

Commonwealth of Kentucky
Court of Appeals

NO. 2005-CA-001675-DG

CRITTENDEN BUILDERS SUPPLY CO.

APPELLANT

ON DISCRETIONARY REVIEW
FROM GRANT CIRCUIT COURT
v. HONORABLE JULIE REINHARDT WARD, SPECIAL JUDGE
ACTION NO. 05-XX-00003

GRANT COUNTY CONCRETE CO., INC.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TAYLOR AND SCHRODER, JUDGES; MILLER,¹ SPECIAL JUDGE.

MILLER, SPECIAL JUDGE: This matter is before us upon an order granting discretionary review dated October 17, 2005. Kentucky Rules of Civil Procedure 76.20. We are reviewing a decision of the Grant Circuit Court which affirmed an appeal from the Grant District Court, Small Claims Division.

¹ Retired Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

As an initial matter, we suggest that discretionary review was improvidently granted.² The granting of discretionary review in a case of this nature is outside the underlying purpose of the Small Claims Division. We sit far removed from a decision of a court that was not bound to compile a sophisticated record supporting its decision. However, since discretionary review has been granted, we address the issues presented on the merits, and affirm.

The Small Claims Division entered judgment against appellant "Crittenden Builders Supply Co." adjudging it liable for the price of a shipment of concrete delivered by appellee Grant County Concrete Co., Inc. (Grant County Concrete). For the reasons stated below, we affirm.

On May 21, 2002, Crittenden Lumber & Building Supply, LLC (Crittenden Lumber) placed an order with Grant County Concrete for approximately 11-1/2 yards of concrete. Grant County Concrete delivered the material on the same day it was ordered. The concrete was used for improvement upon the business premises then owned and occupied by Crittenden Lumber. Grant County Concrete contemporaneously invoiced Crittenden Lumber. Crittenden Lumber never paid.

² Cf. Campbell v. Crager, 167 S.W.3d 669 (Ky.App. 2005), wherein discretionary review of a decision of the Small Claims Division was appropriately granted. We recognized that a default judgment was an appropriate device in small claims proceedings.

At some point following the delivery, Crittenden Lumber went out of business. On December 19, 2002, Frances Henry, LLC d/b/a Crittenden Builders Supply Company (Crittenden Builders Supply) was organized. It subsequently acquired some of Crittenden Lumber's assets, including its inventory and the improved premises, and commenced operations of a similar nature upon the same premises.

On January 21, 2005, Grant County Concrete filed a Small Claims Complaint against Crittenden Builders Supply. A brief trial was held on March 8, 2005. At trial, Grant County Concrete proved the May 21, 2002, delivery, and Crittenden Builders Supply defended on the basis that the purchase was made by a different company (Crittenden Lumber), and that it had not even been organized at the time of the delivery. The trial court entered judgment in favor of Grant County Concrete in the amount of \$1,443.59 upon the basis that Crittenden Builders Supply obtained a benefit from the concrete delivery, i.e., the improvement to the premises. On July 6, 2005, the circuit court affirmed upon the same reasoning. We affirm, though upon different reasoning.

The circuit court order stated, in relevant part, as follows:

Appellant argues on appeal that it is not the proper party to be before the Court on this claim because it was not the legal

entity with which the Plaintiff/Appellee contracted in May of 2002. However, a review of the record and the evidence before the trial court is sufficient for the trial court to find that, based on the purchase by the Defendant/Appellant of the substantial assets of Crittenden Builders Supply, that Crittenden Builders Supply, Inc. has acquired an equitable benefit from the Grant County Concrete delivery of its product in 2002. Accordingly:

IT IS ORDERED that the Judgment of the Grant County District Court is affirmed.

Before us, the appellant contends that the trial court erred by ruling in favor of Grant County Concrete. Grant County Concrete argues that the judgment should stand because Crittenden Builders Supply Company is merely a continuation of Crittenden Lumber Co.³

It is generally accepted in Kentucky that a corporation which acquires the assets of another corporation does not thereby necessarily assume responsibility for payment of the debts or liabilities of the corporation which it has acquired. American Railway Express Co. v. Commonwealth, 190 Ky.

³ In its reply brief, Crittenden Builders Supply contends that Grant County Concrete has not preserved this issue for review because it was not presented to the small claims court. The trial transcript is a little over three pages, neither side was represented by counsel, and legal arguments, as such, were not presented by either party. Further, Crittenden Builders similarly raised arguments in its circuit court appeal, and its appeal to this Court, which were not specifically presented to the small claims court. Moreover, Grant County Concrete did raise this argument to the circuit court. In light of all these factors, we will consider the argument as sufficiently preserved. Similarly, the appellant objects to our consideration of certain public records obtained by the appellee from the office of the Kentucky Secretary of State and attached as an appendix to its brief. As the information contained in these documents is within the scope of judicial notice, see Kentucky Rules of Evidence 201, we have considered the corporate documents in our review.

636, 228 S.W. 433 (1920). The sale of corporate assets is generally a bona fide transaction, and the selling corporation receives money to pay its debts or property that may be subjected to the payment of its debts and liabilities. The purchasing corporation will not, in the absence of a contract obligation or fraud, be held responsible for the debts or liabilities of the selling corporation. American Railway, 228 S.W. at 437. Exceptions to the general rule that a purchaser, in the absence of a contract obligation, cannot be held responsible for the debts and liabilities of the selling corporation, are:

(1) where the purchaser expressly or impliedly agrees to assume such debts or other liabilities;

(2) where the transaction amounts to a consolidation or merger of the seller and purchaser;

(3) where the purchasing corporation is merely a continuation of the selling corporation; or

(4) where the transaction is entered into fraudulently in order to escape liability for such debts. (Emphasis added).

Id. at 437; Pearson ex rel. Trent v. National Feeding Systems, Inc., 90 S.W.3d 46 (Ky. 2002)

Based upon the ownership, management, and control of Crittenden Lumber vis-à-vis Crittenden Builders Supply,⁴ as

⁴ For example, Crittenden Lumber was organized by Val Andrews, Inc. and Stoneridge Development, Inc. V. Ruth Klette was an officer and director of

reflected in the record, we believe that exception three applies, and, though for a different reason, conclude that the trial court properly held the appellant liable for the May 21, 2002 concrete delivery. We are persuaded that Crittenden Builders Supply is, in substance, merely a continuation of Crittenden Lumber Co., and that exception three to the general rule as stated in American Railways, as set forth above, applies so as to bind Crittenden Builders Supply for the May 21, 2002, concrete delivery.

The appellants contend that there is insufficient evidence to establish that the "continuing business" exception applies in this case. We disagree. This is nothing more than a simple suit for debt. Consistent with the purpose in establishing the Small Claims Division, see KRS 24A.220, the case was tried without counsel. In such cases, the Small Claims Division does not engage in legal niceties nor sophisticated findings. It effectively has no record other than perhaps a "form" complaint and sometimes a response of sorts. The Court simply considers the complaint and sundry information provided by the parties and renders a decision based upon equity and fair dealing. It is essentially an oral proceeding. That is

Val Andrews, Inc. Crittenden Builders Supply was organized by V. Ruth Klette. Thus, among other reasons, there is a direct link, through V. Ruth Klette, between Crittenden Lumber and Crittenden Builders Supply.

precisely what occurred in the case at hand. No attorneys were involved until an appeal was taken to the circuit court.

While we do not necessarily agree with the Small Claims Division that Crittenden Builders Supply Company should pay for the concrete simply because it is using same, that is an important factor in rendering an opinion based upon equity and justice. At the appeal level there is sufficient documentation to demonstrate that the ownership, management, and control of the corporations are quite the same.

We find the case of Pearson ex rel. Trent v. National Feeding Systems, Inc., 90 S.W.3d 46 (Ky. 2002), a case injected by the lawyers and used to convince this court to grant discretionary review, not dispositive. However, if one should insist upon its applicability, we believe that the situation at hand clearly falls within the "continuing business" exception as set out therein. Actually, the Pearson decision addressed the question of whether a purchaser of corporate assets at a bankruptcy sale would be liable for the torts (products liability) of the seller.⁵ In order to resolve this question, the Court looked to the ancient principle that a purchaser of corporate assets is not ordinarily liable for the debts of the

⁵ In modern vernacular the question is whether a corporation that "purchases the assets" (in contrast to merger and consolidation, which is controlled by statute, see Kentucky Revised Statutes 273.291) of another corporation can be said to have "purchased the former's torts."

seller. In so doing the Court simply viewed the tort claims as a debt. That has little to do with the issues before us.

For the foregoing reasons the Judgment of the Grant Circuit Court is affirmed.

TAYLOR, JUDGE, CONCURS.

SCHRODER, JUDGE, DISSENTS.

BRIEF FOR APPELLANT:

Robert A. Winter
Ft. Mitchell, Kentucky

BRIEF FOR APPELLEE:

John Brent Threlkeld
Williamstown, Kentucky