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SJC-12759

ROBERT SMITH vs. ROBERT E. KELLEY.

Norfolk. November 5, 2019. - February 11, 2020.

Present: Gants, C.J., Lenk, Lowy, Budd, Cypher, & Kafker, JJ.

Attorney at Law. Fraud. Corporation, Professional corporation, Corporate successor liability. Judgment, Preclusive effect. Collateral Estoppel. Damages, Fraud.

Civil action commenced in the Superior Court Department on July 18, 2016.

The case was heard by Thomas A. Connors, J., on motions for summary judgment.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Jeffrey S. Baker (Jonathan D. Plaut also present) for the plaintiff.
Dana Alan Curhan (James F. McLaughlin also present) for the defendant.
Thomas J. Carey, Jr., for Brian JM Quinn & others, amici curiae, submitted a brief.

KAFKER, J. The instant case concerns a final judgment that was entered four years ago against a professional corporation,

RKelley-Law, P.C. (the P.C.), for the fraudulent activity of one of its associates. The associate defrauded the plaintiff, Robert Smith, in a mortgage scam. The defendant in this case, Robert Kelley, was at all times the sole shareholder and officer of the P.C. The day after the entry of final judgment against the P.C., the defendant voted to wind up the corporation. That same day, he began operating his law practice as a sole proprietorship. Not long thereafter, the P.C. was placed into bankruptcy proceedings. The P.C. now has no assets, and the plaintiff seeks to recover from the defendant personally. For the reasons discussed infra, we conclude that, in the very unique circumstances of this case, the plaintiff may pursue successor liability against the defendant's sole proprietorship, as it was a mere continuation of the former professional corporation.[1]

1. Background. In the instant litigation, Smith seeks recompense from the defendant for liability established in prior Federal court proceedings, see Smith v. Jenkins, 818 F. Supp. 2d 336 (D. Mass. 2011) (Smith I), aff'd in part, vacated in part, & rev'd in part, 732 F.3d 51 (1st Cir. 2013) (Smith II). We begin by summarizing the facts and rulings from those proceedings.

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[1] We acknowledge the amicus brief submitted by Brian JM Quinn, Natali De Corso, and Rebecca Rabinowitz, supporting neither party.

a. Mortgage fraud scheme. The plaintiff, Smith, is a United States Marine Corps veteran. Smith I, 818 F. Supp. 2d at 340. He suffers from schizophrenia, posttraumatic stress disorder, and depression, and he is functionally illiterate. Smith II, 732 F.3d at 59. In 2005, Smith was living out of his car and working as a trash collector. Smith I, supra at 341. It was during this period that he was the victim of a mortgage fraud scheme. Smith II, supra.

Smith was approached by a participant in the scheme about a "special investment program" that would not require him to invest any money. Smith I, 818 F. Supp. 2d at 341. Smith agreed, and two real estate purchases were subsequently orchestrated in Smith's name using a false financial profile of his income, assets, and work and renting history. Smith II, 732 F.3d at 60.

Louis Bertucci, a real estate attorney and then-associate at the P.C., acted as the closing attorney for both properties. See Smith I, 818 F. Supp. 2d at 341. Although Bertucci was acting as the lender's attorney in these transactions, he directed Smith to sign the loan documents. Id. at 341, 344. Bertucci also instructed Smith to sign contradictory and false owner-occupancy affidavits. Id. at 345. As the District Court judge explained:

> "Smith testified that at each closing Bertucci introduced himself as the lawyer handling the paperwork for the 'investment.' Although Bertucci testified that he had no memory of Smith, the jury were warranted from their observations of Smith's demeanor in the belief that it would have been apparent to Bertucci that Smith did not understand the significance of the closings, much less the nature of the real estate 'investments' being made in his name. They were also warranted in crediting Smith's testimony that Bertucci had led him to believe that he was acting in Smith's best interest as his lawyer."

Id. at 344.

Several months after the closings, Smith began receiving telephone calls from lenders about missed mortgage payments. Id. at 342. Both properties subsequently went into foreclosure. Smith II, 732 F.3d at 61. The foreclosures ruined Smith's credit and prevented him from being able to rent an apartment. Id. His mental health also deteriorated precipitously; his schizophrenia worsened, he became suicidal, and he withdrew from others. Id.

b. Lawsuit against Bertucci, Kelley, and others. In 2007, Smith brought suit in State court against Bertucci, the P.C., Kelley (the sole shareholder of the P.C.), and others. Id. at 61. The case was removed to the United States District Court for the District of Massachusetts. Id. At trial, Kelley and the P.C. sought a directed verdict on the claims asserted against them for fraud and vicarious liability. See id. at 72. The District Court judge concluded that

> "with respect to . . . Kelley, there is absolutely nothing in the record that would persuade me that he even knew [the ringleader of the scheme, who was not Bertucci], much less that he actively participated in the scheme alleged; and because, as I have indicated, there is no basis under which an attorney-client relationship with [the ringleader] can be imposed on [the P.C.], there is no basis for liability on the part of . . . Kelley."

Accordingly, the District Judge entered a directed verdict in favor of Kelley and the P.C. Smith I, 818 F. Supp. 2d at 339 n.1. At the conclusion of the trial, judgment was entered in Smith's favor as to most of his remaining claims. Smith II, 732 F.3d at 61-62.

On appeal, the United States Court of Appeals for the First Circuit agreed that there was insufficient evidence of Kelley's personal liability. The First Circuit observed that, while Kelley had signed several of the closing documents, "Kelley's signature on a couple of forms is simply not enough to show that Kelley made false statements to Smith upon which Smith relied to his detriment." Id. at 72. At the same time, however, the First Circuit ruled that "[s]ufficient evidence was presented to warrant a finding that the [P.C.] was vicariously liable for Bertucci's fraud" and remanded the case to the District Court for a determination on that issue. Id. at 72-73.

On remand, the District Court judge noted that "[the P.C.] did receive compensation for the . . . property closings. Additionally, . . . Kelley and [the P.C.] are identified as the

closing agents for both properties, and Bertucci (and . . . Kelley) signed the closing documents on behalf of 'RKelley-Law.'" Accordingly, the judge found the P.C. vicariously liable for Bertucci's participation in the mortgage fraud scheme. The judge entered a final judgment against the P.C. in excess of $200,000 on January 12, 2016. As the District Court judge had entered a directed verdict in favor of Kelley on the claims against him, and the verdicts were affirmed on appeal, no final judgment was entered against Kelley personally.

c. The P.C. The P.C., against which the final judgment was entered, had been formed by Kelley in or around 2003. The practice primarily involved real estate conveyances. At the height of the practice, the P.C. employed twelve to fifteen employees. At all times, Kelley was the sole shareholder, president, treasurer, secretary, and director of the P.C. Additionally, he served as the P.C.'s registered agent in Massachusetts.

In 2014, during the pendency of the litigation in Federal court, Kelley laid off everyone who worked at the P.C. other than himself. For approximately six months, Kelley was the only employee of the P.C. Kelley eventually hired back his wife as an office manager, but he remained the only other employee.

The day after final judgment was entered against the P.C. on Smith's claims, Kelley resigned from his officer positions in

the P.C. and voted to wind up the corporation. Pursuant to the vote,[2] Kelley decided to "consult with [a] bankruptcy lawyer on whether to file dissolution papers or bankruptcy." At the same time, Kelley opened a sole proprietorship called Law Office of R. Emmett Kelley (the sole proprietorship).[3] Pursuant to the wind-up vote, Kelley had existing clients of the P.C. amend their fee agreements to bill all future work to the sole proprietorship, instead of the P.C. The sole proprietorship

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[2] The specific terms of the vote were as follows:

> "that R. Kelley Law, P.C. would cease operations effective immediately; that the sole stockholder shall direct a plan to wind up the corporation; that a list of all assets be compiled; that existing clients be contacted and asked to amend any ongoing fee agreements and be billed for all future work to the Law Offices of R. Emmet Kelley; to establish a new account in the law office of Robert E. Kelley, D/B/A Law Offices Of R. Emmett Kelley, new [tax identification number]; file a final tax return for R. Kelley-Law, P.C.; apportion ongoing expenses to the two law firms during the wind-up process; prepare an agreement to sell any assets to the Law Offices of Robert E Kelley at their fair market value; consult with bankruptcy lawyer on whether to file dissolution papers or bankruptcy; and to do all things necessary to wind up corporation."

[3] The record includes an affidavit from Kelley wherein he averred that his solo practice was closed in May 2017. He further stated that all hard assets of his solo practice had been moved to a storage facility and "remain there awaiting the conclusion of this case" and that he continues to use his office for "mail only." The parties have not raised this issue in their briefing, or articulated the extent to which it should affect our analysis. Accordingly, without briefing or a more well-developed factual record on this point, we decline to address it.

operated out of the same office as the P.C., used the same e-mail address, and utilized very similar letterhead.

Approximately three months after final judgment was entered against the P.C., on April 4, 2016, the Federal District Court judge issued an execution against the P.C. for $255,728 plus interest.[4] Smith made a demand upon the P.C., but the P.C. failed to remit any money to him. On July 18, 2016, Smith brought the instant suit against Kelley in the Superior Court, seeking a declaratory judgment that Kelley was personally liable for the P.C.'s liabilities as a successor in interest to the P.C. Smith also brought an equitable claim to reach and apply Kelley's assets to satisfy the final judgment entered against the P.C.

d. Bankruptcy proceedings. On May 19, 2017, the P.C. filed a voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code, 11 U.S.C. §§ 301 et seq. (2012). A trustee was appointed. During the course of discovery in the bankruptcy proceedings, the trustee determined that the P.C. had direct claims against Kelley. Specifically, Kelley had taken equipment, inventory, and supplies from the P.C. without paying for them. Moreover, receivables owed to the P.C. had been

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[4] The damages award consisted of $25,000, prejudgment interest, treble damages, $113,865 in attorney's fees and costs, and $42,000 for postverdict attorney's fees and costs.

deposited into Kelley's account, rather than the account of the P.C. The trustee calculated the total value of the direct claims that the P.C. could assert against Kelley at $74,000.[5] Kelley offered to purchase the claims from the bankruptcy estate for $85,000.

The trustee subsequently moved for an order from the bankruptcy court to authorize the sale of the P.C.'s claims. The sale was to comprise "all of the claims . . . that the bankruptcy estate has or could have against Kelley." This included not only direct claims that the P.C. could assert against Kelley, mentioned supra, but also any "indirect-liability" claims, defined as claims "based on imputation of liability theories such as alter ego or veil-piercing that could have been asserted by creditors of the [P.C.] against Kelley to the extent those claims may be legally asserted on behalf of a bankruptcy estate." The motion further provided that

> "the Claims are being sold without any representation or warranty that any claim in the Successor Liability Action, or any other particular claim or 'imputed' claim, is or is not property of the bankruptcy estate that would be included in the Claims being sold. Claims based on general harm to creditors are usually property of the bankruptcy estate, while claims based on a creditor's individualized damages are not."

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[5] At the hearing on the summary judgment motions, the plaintiff indicated that the bankruptcy judge did not hold a hearing on the valuation of what Kelley owed the P.C., and that no expert testimony was heard or valuation conducted.

The trustee also indicated that he believed the probability of success on the indirect liability claims "to be uncertain at best." The trustee explained that he was "not aware of any instance in which an individual attorney has been found liable as a successor to his previous professional corporation."

The bankruptcy judge allowed the trustee's sale motion. In so ruling, however, the bankruptcy judge added the following caveat:

> "The court hereby clarifies that this ruling should not be deemed a determination that the alter ego and veil piercing claims alleged or to be alleged against . . . Kelley are an asset of the bankruptcy estate and therefore sold to . . . Kelley. Creditor . . . Smith withdrew his objection to this motion based on the foregoing clarification and counsel to . . . Kelley stated on the record that his client does not insist that those claims be deemed assets of the estate."

e. Summary judgment. Subsequent to the bankruptcy judge's ruling, the parties filed cross motions for summary judgment in the instant State court litigation. Therein, the parties disputed whether Kelley's sole proprietorship could be held liable for the final judgment that had been entered against the P.C., either as a successor in interest or under the doctrine of piercing the corporate veil. A judge in the Superior Court granted Kelley's motion for summary judgment and denied Smith's motion for the same. The judge concluded, inter alia, that the doctrine of successor liability was only applicable to successor corporations, and could not be applied where the successor in

interest was a natural person, rather than a corporate entity. Smith appealed, and we transferred the case to this court on our own motion.[6]

2. Analysis. We note at the outset that the unusual facts underlying this case appear to prevent Smith from recovering from Kelley pursuant to this court's rules governing misconduct by attorneys in professional corporations. Generally speaking, the owners of a professional corporation engaged in the performance of legal services will be held personally liable for their own misconduct and the misconduct of their employees. Pursuant to S.J.C. Rule 3:06 (3) (b), as amended, 423 Mass. 1302 (1996), the owners of a professional corporation may be held jointly and severally liable for damages[7] resulting from "any

[6] Smith does not appear to appeal from the judgment of the Superior Court as to his reach and apply claim. Because he has not raised the issue on appeal, we need not address it.

[7] Rule 3:06 does impose limits on the amount of damages for which an owner of a professional corporation may be held vicariously liable. Pursuant to the rule, damages are limited to the excess of

> "(1) the sum of $50,000 plus the product of $15,000 multiplied by the number of owners and employees of said entity at the time of such act, error, or omission who are duly licensed by this court to practice law in the Commonwealth, or duly licensed to practice law by the licensing authority in the jurisdiction in which they practice, and who are owners of or employed by said entity as lawyers, but not in excess of $500,000 in the aggregate, over (2) the sum of the assets of said entity and the

negligent or wrongful act, error, or omission" performed by an owner or employee of the professional corporation if the tortious conduct (1) occurred in the course of performing legal services and (2) resulted in damages to the person for whom the legal services had been performed. Here, however, Smith was not a client of the P.C. Bertucci, the attorney with whom Smith interacted, did not represent Smith, but instead worked on behalf of the lender, although he may have misled Smith into believing he was representing Smith.

Rule 3:06 (3) also imposes personal liability on each owner of a professional corporation for "damages which arise out of the performance of legal services on behalf of the entity and which are caused by [the owner's] own negligent or wrongful act, error, or omission." S.J.C. Rule 3:06 (3) (a), as amended, 423 Mass. 1302 (1996). As the Federal judgment established, however, Kelley had not personally engaged in negligent or wrongful conduct toward Smith. Thus, this case involves a circumstance in which the liability at issue does not appear to fall within the purview of rule 3:06, despite the fact that the underlying misconduct occurred in the course of providing legal

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> proceeds of any insurance policy issued to it which are applied to the payment of such damages."

S.J.C. Rule 3:06 (3) (b), as amended, 423 Mass. 1302 (1996).

services. Most importantly, no argument has been made by Smith that rule 3:06 provides a basis for recovery in the instant case.[8]

a. Issue or claim preclusion. We next address Kelley's contention that the Federal court proceedings preclude Smith from advancing these claims here. Examining each of Kelley's contentions in turn, we conclude that Smith's claims are not subject to preclusion under Federal law. See Anderson v. Phoenix Inv. Counsel of Boston, Inc., 387 Mass. 444, 449 (1982) (question of preclusive effect of prior Federal court judgments on State court proceedings are examined under Federal law).

Under the Federal doctrine of claim preclusion, "a final judgment forecloses 'successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit.'" Taylor v. Sturgell, 553 U.S. 880, 892 (2008), quoting New Hampshire v. Maine, 532 U.S. 742, 748 (2001). The claims at issue here do not, however, involve the "very same claims" at issue in the prior Federal litigation. The Federal litigation concerned whether Kelley personally

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[8] In their thoughtful brief, the amici highlight the general use of rule 3:06 (3) to impose personal liability on owners of a professional corporation. Neither party to the instant litigation, however, has provided briefing on the applicability of the rule. Additionally, the amici have not addressed, and we do not consider, whether Bertucci's interactions with Smith were such that Smith could be deemed a person for whom Bertucci's legal services had been performed.

engaged in tortious conduct toward Smith. By contrast, the instant case concerns whether Smith may collect from Kelley's sole proprietorship the judgment that had been entered against the P.C. The sole proprietorship was established in response to the final judgment entered in the Federal court, and did not exist during the pendency of the Federal litigation. Smith thus did not have a "full and fair opportunity to litigate" the issue of imposing liability on the sole proprietorship in the normal course of the Federal litigation. Taylor, supra, quoting Montana v. United States, 440 U.S. 147, 153 (1979).

The bankruptcy proceedings similarly do not preclude Smith's claims against Kelley. This is true even though the trustee's suggestion of bankruptcy asserted that Smith's claims against Kelley constituted "the exclusive property of the [P.C.'s] bankruptcy estate," and, as the judge below observed, the question whether Smith's successor liability and veil piercing claims were sold to Kelley "is a matter that should have been decided by the Bankruptcy Court as part and parcel of its adjudication of the final consequences of the P.C.'s Chapter 7 filing over which the Bankruptcy Court enjoys exclusive jurisdiction as a matter of federal supremacy." The bankruptcy judge nonetheless explicitly declined to adjudicate this issue when he allowed the trustee's sale motion. The bankruptcy judge instead created a carve-out for the very claims at issue and

indicated that Kelley "did not insist" that Smith's claims be deemed assets of the estate. In light of Kelley's concession and the bankruptcy judge's failure to resolve the issue, we agree with the Superior Court judge below that the bankruptcy judge's order allowing the sale of the P.C.'s claims to Kelley has no preclusive effect on the instant litigation.[9]

b. Successor liability. Having determined that the prior litigation does not foreclose Smith from seeking to impose personal liability on Kelley, we turn to the question whether Kelley's sole proprietorship may be held liable for the final judgment entered against the P.C. as a successor in interest. We conclude that in the narrow factual circumstances of this case, it may.

As a general rule of corporate law, the liabilities of a corporation are not imposed upon its successor. See Milliken & Co. v. Duro Textiles, LLC, 451 Mass. 547, 556 (2008). This principle is no less applicable to professional corporations, which are afforded the same protections against liability as corporations formed under G. L. c. 156D. See G. L. c. 156A, § 6 (a). See also 63 Am. Jur. 2d Products Liability § 117 (1997) ("The traditional rule of corporate successor liability and the exceptions to the rule are generally applied regardless

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[9] We also note that Kelley did not file for personal bankruptcy in the aftermath of the judgment against his P.C.

of whether the predecessor or successor organization was a corporation or some other form of business organization"); Graham v. James, 144 F.3d 229, 240 (2d Cir. 1998).

While we respect the integrity of corporate structures, we nonetheless find it troubling "that by merely changing its form, without significantly changing its substance, a single corporation can wholly shed its debts to unsecured creditors, continue its business operations with an eye toward returning to profitability, and have no further obligation to pay such creditors." Milliken & Co., 451 Mass. at 561. The application of the doctrine of successor liability is "designed to remedy this fundamental inequity." Id. The "essence" of this doctrine is that, "[u]nder principles of equity, a court will consider a transaction according to its real nature, looking through its form to its substance and intent." Id. at 560. If the entity remains essentially the same, despite a formalistic change of name or of corporate form, successor liability may be imposed.

Successor liability is triggered, inter alia, when a successor entity is a mere continuation of its predecessor.[10]

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[10] There are four exceptions to the general rule of limited corporate liability that fall within the doctrine of successor liability. A successor in interest may be held responsible for the liabilities of its predecessor where "(1) the successor expressly or impliedly assumes liability of the predecessor, (2) the transaction is a de facto merger or consolidation, (3) the successor is a mere continuation of the predecessor, or (4) the

The "mere continuation" exception of successor liability "reinforces the policy of protecting rights of a creditor by allowing a creditor to recover from the successor corporation whenever the successor is substantially the same as the predecessor" (footnote omitted). 15 W.M. Fletcher, Cyclopedia of Corporations § 7124.10, at 321 (rev. 2017). To determine whether the exception applies, we examine the continuity or discontinuity of the ownership, officers, directors, stockholders, management, personnel, assets, and operations of the two entities. See Cargill, Inc. v. Beaver Coal & Oil Co., 424 Mass. 356, 359 (1997) (focusing on de facto merger exception, but articulating factors relevant to mere continuation analysis, including continuity of management, personnel, physical location, assets, and general business operations); McCarthy v. Litton Indus., Inc., 410 Mass. 15, 23 (1991); Columbia State Bank v. Invicta Law Group PLLC, 199 Wash. App. 306, 312-314 (2017) (discussing relevant factors in finding mere continuation of law firm from professional corporation to sole proprietorship, such as continuity of business, clients, leadership, and location). We emphasize that "no single factor

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transaction is a fraudulent effort to avoid liabilities of the predecessor" (citation omitted). Milliken & Co. v. Duro Textiles, LLC, 451 Mass. 547, 556 (2008). Because we conclude that the proprietorship is a mere continuation of the P.C., we need not consider the three other theories of successor liability in this decision.

is dispositive, and the facts of each case must be examined independently." Milliken & Co., 451 Mass. at 558. Ultimately, however, our focus is on "whether one company has become another for the purpose of eliminating its corporate debt." Id. at 556.

Kelley urges this court to analyze the degree of continuity between the P.C. and the sole proprietorship based on the characteristics of the P.C. over the course of its lifetime. As Kelley notes, the P.C. at one point employed twelve to fifteen employees, while the sole proprietorship employed just one. At all times, however, Kelley was the sole shareholder, officer, and director of the P.C. Crucially, the leadership structure of the P.C. and Kelley's sole proprietorship were functionally identical -- while the sole proprietorship does not have officers, directors, or shareholders, Kelley has operated at the helm of both entities, with his wife serving as an office assistant or manager. See Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc., 166 Wash. 2d 475, 482-483 (2009) ("Though there is no continuation of officers, directors, or shareholders where a sole proprietorship is involved, we can consider the continuity of individuals in control of the business as satisfying this factor, which at any rate is not a rigid requirement for finding successor liability").

More significantly, the most relevant time frame of comparison here is not the entire lifespan of the predecessor

entity, but the time immediately preceding its dissolution. We are not evaluating the evolution of the P.C. but the change wrought by its transformation into another organization. Looking at the relevant time frame, there is substantial evidence that Kelley's sole proprietorship served as a mere continuation of the P.C. In almost every respect, Kelley's sole proprietorship mirrored the P.C. that immediately preceded it. Prior to dissolution, it was effectively a one-person P.C., and after dissolution, it was effectively a one-person sole proprietorship.[11] Kelley continued to receive legal fees from clients of the P.C., and legal fees due the P.C were paid to the sole proprietorship. The client fee agreements of the P.C. that preceded its dissolution date were also rolled over to the sole proprietorship, as though nothing had changed. Kelley also took the equipment, inventory, and supplies from the P.C. for use in the sole proprietorship without paying for them. Both entities used the same e-mail address, the same physical address, the same IOLTA account with the same name, and the same health insurance with the same named employer, and paid the same creditors and vendors. Kelley did "eventually" use a different telephone number for the sole proprietorship from the one he had used for the P.C., although it is not clear when this change

[11] As mentioned, both pre- and postdissolution, Kelley also employed his wife as an office assistant or manager.

occurred. In sum, the evidence appears overwhelming that Kelley's sole proprietorship amounted to a "reincarnation" of the predecessor professional corporation. Bud Antle, Inc. v. Eastern Foods, Inc., 758 F.2d 1451, 1458 (11th Cir. 1985). All that had changed was the label.

Having examined the similarities between the predecessor entity and the successor entity, we consider whether successor liability is nonetheless unavailable because the successor entity is a sole proprietorship. Had Kelley dissolved the P.C. in favor of another corporate form that limited personal liability, such as a successor professional corporation or a limited liability company, we would have little difficulty in finding the successor entity liable. The only issue is whether a different set of rules applies when the successor is a sole proprietorship. For the reasons discussed infra, we conclude that successor liability may apply to sole proprietorships even though they expose their proprietors to personal liability. This exposure is an additional concern that must be taken into account, especially when considering the equities at the damages stage, but we ultimately conclude that successor liability is justified where the sole proprietorship is a mere continuation of its predecessor and the purpose of the change is to eliminate the debt. See Milliken & Co., 451 Mass. at 560; Ed Peters Jewelry Co. v. C & J Jewelry Co., 124 F.3d 252, 268 (1st Cir.

1997) ("equity is loath to elevate the form of the transfer over its substance, and deigns to inquire into its true nature").

Although we have found no cases in Massachusetts that squarely deal with this situation, successor liability has been found in the closest case on point in another jurisdiction, Columbia State Bank, 199 Wash. App. at 312. There, a lender sought recovery against an attorney whose professional limited liability company (PLLC) had defaulted on a loan. Id. at 312, 314. The attorney was the sole owner and managing partner of the PLLC. Id. at 312. The attorney subsequently filed a voluntary Chapter 7 petition for personal bankruptcy and ceased operating the PLLC the same day.[12] Id. at 313. The next day, he began operating a sole proprietorship. Id. at 314. Despite this, he continued to use engagement letters with the letterhead of his old PLLC for nearly six months. Id. He also continued to use "the same name, website, signage, telephone number, offices, insurance, employees, and equipment," and continued to represent the same clients. Id. Clients were not timely informed of the change in legal structure, but all client income was placed in the sole proprietorship's bank account. Id. The

[12] The attorney in Columbia State Bank v. Invicta Law Group PLLC, 199 Wash. App. 306, 312-313 (2017), had also signed his firm's loan agreement individually as a guarantor and was discharged from his personal guaranty when he emerged from bankruptcy.

court ruled that the lender could recover against the sole proprietorship under the mere continuation theory of successor liability. Id. at 320-322. In so doing, the court concluded that while the sole proprietorship did not, by definition, have officers, directors, or shareholders, there was nevertheless a "continuity of individuals in control of the business." Id. at 320, quoting Cambridge Townhomes, LLC, 166 Wash. 2d at 482-483. Additionally, the individual at the helm of both entities was the same, the clients were the same, and the business at issue (law) was the same. Columbia State Bank, supra at 321. The court also ruled that no legal transfer of assets was necessary for successor liability to apply, because the attorney "owned the past business and simply continued using the assets for his new business." Id. at 324.

The liabilities of the PLLC in the Columbia State Bank case were thus imputed to the attorney. See id. at 335. In so ruling, the court explained that successor liability "exists in equity to protect creditors from debtors that attempt to change corporate form, sell off their assets, or merge with another company in an attempt to avoid their debts." Id. at 334. Moreover, and as we have also discussed, the mere continuation theory of liability prevents a company from escaping liability by "transferring all of the company's assets and continuing business in another form." Id. The fact that the successor was

a sole proprietorship did not change the court's analysis of successor liability.

We do recognize that imposing successor liability on a sole proprietorship carries with it additional ramifications. A sole proprietorship, by definition, is a form of business wherein a single person "owns all the assets" of the business. See Ladd v. Scudder Kemper Invs., Inc., 433 Mass. 240, 243 (2001), quoting Black's Law Dictionary 1392 (6th ed. 1990). Unlike business entities that shield shareholders from personal liability, a sole proprietorship subjects the proprietor to personal liability as to "all debts of the business." See Ladd, supra, quoting Black's Law Dictionary, supra. A sole proprietorship thus leaves the proprietor much more exposed to personal legal liabilities than professional corporations and other common corporate entities would. Accordingly, imposing successor liability on a sole proprietorship has significant consequences for the proprietor beyond those typically at issue in corporate forms that are protected against personal liability.

Despite these concerns, we nonetheless conclude that the doctrine of successor liability should be extended here, where the record plainly reflects that the purpose of dissolving the P.C. and establishing the sole proprietorship was to avoid payment of the liabilities at issue. The record establishes

that Kelley voted to wind up the P.C. and establish his sole proprietorship the day after final judgment was entered against the P.C. Indeed, Kelley openly admitted in deposition testimony that he dissolved the P.C. precisely because of the judgment entered against it. When directly asked whether he dissolved the P.C. because of the judgment, Kelley testified, "That is exactly why I dissolved it." Moreover, when questioned as to whether he metaphorically "pulled down the shingle that said P.C. and held up a shingle that said R. Emmett Kelley," Kelley responded, "Metaphorically you're spot on."

The defendant contends nonetheless that it is unfair to convert the debt of the P.C. into personal debt. Of course, as explained supra, he is responsible for that conversion himself. Had Kelley continued the law practice as a professional corporation, he would not have been personally liable for the P.C.'s debt. Had he not converted the P.C. into a sole proprietorship, he would not have been liable for the P.C.'s debt. Instead, he attempted to continue the practice as before but eliminate its debt to Smith. He used the conversion to a sole proprietorship to try to accomplish this inequitable purpose. Although the conversion has backfired and resulted in imposing the liability on Kelley personally, that was the consequence of his own choices. As an attorney held to the high ethical standards of the bar, his actions are especially

concerning. We therefore discern nothing inequitable in these circumstances, particularly when confronted with the countervailing equities. Smith, a mentally ill, functionally illiterate, and disabled veteran was scammed by the P.C.'s associate and left destitute. The P.C. was found vicariously liable for its associate's actions. Equity cries out for a remedy in these circumstances. When the bankruptcy judge chose not to resolve the matter, he left the issue for us to decide.

At bottom, successor liability is an equitable remedy aimed at fairness and justice. Milliken & Co., 451 Mass. at 560. As we have previous said, focusing on the substance and intent of a transaction, rather than its form, is at "the essence" of the doctrine of successor liability. Id. While we recognize that imputing liability to Kelley's sole proprietorship will also subject him to personal liability, this liability is only implicated because Kelley sought to shed the debts of the P.C. without shedding its clients or business. Given that Kelley tried to avoid the P.C.'s liabilities while continuing the P.C.'s business, the equities of this case weigh in favor of imposing successor liability. See Cargill, Inc., 424 Mass. at 362 ("We consider the fair remuneration of corporate creditors a policy worthy of advancement"). Indeed, Kelley's attempt to avoid the P.C.'s liabilities is "precisely the kind of harm to

innocent creditors that the successor liability doctrine was designed to prevent." Milliken & Co., supra.

Although we conclude that Kelley's sole proprietorship is liable under the mere continuation theory in this case, we caution that the application of successor liability is fact-specific, and "the facts of each case must be examined independently." Id. at 558. If, for example, the P.C. had had multiple shareholders, each of whom set off to pursue his or her own business upon dissolution of the P.C., successor liability would not be warranted. A much more difficult question would also be presented had Kelley left the practice to work for a different firm.[13] Here, however, it is evident that Kelley intended to continue his practice just as he had before the entry of the final judgment against the P.C., but wished to do so without the liability it had incurred. See DeJesus v. Bertsch, Inc., 898 F. Supp. 2d 353, 362 (D. Mass. 2012), aff'd sub nom. DeJesus v. Park Corp., 530 Fed. Appx. 3 (1st Cir. 2013) ("The successor liability doctrine is an equitable doctrine, and the Court considers whether the shareholders used a disguised mechanism to transfer the legal ownership of the corporation but ultimately retain the same effective control"). Thus, on the

[13] We also note, as explained supra, that had the bankruptcy court addressed and resolved the liability, Kelley would also have been in a much different position.

facts of this case, we impute successor liability from the P.C. to Kelley's sole proprietorship.

c. Damages. Finally, having concluded that Kelley's sole proprietorship is liable as a successor in interest to the P.C., we consider the extent of the liability imposed upon Kelley. As mentioned, sole proprietors are personally liable for the entirety of the debts foisted upon their proprietorships. See Ladd, 433 Mass. at 243. In the instant case, Kelley continued on with his legal practice after judgment was entered against the P.C.[14] Thus, as a practical matter, the continuation of the practice generated revenues that should have been available to pay off the debt. In fashioning an equitable remedy, however, we consider it just to distinguish between the revenues generated by the ongoing practice and Kelley's other assets.

In fashioning such an equitable remedy, the focus should be on whether the continued business could have paid some or all of the debt, not whether the defendant had other personal assets available to do so. We conclude that equity favors such a focus at the damages stage to properly account for, and protect against, undue personal liability and hardship for Kelley. As the Federal courts found, Kelley was not personally liable for

[14] Kelley's deposition also makes clear that he continued to earn substantial revenues from his business after dissolving the P.C. and continuing on as a sole proprietorship. In 2017, he earned approximately $200,000 in legal fees.

the fraud; rather, the P.C. was vicariously liable. As the P.C. was essentially continued to Kelley's personal benefit, the revenues generated by the continuing practice should be used to pay the debt, not Kelley's other assets. To the extent possible, such a distinction should be preserved. Drawing that line here best achieves equity in the instant case.

More specifically, on remand, the motion judge should attempt to analyze damages as if the P.C. had been continued, not converted, so as to place Smith in the same position as he would have been in had the improper conversion not occurred. To make this determination, the motion judge should examine Kelley's income tax returns during the lifetime of the sole proprietorship to identify the revenues that were generated by the proprietorship. This information will allow the motion judge to identify the amount of income that may be considered appropriately available to satisfy the judgment. A repayment plan over time may have to be considered. The fact that some or all of these revenues may have since been spent by Kelley for his personal needs is of no import, as those monies should have first been dedicated to the repayment of the debt owed by the P.C.

In sum, "[e]quitable remedies are flexible tools to be applied with the focus on fairness and justice." Demoulas v. Demoulas, 428 Mass. 555, 580 (1998). See Milliken & Co., 451

Mass. at 559-560 ("The doctrine of successor liability is equitable in both origin and nature"). See also Musikiwamba v. ESSI, Inc., 760 F.2d 740, 749 (7th Cir. 1985) (observing, in context of successor liability under 42 U.S.C. § 1981, that "nature and extent of liability is subject to no formula, but must be determined upon the facts and circumstances of each case"). We conclude that the approach set out here best achieves these purposes.[15]

3. Conclusion. For the foregoing reasons, we reverse the judgment of the Superior Court granting Kelley's motion for summary judgment and denying Smith's motion for summary judgment. We remand this case to the Superior Court for proceedings consistent with this opinion.

So ordered.

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[15] In light of our conclusion that Smith is entitled to recover under the doctrine of successor liability, we need not address the availability or merits of Smith's theory of recovery as to piercing the corporate veil.