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**DANIEL MARSDALE and IRENE MARSDALE, his wife, Plaintiffs-Appellants, vs. PORT LIBERTE PARTNERS, SORDONI CONSTRUCTION CO., and/or SORDONI SKANSKA CONSTRUCTION CO., CROWN REVENUE SERVICES, INC., RICHARD KILBY, KILBY MANAGEMENT, THE EHRENKRANTZ GROUP, PETER KASTL, KASTL ASSOCIATES, PORT LIBERTE CONDOMINIUM ASSOCIATION I, INC., HOWARD, NEEDLES, TAMMEN and BURGENDORF, Defendants, and THALLE CONSTRUCTION COMPANY, INC., Defendant/Third-Party Plaintiff-Respondent, vs. J.F. CREAMER & SONS; MILLINGTON NURSERIES INC., AQUA MIST IRRIGATION, AUTOMATIC LAWN SPRINKLER CO., and SORDONI CONSTRUCTION, Third-Party Defendants. DANIEL MARSDALE and IRENE MARSDALE, his wife, Plaintiffs-Appellants, vs. SKANSKA USA and SORDONI SKANSKA CONSTRUCTION CO., Defendants-Respondents.**

**DOCKET NO. A-3890-03T1**

**SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION**

*2007 N.J. Super. Unpub. LEXIS 2745*

**November 29, 2006, Argued**

**January 9, 2007, Decided**

**NOTICE:** NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.

**SUBSEQUENT HISTORY:** Companion case at *Marsdale v. Port Liberte Ptnrs*, 2007 N.J. Super. Unpub. LEXIS 2772 (2007)

**PRIOR HISTORY:** [\*1]

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-5117-97.

**COUNSEL:** Edward Harrington Heyburn argued the cause for appellants (Ronald B. Grayzel, on the brief).

Alan Winkler argued the cause for respondents Skanska USA and Sordoni Skanska Construction Co. (Peckar &

Abramson, attorneys; Bruce D. Meller, of counsel; Mr. Winkler and Kevin J. O'Connor, on the brief).

William F. Mueller argued the cause for respondent Thalle Construction Company, Inc. (Clemente, Mueller & Tobia, attorneys; Mr. Mueller, of counsel; John W. Hofsaess, on the brief).

**JUDGES:** Before Judges Cuff, Winkelstein and Fuentes.

**OPINION**

PER CURIAM

This appeal is a companion to A-4311-04, decided this date. The claims against defendants in this appeal arise from a fall by plaintiff Daniel Marsdale during the construction of a luxury waterfront residential development in Jersey City. Plaintiff fell into an opening

of a storm drainage system. A temporary plywood cover obscured by grass collapsed under plaintiff's weight. A jury eventually found the subcontractor retained to install the storm system and the project engineer liable and awarded plaintiff \$ 1,487,096 plus prejudgment interest. This appeal concerns [\*2] the June 2000 summary judgment in favor of defendant Sordoni Skanska, a firm that plaintiff alleges is the successor of defendant Sordoni Construction Co., the construction manager of the project. We affirm.

On May 23, 1997, plaintiffs Daniel and Irene Marsdale filed a complaint in the Law Division seeking damages for injuries sustained by Daniel Marsdale during the course of his employment at a job site at the Port Liberte development in Jersey City. The complaint named as defendants, Port Liberte Partners (PLP), the owner of the premises; Sordoni Construction Co. (Sordoni Construction), the construction manager responsible for the job site; and fictitious-name defendants. On August 4, 1997, plaintiffs filed an amended complaint naming Sordoni Skanska Construction Co. (Sordoni Skanska) as a defendant. Plaintiffs alleged that Sordoni Construction "and/or" Sordoni Skanska "was the general contractor at the job site" and was negligent in allowing a defective condition, the obscured and improperly covered opening to the storm drainage system, to exist.

In October 1998, plaintiffs filed a separate complaint (Docket No. L-9852-98) against Skanska USA and Sordoni Skanska, alleging that Sordoni [\*3] Skanska was vicariously liable for the negligence of Sordoni Construction premised on a theory of successor liability. By order entered February 5, 1999, this complaint was consolidated with the Marsdales' May 1997 complaint under Docket No. L-5117-97. In March 2000, plaintiffs moved and Sordoni Skanska cross-moved for summary judgment on the issue of Sordoni Skanska's successor liability for the alleged negligence of Sordoni Construction. On June 16, 2000, Judge Yolanda Ciccone entered an order granting the cross motion of Sordoni Skanska dismissing the complaint and all cross-claims against it, with prejudice.

In 1989, Sordoni Construction withdrew from the Port Liberte project due to payment problems and filed a mechanics lien in the amount of \$ 6,921,378, against PLP. On April 26, 1990, Sordoni Construction entered into an "asset purchase agreement" (Agreement) with

Skanska USA, resulting in the formation of Sordoni Skanska as a wholly owned subsidiary of Skanska USA. Pursuant to the Agreement, Sordoni Skanska obtained some, but not all, of the assets and corresponding liabilities of Sordoni Construction. Sordoni Construction retained its interest and corresponding liabilities in the [\*4] Port Liberte project.

The summary judgment record relating to the transaction between Sordoni Construction and Sordoni Skanska reveals the following undisputed facts. Stuart Graham, a shareholder and President of Sordoni Construction at the time of execution of the Agreement, testified at his deposition that the economic environment in the late 1980s necessitated that Sordoni Construction be part of a larger enterprise to ensure its future business viability. He consulted Steve Darnell, who was affiliated with Fails Management Institute, which facilitated mergers and acquisitions. Darnell referred Graham to Claus Bjork of Skanska USA, a Swedish holding company that owned several other construction companies in the United States. Bjork told Graham that Skanska USA was only interested in acquiring "certain assets" and the name/goodwill of Sordoni Construction.

Thereafter, Skanska USA and Sordoni Construction retained independent counsel for the purpose of negotiating and executing the Agreement. At the time of these negotiations, Sordoni Construction had between eight to ten ongoing projects. The Agreement was executed on April 26, 1990, and had an effective date of March 31, 1990. The [\*5] parties to the Agreement included Graham and the other shareholders of Sordoni Construction, Charles E. Parente, Andrew J. Sordoni, William B. Sordoni, Stephen Sordoni, and Michael Healy, who was also Executive Vice President of Sordoni Construction.

Pursuant to the Agreement, Sordoni Skanska acquired from Sordoni Construction specified assets including contracts relating to certain ongoing projects. Sordoni Skanska also obtained "[t]he right to use the name 'Sordoni' . . . provided, however, that [it] agrees to use such name only in conjunction with the name 'Skanska' . . . and only in the fields of construction, construction management and related businesses." In addition, Sordoni Construction assigned its lease for its office space in Parsippany to Sordoni Skanska. As consideration for the acquired assets, Sordoni Skanska agreed to make a cash payment of \$ 250,000 to Sordoni

Construction and to assume specified liabilities.

The Agreement further provided that Sordoni Construction retained specified assets, trade receivables, and accounts receivable from various projects, including trade receivables from Melvin Simon Associates and the Port Liberte project. Sordoni Construction also [\*6] retained an ownership interest the Port Liberte Yacht Club. Further, Sordoni Construction retained specified liabilities and obligations relating to ten business entities, including PLP. Sordoni Construction also retained responsibility for workers' compensation claims pending as of the closing date of the Agreement or arising from events that occurred on or before the closing date. In addition, it retained responsibility for product liability and warranty claims relating to work performed prior to the Agreement. In order to satisfy all of its retained liabilities, Sordoni Construction agreed to retain sufficient assets or to transfer such assets into a liquidating trust.

In addition, the Agreement included a non-competition clause whereby, among other things, Sordoni Construction, its shareholders and various affiliated companies were precluded for a period of six years from "directly or indirectly" engaging in the "construction or construction management business" in New Jersey, New York and Connecticut. In return, shareholders of Sordoni Construction received \$ 750,000. The non-competition agreement also precluded Sordoni Skanska from using the "Sordoni" name in connection with any [\*7] construction or management business within Pennsylvania, with the exception of the Philadelphia metropolitan area. The Agreement stipulated that Graham and Healy would execute separate employment agreements with Sordoni Skanska. They did not become shareholders of Sordoni Skanska.

According to Graham, less than 50% of Sordoni Construction's assets were ultimately acquired by Sordoni Skanska pursuant to the Agreement. The estimated value of the assets retained by Sordoni Construction exceeded \$ 10,000,000.

Following execution, Sordoni Skanska employed some of Sordoni Construction's employees and purchased its own workers' compensation insurance for these employees. Paul Nylund, a Sordoni Construction project manager, was employed by Sordoni Skanska. Sordoni Construction paid Sordoni Skanska approximately \$ 168,690 for the services of Nylund, and other former

employees, who assisted Sordoni Construction in "closing out" the retained projects. Nylund provided "close out" assistance for the Port Liberte project with regard to subcontractors and the disputes with the owner and in the lawsuits instituted by Sordoni Construction to obtain money due and owing on the Port Liberte project.

Several [\*8] years after execution of the Agreement, the shareholders of Sordoni Construction effected its dissolution by means of a "liquidating trust." In September 1991, Sordoni Construction settled a lawsuit against Melvin Simon Associates for \$ 4,150,000, which was paid in installments through May 1993. In December 1991, nearly two years after the effective date of the Agreement, the Sordoni Construction liquidating trust "transferred aggregate assets" totaling \$ 3,891,144 to its shareholders in amounts proportionate to their shareholder interests. In 1993, Sordoni Construction settled its lawsuit against PLP and distributed the proceeds to its shareholders through the Sordoni Construction liquidating trust. Sordoni Skanska did not receive any portion of the Port Liberte proceeds. In the face of these undisputed facts, the only issue was the legal interpretation of the factual record.

In a thorough written decision, Judge Ciccone recognized the general rule that a company that acquires the assets of another company ordinarily is not liable for the debts and liabilities of the transferor. The judge also recognized the five established exceptions to the general rule and that successor liability [\*9] may be imposed by statute. Following an exhaustive analysis of the case law, with principal reliance on *Woodruff v. Jack J. Burke Real Estate, Inc.*, 306 N.J. Super. 61, 72-73, 703 A.2d 306 (App. Div. 1997), *certif. granted sub nom. Woodruff v. Fox & Lazo, Inc.*, 153 N.J. 214, 708 A.2d 65, *appeal dismissed*, 157 N.J. 537, 724 A.2d 799 (1998), as applied to the undisputed facts, the judge found that Sordoni Construction continued to operate for one year and nine months after the effective date of the Agreement; it continued to prosecute and defend multiple lawsuits for its own benefit for approximately three years after the effective date of the Agreement; it continued to receive monthly installment payments for over three years after the effective date of the Agreement pursuant to a settlement; it did not dissolve its operations as soon as "practically or legally possible"; there was no commonality of ownership or shareholder interest between Sordoni Construction and Sordoni Skanska; and while the President and Executive Vice President of

Sordoni Construction were employed by Sordoni Skanska, they were the only Sordoni Skanska shareholders "not to receive any money in return for their covenant not to compete." In addition, the [\*10] fact that the purchase included a property lease, a trade name, and various assets necessary to offer similar services, was "not enough" for the court to find "that there was, in fact, a continuation or de facto merger."

Rather, Judge Ciccone found it significant that "Sordoni Construction and Sordoni Skanska operated as two separate corporations, each receiving benefits of it [sic] own assets and each having its own liabilities." Further, it found that "[t]he stipulations and conditions of the Agreement point to the fact that there was not an intent on the part of the contracting parties to effectuate a merger or consolidation; the [A]greement was a pure sale of assets." In this regard, the court observed that the Agreement incorporated an "extensive non-competition agreement," which was inconsistent with an intent to merge. The court also found it significant that Sordoni Construction retained \$ 3,891,144 in assets and continued to receive settlement proceeds. "Moreover, Sordoni Skanska did not continue the business of Sordoni Construction at the Port Liberte project." These facts convinced the judge that there was neither a de facto merger nor a mere continuation of business operations [\*11] between Sordoni Skanska and Sordoni Construction.

Plaintiffs assert that Judge Ciccone erred in determining that Sordoni Skanska could not be held liable for the alleged negligent conduct of Sordoni Construction under a theory of corporate "successor liability." Plaintiffs contend that the evidence supported the imposition of liability against Sordoni Skanska pursuant to two "traditional exceptions" to the general rule of nonliability in asset acquisitions; namely, the "de facto merger" and "mere continuation" exceptions.

In our review of an award of summary judgment, this court applies the same standard as the trial court, but it is not bound by a trial court's construction of legal principles. *Kopin v. Orange Prods., Inc.*, 297 N.J. Super. 353, 366, 688 A.2d 130 (App. Div.), certif. denied, 149 N.J. 409, 694 A.2d 194 (1997); *Lombardo v. Hoag*, 269 N.J. Super. 36, 47, 634 A.2d 550 (App. Div. 1993), certif. denied, 135 N.J. 469, 640 A.2d 850 (1994). Here, the motion court correctly interpreted governing law in finding that Sordoni Skanska was not liable for the

alleged negligence of Sordoni Construction as a matter of law.

The traditional rule of successor liability in New Jersey holds that "where one company sells or otherwise transfers all [\*12] of its assets to another company, the transferee of those assets is not ordinarily liable for the debts of the transferor company, including those arising out of the transferor's tortious conduct." *Woodrick, supra*, 306 N.J. Super. at 72-73; see also *Lefever v. K.P. Hovnanian Enters., Inc.*, 160 N.J. 307, 310, 734 A.2d 290 (1999) (a purchaser is generally not liable for the debts of the company from which it purchases assets unless the purchaser is, in fact, a "mere continuation of the seller"). However, the courts have recognized five exceptions to the traditional rule of corporate successor nonliability in asset acquisitions, as the trial judge recognized. *Woodrick, supra*, 306 N.J. Super. at 73; *McKee v. Harris-Seybold Co.*, 109 N.J. Super. 555, 561, 264 A.2d 98 (Law Div. 1970), aff'd, 118 N.J. Super. 480, 288 A.2d 585 (App. Div. 1972).

While no one factor is dispositive, the intent of the contracting parties is especially important. *Woodrick, supra*, 306 N.J. Super. at 74, 76-77; accord *Luxliner P.L. Export Co. v. RDI/Luxliner, Inc.*, 13 F.3d 69, 73 (3d Cir. 1993); *Koch Materials Co. v. Shore Slurry Seal, Inc.*, 205 F. Supp. 2d 324, 337 (D.N.J. 2002). Even where the elements of a transfer of stock and retention of the same physical [\*13] location and employees are absent, "a mere continuation may be found where the facts show that the intent was for the successor to assume all the benefits and burdens of the predecessor's business, with the successor becoming a 'new hat' for the predecessor." *Woodrick, supra*, 306 N.J. Super. at 74 (citing *Wilson v. Fare Well Corp.*, 140 N.J. Super. 476, 491, 356 A.2d 458 (Law Div. 1976)).

Further, the structuring of the transaction as an asset sale is not controlling. *Id.* at 76. In the final analysis, "the most relevant factor is the degree to which the predecessor's business entity remains intact. The more a corporation physically resembles its predecessor, the more reasonable it is to hold the successor fully responsible." *Id.* at 74 (quoting *Wilson, supra*, 140 N.J. Super. at 490).

Plaintiffs maintain that the pertinent facts of this case are analogous to those in *Woodrick*, where the court imposed liability under the de facto merger/mere continuation exceptions. *Id.* at 66. The agency entered

into an "Asset Purchase Agreement" with another broker. *Id.* at 69. All of its active real estate listings and contracts were transferred to the other broker, and it assumed "a significant portion, if not all, [\*14] of the liabilities necessary for the continuation of the business of [the agency]." *Id.* at 76. In addition, the agency ceased to exist after the transaction and a signatory on the Asset Purchase Agreement stayed on as a vice president and regional manager of Fox & Lazo. *Id.* at 71, 76. "All that remained of [the agency] was a shell corporation with no ability to pay debts." *Id.* at 76. "Also, except for ten employees, at least 165 sales agents and key employees were retained by [the acquiring broker] in the capacities they held at [the agency]." *Id.* at 77.

A motion judge granted summary judgment in favor of the plaintiffs and held that the acquiring broker was liable for the default judgment against the agency pursuant to the theory that the "purchase of [the agency]'s assets was a de facto merger, resulting in a mere continuation of the predecessor's business." *Id.* at 66.

In affirming, this court stated that of all the relevant considerations, "[m]ost importantly, it is evident from the structure of the deal that it *was the intent* of [the acquiring broker] to absorb and continue the operation of [the agency]." *Id.* at 76 (emphasis added). "This transaction resulted in nothing more than [\*15] a change of hat for [the agency], thus constituting a mere continuation of the predecessor's business." *Id.* at 77.

The facts of this case are distinguishable from *Woodrick* and do not establish a de facto merger, or a mere continuation of Sordoni Construction.

Sordoni Skanska made it clear from the outset of its negotiations with Sordoni Construction that it was not interested in a merger and wanted to purchase only select assets and the name/goodwill of Sordoni Construction. Pursuant to the Agreement, Sordoni Skanska ultimately acquired less than one-half of the assets of Sordoni Construction. In addition, the Agreement included a comprehensive non-competition clause restricting both entities' post-Agreement activities. Among the assets retained by Sordoni Construction were receivables due from its work on the Port Liberte project, and its ownership interest in the Port Liberte Yacht Club. Sordoni Construction also retained its rights with respect to nine other construction projects. These facts point to the intent of the parties to the Agreement to continue as separate and distinct business entities.

Furthermore, Sordoni Skanska did not assume all of the liabilities necessary for its [\*16] uninterrupted continuation of the business of Sordoni Construction. Rather, Sordoni Construction retained liabilities associated with the retained projects. Sordoni Construction also retained responsibility for various other actual and potential liabilities arising prior to execution of the Agreement, including workers' compensation claims, product liability claims, and warranty claims.

Nor was there an immediate cessation of Sordoni Construction's ordinary business and a dissolution as soon as practically and legally possible. Sordoni Construction completed or closed-out ten retained projects resulting in an asset distribution to its shareholders nearly two years after execution of the Agreement. In addition, Sordoni Construction continued to prosecute and defend multiple lawsuits for approximately eight years.

While the purchase did include the assignment of Sordoni Construction's office lease and trade name, and Sordoni Skanska did employ two Sordoni Construction executives, these facts alone did not transform a limited purchase of assets into a merger or mere continuation. *See, e.g., McKee, supra, 109 N.J. Super. at 559-70* (successor's use of predecessor's trade name and employment [\*17] of key executives were not determinative of de facto merger/mere continuation, where predecessor continued to exist for one year following purchase and there was little continuity of ownership and shareholder interest). None of Sordoni Construction's employees or shareholders became shareholders in Sordoni Skanska.

Thus, the Agreement and subsequent conduct of Sordoni Construction and Sordoni Skanska bore little resemblance to the circumstances in *Woodrick*, where the purchased realty business ceased to exist and the successor business seamlessly continued the predecessor's operations at the same location, with the same employees and the same manager. Here, the great bulk of the evidence suggests that the intent of the parties in undertaking this transaction was simply to effect a purchase/sale of limited assets. The structure of the transaction simply did not reflect an intent to effectuate a merger of the two corporations, or a mere continuation of Sordoni Construction's business. Rather, the terms of the Agreement and the conduct of each entity following execution, led to the inescapable conclusion that Sordoni

Skanska and Sordoni Construction continued as separate and distinct entities, [\*18] rather than as a single business.<sup>1</sup>

*811 (1981)*. *Ramirez* is not applicable in non-product liability actions.

Accordingly, the June 16, 2000 summary judgment in favor of Sordoni Skanska is affirmed.

<sup>1</sup> We part company with the motion judge's analysis only to the extent she referred to *Ramirez v. Amsted Industries, Inc.*, 86 N.J. 332, 431 A.2d