

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

CASE NO. 0000-00

WILLIAM BROWN, individually, and
CHERYL BROWN, individually,

JUDGE

Plaintiffs,

vs.

SCOTT GREEN, individually,
JOHN BLACK, individually, and
GREEN TRISTAR BUILDERS, LLC,
An Ohio limited liability company,

Defendants.

**DEFENDANT GREEN TRISTAR BUILDERS, LLC'S
MOTION FOR JUDGMENT ON THE PLEADINGS**

Defendant GREEN TRISTAR BUILDERS, LLC, an Ohio limited liability company (hereinafter "GTB"), by and through undersigned counsel, now files this Motion For Judgment on the Pleadings regarding the Complaint filed by Plaintiffs WILLIAM BROWN, individually, and CHERYL BROWN, individually (hereinafter "Plaintiffs") in the above-captioned case. **Ohio R. Civ. P. 12(C)**. For the reasons set forth below, Defendant GTB asserts entitlement to judgment on the pleadings regarding Plaintiffs' claims directed to GTB.

1. On or about April 5, 2011, Plaintiffs filed a six-count complaint against Defendants SCOTT GREEN (hereinafter "Green"), JOHN BLACK (hereinafter "Black") and GTB concerning

disputes arising out of a home construction agreement which Plaintiffs entered into with North Shore Builders, Inc., an Ohio corporation (hereinafter “North Shore”).

2. Regarding Defendant GTB, Plaintiffs allege that Defendants Green and Black were officers/agents of North Shore, **Complaint, at Para. 2-3**, that Defendants Green and Black formed GTB as “merely a continuation” of North Shore to avoid liability for North Shore’s debts, **Complaint, at Para. 90**, and that GTB should therefore be held liable for North Shore’s obligations.

LAW AND ARGUMENT

3. Under Ohio law, the well-recognized general rule of successor liability provides that a purchaser/transferee of a corporation’s assets is not liable for the debts and obligations of the seller corporation. **Welco Industries, Inc. v. Applied Companies (1993), 67 Ohio St. 3d 344, 346.**

Equally well recognized are the four exceptions to this general rule, *to wit*:

- (i) the buyer expressly or impliedly agrees to assume such liability;
- (ii) the transaction amounts to a *de facto* consolidation or merger;
- (iii) the buyer is merely a continuation of the seller corporation; or
- (iv) the transaction is entered into fraudulently for the purpose of escaping liability.

Welco Industries, Inc. v. Applied Companies, supra, 67 Ohio St. 3d at 347.

4. In their Complaint, Plaintiffs make reference only to the “mere-continuation” exception, *to wit*, that Defendant GTB was “merely a continuation of North Shore (**fn1**) [.]” **Complaint, at Para. 90**. In support of this argument, Plaintiffs allege that there exists “significant shared features” between North Shore and GTB, “including utilizing the same office address as North Shore, the same statutory agent, the same employees, the same information on its website and offering the same services as North Shore.” **Id.**

5. In **Welco Industries, Inc. v. Applied Companies**, the Ohio Supreme Court ruled that Ohio’s “mere-continuation” exception is predicated upon “the continuation of the corporate entity, not the business operation, after the transaction.” **Welco Industries, Inc. v. Applied Companies, supra, 67 Ohio St.3d at 347**. Indicia of such “continuation of the corporate entity” would normally include a transfer of assets from the transferor entity to the transferee entity with the same people owning both entities. **Id. at 350**. Significantly, the **Welco** court expressly rejected what it referred to as “the expanded mere-continuation theory” which allows for a finding of successor liability if there exists “significant shared features” between the subject entities such as “having the same physical plant, officers, employees, and product line[.]” **Id. at 349-350**.

6. In this case, Plaintiffs’ “mere-continuation” allegations are fatally defective because they focus exclusively upon Defendant GTB’s continuation of North Shore’s *business operations* as

[**fn1**] Plaintiffs may have attempted to reference the “fraudulent transaction to escape liability” exception by alleging in Para. 91 of their Complaint that Defendant GTB was “formed by Scott Green and John Black in an attempt to escape liability for their actions as corporate officers for North Shore Builders.”

Plaintiffs fail, however, to include the threshold allegation that the creation of Defendant GTB was a “fraudulent transaction.” Moreover, Plaintiffs fail to allege any “indicia of fraud” such as “inadequate consideration and lack of good faith.” **Welco Industries, Inc. v. Applied Companies, supra, 67 Ohio St.3d at 349**. As such, even if Plaintiffs were attempting to reference the “fraudulent transaction to escape liability” exception, their Complaint, as written, fails to state a claim upon which relief can be granted.

opposed to Defendant GTB being *a continuation of the corporate entity*. In this regard, Plaintiffs fail to allege any sort of “continuation of corporate entity” factors such as (i) transfer of assets from North Shore to GTB, or (ii) common ownership of both entities, **Welco Industries, Inc. v. Applied Companies, supra, 67 Ohio St.3d at 350**, and instead Plaintiffs allege the sort of “significant shared features” which the **Welco** Court expressly rejected as a cognizable basis to invoke the “mere-continuation” exception. **Id. at 349-350. Cf. Aluminum Line Products Co. v. Brad Smith Roofing Co., Inc. (1996), 109 Ohio App.3d 246, 265** (“[m]erely sharing the same physical plant, employees, and continuing to market some products of SMI by ERA is not sufficient to establish liability under the mere continuation theory”).

7. Accordingly, because Plaintiffs’ Complaint fails to set forth a cognizable basis to impose successor liability upon Defendant GTB, **Welco Industries, Inc. v. Applied Companies, supra, 67 Ohio St.3d at 349-350**, Defendant GTB submits that it is entitled to judgment on the pleadings in this matter.

CONCLUSION

For the above-mentioned reasons, Defendant GTB asserts its entitlement to judgment on the pleadings regarding Plaintiffs' claims directed to Defendant GTB.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Dismiss has been furnished by U.S. Mail this _____ day of May, 2011, to:

MATT JONES
Counsel for Defendant GTB

