

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 26th day of August, 2019.

Present: All the Justices

La Bella Dona Skin Care, Inc., Appellant,

against Record No. 181017
 Circuit Court No. CL14-2083

Belle Femme Enterprises, LLC, et al., Appellees.

Upon appeal from a judgment rendered by the Circuit Court of Chesterfield County.

This case returns to us following our initial remand to the circuit court, in which we issued an opinion affirming the judgment below in part, reversing in part, and remanding for further proceedings. On remand, the circuit court reviewed the evidence from the bench trial and dismissed the successor liability claim brought by La Bella Dona Skin Care, Inc. (“La Bella Dona”). Upon consideration of the record, briefs, and argument of counsel, for the reasons set forth below, the Court is of opinion that the judgment of the circuit court should be reversed.

I.

La Bella Dona obtained a judgment against three of its former employees and their competing business, Bon Air Med Spa, LLC (“Bon Air”) for misappropriation of trade secrets. La Bella Dona attempted to levy on the property of Bon Air, at which point it discovered that Bon Air had transferred its assets to the law firm Ayers & Stolte, P.C., which then sold those assets to a new entity, Belle Femme Enterprises, LLC (“Belle Femme”).

La Bella Dona brought an action against Belle Femme and the law firm, seeking to have the transfer of assets set aside as fraudulent. At the conclusion of a bench trial, the circuit court sustained a motion for summary judgment in favor of Belle Femme, finding that La Bella Dona failed to state a claim for either successor liability or fraudulent conveyance. On appeal to this Court, we reversed the circuit court’s judgment and remanded for further

proceedings in accordance with our finding that the circuit court erred by applying a clear and convincing standard of proof to La Bella Dona's mere continuation theory of successor liability. *See La Bella Dona Skin Care, Inc. v. Belle Femme Enters., LLC*, 294 Va. 243 (2017).

On remand, the circuit court sustained Belle Femme's motion to dismiss, finding that even under the more lenient preponderance of the evidence standard, La Bella Dona failed to prove its successor liability claim. La Bella Dona nonsuited its fraudulent conveyance claim and appealed the judgment dismissing its successor liability claim.

II.

On appeal, La Bella Dona argues the circuit court erred in finding the evidence insufficient to support a claim for successor liability. We agree.*

The following factors are relevant in determining whether one corporation is a mere continuation of another: (i) whether the two companies share the same ownership, a "common identity of the officers, directors, and stockholders in the selling and purchasing corporations"; (ii) whether the new corporation continues in the same business as its predecessor; (iii) whether transfer of the selling company's assets was done for less than adequate consideration; (iv) whether two corporations or only one remain after the transactions at issue; and (v) whether the new company continues in the old offices with the same telephone number and address as the old company. *See Kaiser Found. Health Plan of Mid-Atlantic States v. Clary*, 123 F.3d 201, 205 (4th Cir. 1997).

Here, the following evidence leads us to conclude that Belle Femme is a mere continuance of Bon Air:

- Belle Femme was established two days prior to the date that La Bella Dona could execute its judgment;
- Belle Femme is owned by relatives of the three former Bon Air employees that La Bella Dona had obtained judgment against;
- there was a lack of consideration for the transfer of assets from Bon Air to Belle Femme;

* In light of our holding, it is unnecessary for us to address La Bella Dona's first assignment of error regarding the circuit court's failure to conduct a new trial.

- Belle Femme drained Bon Air's bank accounts the day before La Bella Dona could execute its judgment;
- the law firm foreclosed on a lien on the remaining assets of Bon Air and scheduled a public auction, publishing a list of items for sale that did not include Bon Air's most valuable assets;
- the law firm purchased the remaining assets at the auction;
- the auction assets shifted through the law firm and were sold back to Belle Femme;
- the individual judgment debtors worked for Belle Femme as minimum wage employees while their earnings were paid out through their relatives, who had formed Belle Femme; and
- the law firm backdated transaction documents to alter the apparent dates of parts of the overall transaction.

Because we conclude the circuit court erred in ruling that the evidence in the record was insufficient to support La Bella Dona's successor liability claim, we reverse the judgment of the circuit court, enter judgment for La Bella Dona, and remand this case to the circuit court for a determination of damages.

This order shall be certified to the Circuit Court of Chesterfield County.

A Copy,

Teste:



Clerk