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SUCCESSOR LIABILITY: The Right and Wrong Way to Assert It.

By: Michael L. Rich

What recourse is there for a plaintiff seeking to recover a debt when the defendant goes bankrupt during suit, and its owner commences operating essentially the same business through another legal entity? Can successor liability be asserted and, if so, how? Those issues played out in the recent case of *Marange Printing, Inc. v. Finish Line NJ, Inc., et al.*, Superior Court of New Jersey, Docket No. A-2735-12T2 (decided March 7, 2014). The case is instructive of the procedural steps necessary for assertion of liability against an alleged successor entity.

Facts: *Marange* sued defendant Finish Line NJ, Inc. (the "Corporation") for payment of unpaid invoices, and successfully obtained a money judgment against the Corporation. While attempting to collect on its judgment, *Marange* learned that the Corporation had filed for Chapter 7 bankruptcy protection. It turns out that, while Marange's collection action against the Corporation was pending, the Corporation's president and sole shareholder, Kevin Horan (Horan), formed a new entity called Finish Line NJ, LLC (the "LLC"). *Marange* thereupon filed a motion to amend the judgment to add the LLC as a judgment debtor. *Marange* served its motion papers on the attorney who had represented the Corporation in the collection action, and also mailed copies to the address where the Corporation had done business and where the LLC was then doing business. The Corporation's attorney maintained that he no longer represented the Corporation and could not accept service on behalf of either the Corporation or the LLC. Subsequently, the Corporation's debt apparently was discharged through the bankruptcy. Meanwhile, the LLC did nothing further in the collection action until *Marange's* motion to amend the

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judgment was granted, and it began to execute against the LLC's property. The LLC then retained separate counsel to move to vacate the judgment. The motion was denied. The LLC appealed.

Holding: The Appellate Division reversed and remanded to the Law Division with instructions to vacate the amended judgment. The Court observed that the Corporation and the LLC are separate entities, and although they had the same principal and some overlap in their businesses, they were formed at different times. It further observed that *Marange* did business with the Corporation, not the LLC. Indeed, the LLC was not in existence until after suit was instituted, and thus was not a defendant at the time of commencement of the action or at the time of entry of judgment. The Court noted that *Marange* might ultimately have the right to collect from the LLC on the theory of successor liability, but cannot do so simply by filing a motion to amend the judgment to include a non-party to the original action. Because the LLC was not a party to the original action, the lower court lacked personal jurisdiction, and service by way of motion was ineffective. The Court explained that "successor liability" is a legal doctrine under which one entity can be found accountable for another entity's debts. As cited in the opinion:

> The general rule of corporate-successor liability is that when a company sells its assets to another company, the acquiring company is not liable for the debts and liabilities of the selling company simply because it has succeeded to the ownership of the assets of the seller. Traditionally, there have been only four exceptions: (1) the successor expressly or impliedly assumes the predecessor's liabilities; (2) there is an actual or de facto consolidation or merger of the seller and the purchaser; (3) the purchasing company is a mere continuation of the seller; or (4) the transaction is entered into fraudulently to escape liability.

Bottom Line: To assert a viable claim for successor liability, a plaintiff must first amend its complaint to join the successor entity as a defendant and effect service of process upon that new party defendant to acquire jurisdiction. That step cannot be avoided simply by moving to amend the original judgment to add a judgment debtor who was never

properly made a party defendant.

Don't Sit on Arbitration Rights

By: Eliyahu S. Scheiman

Many business contracts include arbitration clauses, as arbitration offers several possible advantages over the traditional litigation process, like control over the nature, length and cost of the proceedings, and more finality over the outcome. The case of *Bassem v. M.G.C.C. Group, Inc., et al.*, Superior Court of New Jersey, Docket No. L-1634-09, *rev'd*, Docket No. A-2311-12T4 (App. Div. Feb. 5, 2014), serves as a reminder that, if you find yourself in the middle of a lawsuit first wondering whether to invoke a contractual arbitration clause, it is likely already too late.

The facts were straightforward. Homeowners bought a home from a developer under an agreement of sale that contained an arbitration clause. Because of soil drainage issues, the homeowners sued the developer in state court. After three-plus years of litigation, the homeowners, with little explanation why, invoked the arbitration clause in the agreement of sale. The developer resisted on the grounds that the homeowners had waived their arbitration rights by availing themselves of the state court litigation process. The trial court disagreed, holding that the contract "calls for arbitration and the courts should enforce an arbitration provision."

Despite New Jersey's "strong preference to enforce arbitration agreements," the appellate division reversed, finding that the plaintiffs had waived their contractual right to arbitrate by engaging in litigation conduct "tangibly" inconsistent with an intent to invoke an agreement to arbitrate. It noted that the plaintiffs filed their complaint with a jury demand and without reference to arbitration; the defendant filed its answer to the complaint without seeking to enforce arbitration; the parties engaged in extensive fact and expert discovery; and the trial court monitored discovery and decided various discovery motions. This "skein of events" bespoke "plaintiffs' firm commitment to the litigation process, to the exclusion of other forms of compulsory dispute resolution."

Bottom Line: *Bassem* provides a good reminder that both plaintiffs and defendants should weigh the pros and cons of the arbitration process under the facts of a particular case as soon as a dispute develops.
