

[J-91-2010]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

FIZZANO BROTHERS CONCRETE PRODUCTS, INC.	:	No. 29 MAP 2010
	:	
v.	:	Appeal from the Opinion and Order of the Superior Court at No. 1896 EDA 2007, dated May 15, 2009, reversing the Order Entered of the Delaware County Court of Common Pleas at No. No. 01-11752 dated September 14, 2007
XLN, INC. SUCCESSOR IN INTEREST TO SYSTEM DEVELOPMENT GROUP, INC.	:	
	:	
v.	:	972 A.2d 547 (Pa. Super. 2009)
SHORE CONSULTANTS, LTD., GREGG A. MONTGOMERY, DAVID BINDER AND XLNT SOFTWARE SOLUTIONS, INC.	:	ARGUED: November 30, 2010
	:	
	:	
APPEAL OF: FIZZANO BROTHERS CONCRETE PRODUCTS, INC.	:	

CONCURRING AND DISSENTING OPINION

MR. JUSTICE BAER

DECIDED: MARCH 26, 2012

I join in full the majority’s erudite opinion holding that the de facto merger exception requires “some sort of” proof of continuity of ownership or stockholder interest and that such proof is not restricted to mere evidence of an exchange of assets from one corporation for shares in a successor corporation. Maj. Op. at 30-31. I agree with the majority that a statutory merger may take the form of “obligations” in lieu of shares in the new or surviving corporation and that the underlying corporate realities will not always be evident from the formalities of the proximal corporate transaction. Id. at 31. Moreover, I believe the majority correctly concludes that this type of analysis does not require adherence to a mechanically applied checklist as found by the Superior Court, but rather uses the relevant factors as a map to determine whether a merger of two

corporate entities is the result of the transaction. Because I believe that the trial court's analysis of the facts of this case fulfill the analytical framework set forth by the majority, I would simply reverse the Superior Court's determination and reinstate the trial court's decision concluding that a de facto merger resulted in this case rather than remand for such a determination.

Specifically, as noted by the majority, the trial court concluded that given the realities of the transactions between SDG and XLN and XLN and XLNT there was a corporate continuum from SDG to XLNT. Maj. Op. at 31. As also pointed out by the majority, and relied upon by the trial court, the facts demonstrate that Appellant's causes of action for breach of contract and breach of express warranty derived from a transaction between Appellant and SDG. Sometime following the above events, all of the SDG's shareholders sold their shares to XLN, a sale that unquestionably resulted in a corporate merger of SDG and XLN. In exchange, SDG's shareholders received cash and promissory notes obligating XLN to pay the shareholders a considerable debt on the notes. This obligation was secured by the primary asset of the corporation, its software (the Software). When XLN sold its assets to XLNT, XLN was relieved of its debt obligations to the SDG shareholders and XLNT assumed such obligation with the Software again serving as security for such obligation. Thus, the primary corporate asset, the Software, remained the property of the original SDG shareholders throughout the sales transactions from SDG to XLN and then to XLNT. Finally, the trial court noted that the record demonstrated the key employees and shareholders of SDG, Daniel Fritsch and Michael Hamlin, continued as key employees and owners of the main corporate asset, the Software, at XLNT. Thus, *inter alia*, although there was not a technical continuity of the shareholders from XLN to XLNT, the trial court found there was a de facto merger between XLN and XLNT.

In my view, the above facts found by the trial court likewise satisfy the analytical framework set forth by the majority for determining whether the continuity of ownership prong of the de facto merger test has been satisfied. Specifically, for all intents and purposes, the ownership of XLNT remained the same as the ownership of XLN given the assumed obligations of XLNT to Fritsch and Hamlin, in lieu of shares. Thus, despite the technical lack of shareholder continuity from XLN to XLNT, I would, nevertheless find continuity of ownership. Because the Superior Court concluded otherwise, I would simply reverse its decision and reinstate the trial court's determination.