MARCIA HENRY	*	**NO. 2018-CA-0522**
VERSUS	*	
		COURT OF APPEAL
TROY HENRY	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

*** * * * * * ***

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2011-01516, DIVISION "K"
Honorable Bernadette D'Souza, Judge
* * * * * *
Judge Rosemary Ledet
* * * * * *

(Court composed of Judge Rosemary Ledet, Judge Sandra Cabrina Jenkins, Judge Regina Bartholomew-Woods)

BARTHOLOMEW-WOODS, J., DISSENTS WITH REASONS

Gregory P. Nichols
LAW OFFICE OF GREGORY P. NICHOLS, LLC
829 Baronne Street
New Orleans, LA 70113

COUNSEL FOR PLAINTIFF/APPELLEE

Janet M. Ahern
JANET M. AHERN, PLC
141 Robert E. Lee Blvd., Suite 261
New Orleans, LA 70124

-AND-

David M. Prados
LOWE STEIN HOFFMAN ALLWEISS & HAUVER, L.L.P.
701 Poydras Street, Suite 3600
New Orleans, LA 70139

COUNSEL FOR DEFENDANT/APPELLANT

AFFIRMED

DECEMBER 19, 2018

This is a community property partition case. The parties are Troy Henry, the appellant, and Marcia Henry, the appellee. The narrow issue is whether a community-owned corporation is responsible for the debts of its subsidiary, absent an express assumption or guaranty.

FACTUAL AND PROCEDURAL BACKGROUND

The parties married in 1971. During the marriage, the community acquired a 100% interest in Henry Consulting, LLC ("Henry Consulting").[1] After the parties divorced in February 2011, but before the partition of the community, Henry Consulting acquired a 50% interest in Sterling Fresh Foods, LLC ("Sterling").[2]

In the partition proceeding, the parties agreed, by consent judgment, to the court's appointment of Chaffe & Associates, Inc. ("Chaffe") to value their interest in Henry Consulting.[3] The parties agreed that they would use Chaffe's valuation for purposes of partitioning the community property and that Chaffe would be the only expert used to value Henry Consulting.

---

[1] Henry Consulting is a management consulting firm located in New Orleans, which acquires and develops businesses it owns.

[2] Sterling was formed in November 2011 by Henry Consulting and The Cinque Group, Inc. ("Cinque"), each owning 50% of Sterling.

[3] Chaffe had conducted a prior valuation of the parties' business. In its report, Chaffe states that "it is also familiar with the background and business of the Company and has prepared a valuation of the Company as of April 17, 2009."

Thereafter, the trial court, with the parties' consent, appointed a special master, who conducted the trial on the valuation of the parties' interest in Henry Consulting. At trial, the special master accepted Vanessa Claiborne, Chaffe's President and Chief Executive Officer, as a business-valuation expert. Ms. Claiborne valued Henry Consulting, as of the December 31, 2013 valuation date, at $205,744.[4] Chaffe, however, expressly conditioned that valuation on its assumption that Henry Consulting was a corporate guarantor of certain of Sterling's debts because Troy Henry personally had guaranteed those debts.[5] Thus, in presenting its expert opinion, Chaffe couched its conclusion in the following language: "[v]alue of 100% of the outstanding equity of Henry Consulting, LLC (if Company is responsible for repaying [Sterling's] Debt Obligation)."[6]

[4] Initially, Chaffe opined that, as of December 31, 2013, the value of Henry Consulting was $313,244; however, Chaffe subsequently modified that number to $205,744 based on updated information.

[5] Ms. Claiborne was asked whether she ever reviewed any documents indicating that Henry Consulting was, in fact, a corporate guarantor of the Sterling Debts; she replied in the negative. She additionally testified that she could not make that determination. The special master noted in his recommendation that it was undisputed that there was no express guarantee by Henry Consulting of the Sterling debts.

[6] Ms. Claiborne testified on this point as follows:

> Q. From that value, on Exhibit 1 A, you then subtract Henry Consulting's share of Sterling Financials' debt of 737,340, to achieve your value of Henry Consulting at 313,244. Correct?
>
> A. Correct.
>
> Q. And that is what you opine, at the end of your report, is the value of Henry Consulting, after that debt obligation of Sterling, that, as the owner, it's ultimately responsible for, a value of 313,244. Correct?
>
> A. If Henry Consulting is responsible for half of that debt, yes.

The special master recommended to the trial court that the Sterling debts should be excluded from the valuation of Henry Consulting.[7] The trial court rendered judgment adopting the special master's recommendation.[8] On the parties' previous appeal, this court reversed the trial court's adoption of the special master's recommendation; in all other respects, this court affirmed. *Henry v. Henry*, 17-0282, p. 8 (La. App. 4 Cir. 10/18/17), ___ So.3d ___, 2017 WL 4700385 ("*Henry I*"). The record was insufficient for this court to determine whether the trial court had applied the correct legal standard in evaluating the court-appointed expert's opinion. Accordingly, we remanded this matter to the trial court for further proceedings.

On remand, the trial court, after supplemental briefing, issued an amended judgment, decreeing as follows:

> **IT IS ORDERED, ADJUDGED, AND DECREED** that the Special Master's Opinion, which excluded the debts of Sterling Foods from the valuation of Henry Consulting, LLC is adopted in its entirety, pursuant to La. R.S. 13:4165(C)(3). In support of this determination, the Court finds that the valuation of Chaffe & Associates, insofar as it included the debts of Sterling Foods in its valuation, is unreasonable and not well-founded in accordance with the law.

This appeal by Troy Henry followed.

---

[7] Addressing this issue, the special master in his recommendation observed as follows:

> However, Chaffe does include in the valuation of Henry Consulting, LLC one-half of the liabilities of Sterling Fresh Foods, LLC. Chaffe's reason for including these debts is that Troy Henry and Wendell Pierce (owner of The Cinque Group, Inc.) personally guaranteed these debts and for unknown reasons Chaffe considers the owners of Sterling Fresh Foods, LLC, namely Henry Consulting, LLC and The Cinque Group, Inc., " . . . may be considered corporate guarantors as well . . ." This resulted in a negative value for Henry Consulting, LLC's 50% interest in Sterling Fresh Foods, LLC of $737,340.

[8] The special master issued more than one report, and the trial court adopted all of the special master's reports in their entirety pursuant to La. R.S.13:4165(C)(3). The narrow issue before us pertains only to the valuation of Henry Consulting.

STANDARD OF REVIEW

The facts in this case are undisputed.[9] Thus, the question presented— the obligation of a community-owned corporation for the debts of its subsidiary—is purely a legal one, which we review *de novo*. *See Neivens v. Estrada-Belli*, 17-0225, p. 4 (La. App. 4 Cir. 9/27/17), 228 So.3d 238, 242-43 (citing *Felix v. Safeway Ins. Co*., 15-0701, p. 6 (La. App. 4 Cir. 12/16/15), 183 So.3d 627, 632) (observing that "[i]n a case involving no dispute regarding material facts, but only the determination of a legal issue, a reviewing court must apply the de novo standard of review, under which the trial court's legal conclusions are not entitled to deference"); *see also Mendoza v. Mendoza*, 17-0070, p. 5 (La. App. 4 Cir. 6/6/18), 249 So.3d 67, 71, *writ denied*, 18-1138 (La. 8/31/18), 251 So.3d 1083 (observing that a trial court's legal determinations in a community property partition action are reviewed under the *de novo* standard).

DISCUSSION

Troy Henry asserts five assignments of error, which we consolidate and rephrase as the following two issues: (i) whether the trial court erred in relying on La. C.C. art. 2356[10] in finding the Sterling debts were not community obligations;

---

[9] Although Troy Henry contends that the trial court violated this court's remand instructions by framing the issue regarding the Sterling debts as a legal determination, as opposed to a credibility issue regarding the expert's valuation, this is not a case in which there were factual issues concerning the expert's qualifications or methodology. No one disputes the special master's qualification of Ms. Claiborne as a business-valuation expert; to the contrary, the parties stipulated to the expert's appointment. Rather, the issue in this case, as the trial court once again noted on remand, was the whether a community-owned corporation is responsible for the debts of its subsidiary absent an express assumption or guaranty—a legal, not factual, determination.

[10] La. C.C. art. 2356 provides as follows:

> The legal regime of community property is terminated by the death or judgment of declaration of death of a spouse, declaration of the nullity of the marriage, judgment of divorce or separation of property, or matrimonial agreement that terminates the community.

and (ii) whether the trial court erred in relying on the lack of an express corporate guarantee in excluding the Sterling debts.

Relevance of La. C.C. art. 2356

Troy Henry contends that the trial court implied, by citing La. C.C. art. 2356 in its written reasons for judgment, that the creation of Sterling in November 2011, several months after the termination of the community in February 2011, made that entity and, thus, that entity's debts, a non-community asset. He contends that the trial court erred in failing to recognize the Sterling debts were obligations of the community entity, Henry Consulting, and that the entire community entity, including the entity's liabilities, must be valued at the time of partition. La. R.S. 9:2801(4)(a). Marcia Henry counters that the trial court's reference to La. C.C. art. 2356 was simply to point out that the presumption that a debt created during the community is a community obligation is inapposite here. We agree.

The Special Master observed in his report that "Troy Henry did not list those debts separately in his Sworn Detailed Descriptive List, as they were incurred post-termination and thus, could not be deemed a 'community debt.'"[11] The trial court's reference to La. C.C. art. 2356 can be attributed to the Special Master's reference to the presumption—"deemed"—that would have resulted if Troy Henry had personally guaranteed the Sterling debts during the existence of the community.

[11] In his report, the special master makes the following three statements regarding the Sterling debts not being community obligations:

- [T]hese debts are not listed on the Detailed Sworn Descriptive List by Troy Henry as either outstanding debts or reimbursement claims. Therefore, the only place these debts are addressed is in the valuation report by Chaffe.
- Troy Henry did not list those debts separately in his Sworn Detailed Descriptive List, as they were incurred post-termination and thus, could not be deemed a "community debt."
- The issue for the Special Master is the value of Henry Consulting, LLC and not consideration of any debts personally guaranteed by Troy Henry post-termination.

See In re Succession of Moss, 00-62, p. 5 (La. App. 3 Cir. 6/21/00), 769 So.2d 614, 618 (observing that "[a] debt owed to a corporation as a result of a conventional obligation executed by a spouse during the existence of the community is a community liability"). Stated otherwise, the trial court's reference to La. C.C. art. 2356 simply was to clarify that because Sterling was formed post-termination of the community, there was no basis, absent a contractual undertaking, to attribute Troy Henry's personal guarantee of the Sterling debts to the community as a community obligation.

Lack of a Guarantor Relationship

At trial, the special master noted that the legal issue presented here could be stated as follows: "[d]oes the debt of the subsidiary corporation automatically appear as a debt . . . [of] the parent corporation . . . absent an express assumption or guarantee by the parent corporation?" Under general corporate law, the answer to that question is no; as one commentator has observed:

> Generally, a shareholder is not liable for the debts . . . of the corporation, in the absence of statute or agreement, and exactly the same rule applies where the shareholder is a corporation. The mere ownership by one corporation of a controlling interest or of all the stock of another corporation does not, of itself, make the shareholding corporation liable for the debts . . . of the corporation in which it holds the stock.

13 FLETCHER CYC. CORP. § 6222 (footnotes omitted). The rationale behind this principle is that "a corporation is a legal entity distinct from the members who compose it, and when it contracts a debt, it is the debt of this legal entity, the corporation, and not the debt of the individual members." 13 FLETCHER CYC. CORP. § 6213 (footnotes omitted) (citing *Cefalu v. N. Cefalu Co.*, 253 So.2d 547, 551 (La. App. 1st Cir. 1971) (observing that "what is due by a corporation is not due by any of the individuals who compose the corporation and vice versa").

Absent an actual guarantee or surety relationship, there is no legal basis to impute the debts of one corporate entity to another. "Suretyship must be express and in writing." La. C.C. art. 3038. Suretyship can only be established by "an absolute expression of intent to be bound." *Custom–Bilt Cabinet & Supply, Inc. v. Quality Built Cabinets, Inc.*, 32,441, p. 6 (La. App. 2 Cir. 12/8/99), 748 So.2d 594, 599 (La. App. 2d Cir.1999) (citing *Ball Marketing Enterprise v. Rainbow Tomato Co*., 340 So.2d 700 (La. App. 3d Cir.1976)). Suretyship can neither be presumed nor established by inference. *Am. Bank & Tr. Co. of Coushatta v. Boggs & Thompson*, 36,157, p. 6 (La. App. 2 Cir. 6/12/02), 821 So.2d 585, 589; *Jimco, Inc. v. Gentilly Terrace Apartments, Inc*., 230 So.2d 281, 284 (La. App. 4th Cir.1970); *see also Williams v. Williams*, 95-13, p. 6 (La. App. 5 Cir. 04/25/95), 655 So.2d 405, 408.

In excluding the Sterling debts, the special master explained that it is undisputed the Sterling debts were not guaranteed by Henry Consulting; and, thus, the Sterling debts should not be considered in the valuation. The special master emphasized that Ms. Claiborne testified that it was a legal determination whether the Sterling debts should be included and that she was not qualified to make that determination; the special master summarized her testimony as follows:

> During the trial, Vanessa Claiborne was asked about the inclusion of these debts of Sterling in the valuation since they were not endorsed by Henry Consulting, LLC. In response to the questions, she expressed some doubt about including the debts saying that it was a legal matter for the court to decide.

Resolving the legal matter regarding the Sterling debts, the special master correctly determined that given the lack of an express corporate guarantee, the Sterling debts should be excluded. The special master thus concluded his report to the trial court as follow:

> Chaffe's valuation of $205,744 for Henry Consulting, LLC should be adjusted to disregard the debts of Sterling ($737,340) and the value of Sterling Fresh Foods, LLC should be $0 for purposes of valuing Henry Consulting, LLC. Utilizing this approach, it is the finding of the Special Master that the value of Henry Consulting, LLC as of December 31, 2013 is $943,084. This was the value concluded by Chaffe before consideration of the Sterling debts. Thus, the Special Master is not substituting his opinion for that of the Court's expert, he is using all of her figures, but resolving the legal issues she had.

On remand, the trial court again adopted the special master's opinion that the Sterling debts should be excluded. In so doing, the trial court, in its reasons for judgment, observed that the testimony and the evidence established that Henry Consulting never guaranteed the Sterling debts. The trial court found that "Henry Consulting is not a corporate guarantor of the debts acquired by Sterling Foods." The trial court emphasized that the lack of "indication in any of the Henry Consulting Records or that of Sterling Foods to indicate that this debt was guaranteed by Henry Consulting." Given the lack of documentary support, the trial court found that Chaffe's assumption of a corporate guarantee as the basis for including the Sterling debts was "wholly unsupported by the record." We agree.

Nonetheless, Troy Henry contends that because the Sterling debts were not in default, it was error to rely on the lack of a corporate guarantor relationship to exclude the Sterling debts. He contends that the question of whether Henry Consulting signed as guarantor or surety would only be relevant if Sterling failed to fulfill its own responsibility. *See* La. C.C. art. 3035 (providing that "[s]uretyship is an accessory contract by which a person binds himself to a creditor to fulfill the obligation of another upon the failure of the latter to do so"). This argument is belied by the court-appointed expert's own conditioning of her opinion upon the existence of a corporate guarantee.

We find that the trial court did not err in adopting the special master's recommendation. As outlined elsewhere in this opinion, the special master did not entirely reject the court-appointed expert's opinion; rather, he adjusted it. The special master did so to resolve a legal issue the court-appointed expert acknowledged that she was not qualified to decide. On *de novo* review, we find no error in the trial court's decision to adopt the special master's recommendation on the issue. The court-appointed expert's opinion was conditioned upon the existence of a corporate guarantee. The lack of any evidence that Henry Consulting agreed to guarantee the debts of its 50% owned subsidiary, Sterling, precludes attributing the Sterling debts to Henry Consulting. Accordingly, we find no error in the trial court's decision to adopt the special master's recommendation.

DECREE

For the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED