel's assets to him. It follows that Mason's motion for summary judgment is denied.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-NC

[51] The value of these assets, especially in the context of Mason's judgment for more than $300,000, is likely to be paltry. Also, Schlecker asserts that the fraudulent conveyance claim is barred by the four-year statute of limitations set forth in 6 *Del. C.* § 1309. The sale to Temps was in 1998; this action was filed in 2004. The timing of the transfer of Personnel's assets to Schlecker, while likely to have been in 1998 or 1999, cannot be determined on the present record under the standard for summary judgment.