

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2019 CA 0732

2019 CW 0513

CAMSOFT DATA SYSTEMS, INC.

VERSUS

**SOUTHERN ELECTRONICS SUPPLY, INC.
AND ACTIVE SOLUTIONS, LLC**

Judgment Rendered: JUL 02 2019

**Appealed from the Nineteenth Judicial District Court
Parish of East Baton Rouge
State of Louisiana**

Case No. 582,741

The Honorable Janice Clark, Judge Presiding

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BEFORE: CRAIN, THERIOT, and HOLDRIDGE, JJ.

THERIOT, J.

In this appeal, MMR Constructors, Inc., MMR Group, Inc., and MMR Offshore Services, Inc. (sometimes referred to collectively as “MMR”) seek review of the trial court’s judgment denying their Motion for Partial Summary Judgment on Successor Liability. For the following reasons, we affirm the trial court’s judgment and deny the companion writ application, referred to this panel, as moot.

FACTS AND PROCEDURAL HISTORY

The facts and procedural history are laid out in more detail in this court’s opinion in **CamSoft Data Systems, Inc. v. Southern Electronics Supply, Inc.**, 2019-0730 (La. App. 1st Cir. 7/2/19) (unpublished) also issued this date.

Relevant hereto, CamSoft Data Systems, Inc. (“CamSoft”) asserts that although MMR did not take part in the New Orleans Crime Camera Project, MMR legally stepped into the shoes of one of the main parties, NetMethods, LLC, through an assets and liabilities purchase and is therefore liable for the tortious acts of its agents and employees via successor liability. MMR filed a motion for partial summary judgment on successor liability, contending that CamSoft cannot produce evidence to establish that MMR is a successor to NetMethods such that successor liability applies. MMR argues it was merely a subcontractor of NetMethods on a project wholly unrelated to the Crime Camera Project referred to as the “Ferry Boat Project.” In connection with the Ferry Boat Project, MMR billed over \$330,000.00 to NetMethods. NetMethods was struggling financially, so in May 2009, MMR agreed to an assignment of proceeds for work performed by NetMethods to be paid to MMR in order to pay the outstanding balance owed to MMR. Additionally, MMR agreed to employ several of NetMethods’ employees and to retain Mark St. Pierre (“St. Pierre”), the owner of NetMethods, as a consultant on potential expansion of its own business into the offshore industry. According to MMR, there was never any agreement to purchase NetMethods in its entirety or to assume any prior

obligations of NetMethods; instead, it was an agreement to hire new employees in an attempt to expand MMR's current business.¹ MMR asserts it is entitled to partial summary judgment on the issue of successor liability because CamSoft has failed to produce any evidence that MMR assumed the liabilities of NetMethods.²

After a hearing, the trial court signed a judgment on April 2, 2019, denying MMR's motion for partial summary judgment on successor liability. From this judgment, MMR appeals pursuant to La. R.S. 51:135.³

SUMMARY JUDGMENT AND THE STANDARD OF REVIEW

A motion for summary judgment is a procedural device used to avoid a full scale trial when there is no genuine issue of material fact. **M/V Resources LLC v. Louisiana Hardwood Products LLC**, 2016-0758, p. 8 (La. App. 1st Cir. 7/26/17), 225 So.3d 1104, 1109, writ denied, 2017-1748 (La. 12/5/17), 231 So.3d 624. A motion for summary judgment is properly granted if, after an opportunity for adequate discovery, the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. Code Civ. P. art. 966(A)(3). The burden of proof rests with the mover. Nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover's burden on the motion does not require him to negate all essential elements of the

¹ MMR asserts that it was aware of the ongoing litigation in New Orleans in which Southern Electronics Supply, Inc. and Active Solutions, LLC claimed that they developed a wireless video surveillance system in the Crime Camera Project that constituted a trade secret, just as CamSoft is claiming in this litigation. According to MMR, these claims were discussed with St. Pierre, who assured MMR that there was no truth to any claim that a trade secret existed or that St. Pierre and/or NetMethods engaged in any fraudulent acts that were set forth in the pleadings, and that it was only after that assurance that MMR agreed to enter into a business relationship with NetMethods.

² Although CamSoft argues this issue was previously determined by this court, we do not find that this court's opinion in **CamSoft Data Systems, Inc. v. Southern Electronics Supply, Inc.**, 2018-1609 (La. App. 1st Cir. 12/3/18), — So.3d —, 2018 WL 8141458, writs denied, 2018-02088, 2018-02018 (La. 2/11/19), 263 So.3d 1151, 263 So. 3d 1153, is determinative of whether MMR is liable via successor liability. In that case, this court considered CamSoft's "Motion for Partial Summary Judgment on the Legal Question of Antitrust Mode of Analysis." Although this court stated in dicta that NetMethods sold its assets and liabilities to MMR, this falls short of a legal determination of the issue presented in this appeal, and we find CamSoft's argument on this issue to be without merit. See CamSoft, 2018-1609 at p. 5, — So.3d at —.

³ As set forth in La. R.S. 51:135, all interlocutory judgments in cases involving antitrust claims shall be appealable within five days and shall be heard and determined within twenty days after the appeal is lodged.

adverse party's claim, action, or defense, but rather to point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. The burden is on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. La. Code Civ. P. art. 966(D)(1). In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. **M/V Resources LLC**, 2016-0758 at p. 9, 225 So.3d at 1109.

A fact is material if it potentially ensures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. A genuine issue of material fact is one to which reasonable persons could disagree. If reasonable persons could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate. **Doyle v. Lonesome Development, Limited Liability Company**, 2017-0787, p. 6 (La. App. 1st Cir. 7/18/18), 254 So.3d 714, 718-19, writ denied, 2018-1369 (La. 11/14/18), 256 So.3d 291, quoting **Jackson v. City of New Orleans**, 2012-2742, pp. 5-6 (La. 1/28/14), 144 So.3d 876, 882, cert. denied, — U.S. —, 135 S.Ct. 197, 190 L.Ed.2d 130 (2014). Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. **Succession of Hickman v. State Through Board of Supervisors of Louisiana State University Agricultural and Mechanical College**, 2016-1069, p. 5 (La. App. 1st Cir. 4/12/17), 217 So.3d 1240, 1244.

Although summary judgments are now favored, factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion, and all doubt must be resolved in the opponent's favor. **Quality**

Environmental Processes, Inc. v. Energy Development Corporation, 2016-0171, p. 14 (La. App. 1st Cir. 4/12/17), 218 So.3d 1045, 1059.

DISCUSSION

MMR's Motion for Partial Summary Judgment on Successor Liability and the opposition thereto conflate arguments as if they apply to all three MMR corporations by collectively referring to the three corporations as "MMR." However, all three corporations are separate legal entities. The sole owner of MMR Group is James B. Rutland. MMR Group is the sole shareholder of its subsidiary, MMR Constructors. MMR Offshore Services is a former subsidiary of MMR Group, but it has since been merged into MMR Constructors. A parent company is not liable for the acts of its subsidiaries. **Ames v. Ohle**, 2016-0612, p. 16 (La. App. 4th Cir. 4/26/17), 219 So.3d 396, 407; see also **United States v. Bestfoods**, 524 U.S. 51, 61, 118 S.Ct. 1876, 1884, 141 L.Ed.2d 43 (1998), citing Douglas & Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L.J. 193 (1929); **Bujol v. Entergy Services, Inc.**, 2003-0492, p. 13 (La. 5/25/04), 922 So.2d 1113, 1127. A shareholder of a corporation is not personally liable for the acts or debts of the corporation. La. R.S. 12:1-622(B). MMR's motion for partial summary judgment and the attached evidence predominantly refer to "MMR" generally without distinguishing between the three separate corporations, and this court is unable make that distinction on *de novo* review based solely on the partial summary judgment record before it. Given that the corporate entities are collectively grouped, we are unable to enter judgment as a matter of law in favor of any of the three corporations based on the distinctions and protections afforded under corporate law.

Generally, when a corporation sells all of its assets to another, the latter is not responsible for the seller's debts or liabilities. **J.D. Fields & Co., Inc. v. Nottingham Const. Co., LLC**, 2015-0723, p. 4 (La. App. 1st Cir. 11/9/15), 184 So.3d 99, 101-02, quoting **Golden State Bottling Co., Inc. v. N.L.R.B.**, 414 U.S.

168, 182 n. 5, 94 S.Ct. 414, 424, 38 L.Ed.2d 388 (1973). However, there are three exceptions to this general rule when: (1) the purchaser expressly or impliedly agrees to assume the obligations; (2) the purchaser is merely a continuation of the selling corporation; or (3) the transaction is entered into to escape liability. **Id.** MMR asserts that none of these three exceptions apply and therefore, all claims against it should be dismissed with prejudice.

As to the continuation doctrine,⁴ the key consideration is whether the successor is, in fact, a “continuation” of the predecessor. **J.D. Fields**, 2015-0723 at p. 6, 184 So.3d at 103. The extent to which predecessor and successor have common shareholders, directors, officers, or even employees are pertinent considerations. **Id.** Further, prior business relationships should be considered, as should the continuity of the identity of the business in the eyes of the public. **J.D. Fields**, 2015-0723 at p. 7, 184 So.3d at 103, citing **Bourque v. Lehmann Lathe, Inc.**, 476 So.2d 1125, 1127 (La. App. 3d Cir. 1985). However, Louisiana courts have held that a threshold requirement to trigger a determination of whether successor liability is applicable under the continuation exception is that one corporation must have purchased all or substantially all the assets of another. **Id.**, citing **Pichon v. Asbestos Defendants**, 2010-0570, p. 6 (La. App. 4th Cir. 11/17/10), 52 So.3d 240, 244, writ denied, 2010-2771 (La. 2/4/11), 57 So.3d 317.

In support of their respective positions, both parties submitted St. Pierre’s affidavit, which states in pertinent part:

. . . NetMethods made presentations to MMR in November 2008 and February 2009 for the transfer of NetMethods’ employees, assets, and liabilities, including (1) transition most contracts and accounts receivables held by NetMethods to MMR; (2) transition NetMethods’ employees to MMR; (3) transition the majority of NetMethods’ assets

⁴ We note that MMR did not agree to assume NetMethods’ liabilities. Pursuant to La. Civ. Code art. 1821, “[a]n obligor and a third person may agree to an assumption by the latter of an obligation of the former. To be enforceable by the obligee against the third person, the agreement must be made in writing.” The only written agreement provided in support of or in opposition to the motion is the Assignment of Proceeds of Contract, whereby NetMethods assigned proceeds of certain identified contracts to MMR in order to satisfy a debt. Nothing in this Assignment of Proceeds expresses any assumption by MMR of liabilities owed by NetMethods. CamSoft’s contention that MMR purchased NetMethods’ assets and liabilities in a “purposefully secret, undocumented sale” is insufficient to place liability on MMR pursuant to La. Civ. Code art. 1821.

to MMR; and, in exchange (4) employ Mark St. Pierre as a consultant for MMR with payments in the amount of his annual salary made to S2 Consulting, LLC.

In May 2009, MMR and NetMethods began operating as one company, and MMR's accounting department approved and directed all expenditures made by NetMethods. . . .

The St. Pierre affidavit also acknowledges an "agreement" between NetMethods and MMR, with no indication of what the terms of the alleged agreement ultimately were, i.e., whether they mirrored the "presentations" made to MMR as outlined in the St. Pierre affidavit.

While the facts contained within the St. Pierre affidavit are largely undisputed, the threshold requirement of whether the successor corporation purchased all or substantially all of the assets of the former is not addressed in the affidavit, nor is it definitively answered in any of the attachments to the partial summary judgment. In opposition, CamSoft attached the corporate deposition of MMR Constructors, which established that MMR⁵ purchased bucket trucks and "maybe a trailer" from NetMethods. The corporate deposition of MMR Constructors also stated that not all of NetMethods' assets were purchased by MMR but later stated, "[I]f there were any assets, we would have purchased the assets." While a corporate representative of MMR Constructors referenced a list of NetMethods' assets, that list does not reflect which assets were purchased and which were not. MMR Constructors' representative stated that the only log of which assets were purchased and which were not would be the checks that were written for the equipment, but no such checks were presented to the trial court. It is unclear what assets were purchased by MMR and whether these assets constitute "all or substantially all" of NetMethods' total assets so as to invoke the continuation doctrine. Due to the ambiguous nature of the attached exhibits, MMR failed to meet its burden of demonstrating that no genuine

⁵ Though the deposition testimony does not state which MMR entity purchased these items, CamSoft also presents vehicle titles in its opposition, which reflect a 2000 GMC was sold by NetMethods to MMR Constructors.

issue of material fact remains as to the threshold issue of whether all or substantially all of NetMethods' assets were purchased by MMR. Cf. Boes Iron Works, Inc. v. Gee Cee Group, Inc., 2016-0207, p. 10 (La. App. 4th Cir. 11/16/16), 206 So.3d 938, 947-48, writ denied, 2017-0040 (La. 2/10/17), 216 So.3d 45 (holding that the trial court's reliance of the continuation doctrine was "misplaced" as "the threshold requirement of an asset transfer is lacking"); Monroe v. McDaniel, 2016-0214, p. 12 (La. App. 5th Cir. 12/7/16), 207 So.3d 1172, 1181 (finding the continuation doctrine does not apply because the plaintiffs did not demonstrate at trial that the threshold requirement of a purchase of all the assets of the former by the successor there was met, noting that there was no evidence that the alleged successor corporation purchased any of the assets of the former, much less all of the assets).

In addition to genuine issues remaining as to the threshold requirement of the extent of the asset purchase, several other considerations established by **J.D. Fields** create genuine issues of material fact as to whether MMR is a continuation of NetMethods. While it is undisputed that St. Pierre, the owner of NetMethods, has never had any ownership interest in MMR,⁶ most of NetMethods' employees transferred their employment to MMR Communications, a new division of MMR Constructors, which was engaged in the same business as NetMethods and began operations upon the transfer of NetMethods' employees to MMR Communications. MMR Communications also had the same clients as NetMethods, and NetMethods transferred some existing contracts to MMR Communications. When asked what MMR told NetMethods' customers, Billy Ridge ("Ridge"), the Director of Sales of MMR Communications and a former NetMethods employee, stated, "I would tell my customers we started a new division, a new group at MMR that's going to be doing the same stuff. We've hired the technical people, so we have the same

⁶ MMR, through its corporate representatives, indicated that St. Pierre's employment at MMR (in a consulting role) was not the same capacity in which he served as an executive of NetMethods, and he did not have the authority to act on behalf of MMR.

capabilities, and we'd like you to start doing business with us." Ridge also testified that NetMethods told their customers that "NetMethods was shutting down and we were starting a new company with MMR and that we'd been setting up a new contract." NetMethods also moved to a building owned by MMR as part of creating MMR Communications. Ridge indicated that it was understood that NetMethods would go out of business once Ridge's employment was transferred to MMR Communications. For all of these reasons, MMR does not establish that it is entitled to partial summary judgment as a matter of law, as genuine issues of material fact remain as to whether the continuation doctrine is applicable to impose successor liability.⁷

CONCLUSION

For the above and foregoing reasons, the April 2, 2019 judgment denying the Motion for Partial Summary Judgment on Successor Liability filed by MMR Constructors, Inc., MMR Group, Inc., and MMR Offshore Services, Inc. is affirmed. We deny the companion writ application referred to this panel, as moot. Costs of this appeal are assessed against MMR Constructors, Inc., MMR Group, Inc., and MMR Offshore Services, Inc.

AFFIRMED; WRIT DENIED AS MOOT.

⁷ We need not address the third instance in which successor liability may apply: when the transaction is entered into to escape liability. Regardless, it is well-established in our jurisprudence that summary judgment is seldom appropriate for determinations based on subjective facts of motive, intent, good faith, knowledge, or malice. *Monterrey Center, LLC v. Education Partners, Inc.*, 2008-0734, p. 10 (La. App. 1st Cir. 12/23/08), 5 So.3d 225, 232.

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 **HOLDRIDGE, J., concurring.**

I concur and further note that this decision does not preclude the defendant from rearguing the motion for partial summary judgment.