SUSAN BRADFORD **et al., Plaintiffs and Respondents,**

v.

DIRK WINTER **et al., Defendants and Appellants.**

2d Civil No. B216235.

Court of Appeals of California, Second District, Division Six.

Filed August 19, 2010.

Neil S. Tardiff. Robert S. Gerstein, for Appellants.

Dan Siegel, Dean Royer; Siegel & Yee, for Respondents.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

YEGAN, A.P.J.

Dirk **Winter** and Pacific Cambria, Inc. (PCI) appeal from a judgment awarding $102,000 damages against **Winter** and imposing $1,177,752.86 successor liability on PCI based on the fraudulent transfer of assets to avoid an antecedent final judgment of the superior court. The trial court found that Moonstone Management Corporation (Moonstone), a corporation solely owned by **Winter**, transferred assets to PCI without consideration to avoid paying a 2004 judgment. We reverse the $102,000 award against **Winter** and affirm the successor liability judgment as to PCI.

First Action

This appeal arises from a 2004 judgment entered after a jury found that Philip Estrada, a Moonstone supervisor, sexually harassed respondents Susan **Bradford** and Lavona Stanley at work. The jury awarded $766,584 damages against Moonstone and Estrada. We affirmed the judgment in an unpublished opinion but reduced Stanley's award against Estrada. (B180328.) Estrada paid his portion of the judgment ($102,000). Respondents then levied on Moonstone's bank accounts and recovered $263.81. Thereafter, Moonstone closed the bank accounts. **Winter** testified that he believed this lawsuit was "frivolous."

Second Action

Respondents brought a motion to add Dirk **Winter**, an individual, as a judgment debtor based on the theory that he was the alter ego of Moonstone. (Code Civ. Proc., § 187; see e.g.,*NEC Electronics Inc. v. Hurt* (1989) 208 Cal.App.3d 772, 778.) The trial court denied the motion. We affirmed the order in an unpublished opinion. (B210866).

Third Action

In 2007, respondents sued **Winter** and PCI for damages under the Uniform Fraudulent Transfer Act (UFTA; Civ. Code, § 3439 et seq.) seeking a judicial declaration that PCI has liability for the judgment in the first action (successor liability) The complaint alleged that Moonstone, at **Winter's** direction, fraudulently transferred its assets to PCI without consideration to avoid paying the judgment.

The trial court impaneled a jury to decide the fraudulent transfer issue. It also submitted issues as to merger and successor liability to the jury.

After an eight day trial, the jury found that Moonstone assets were fraudulently transferred, resulting in a merger of Moonstone and PCI. **Bradford** was awarded $102,000 economic damages and $75,000 emotional distress damages against **Winter**, plus $301,969.83 damages against PCI. Stanley was awarded $102,000 economic damages and $75,000 emotional distress

damages against **Winter**, plus $653,783.03 damages against PCI.

The trial court denied a motion for nonsuit but concluded that successor liability was an equitable matter to be decided by the court. The jury, in awarding the UFTA damages, made special findings dispositive of merger/successor liability. Adopting the jury findings as an advisory verdict, the trial court found that PCI was liable on the 2004 judgment. On December 16, 2008, the trial court entered a modified judgment consistent with the jury verdict.

Appellants moved for judgment notwithstanding the verdict (JNOV) arguing, among other things, that the judgment was not supported by the evidence. The trial court granted a partial JNOV, struck the award for emotional distress damages, and reduced the awards for $204,000 economic damages to $102,000. Vacating the December 16, 2008 judgment, the trial court entered a $102,000 judgment against **Winter** and a successor liability judgment against PCI.

Common Law Merger/Successor Liability

It is well settled that the transfer of corporate assets to another corporation results in successor liability where "the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts. [Citations.]" (*Ray v. Alad Corp.* (1977) 19 Cal.3d 22, 28.) Successor liability may be imposed where the transaction amounts to a consolidation or merger of two corporations or where the purchasing corporation is a mere continuation of the seller. (*Ibid.*)

In *Franklin v. USX Corp.* (2001) 87 Cal.App.4th 615, 625, the court viewed the "mere continuation" theory of successor liability as "merely a subset" of the "consolidation or merger" theory stating: "The crucial factor in determining whether a corporate acquisition constitutes either a de facto merger or a mere continuation is the same: whether adequate cash consideration was paid for the predecessor corporation's assets."

Where, as here, there has been a purported sale or transfer of corporate assets, merger/successor liability requires a showing that (1) Moonstone's assets were transferred without consideration which otherwise could have been made available to satisfy the 2004 judgment, (2) that the purchaser (PCI) continued the same enterprise after the sale, (3) that the shareholders of the seller (Moonstone) became shareholders of the purchaser (PCI), (4) that the seller (Moonstone) liquidated, and (5) that the purchaser (PCI) assumed liabilities necessary to carry on the business of the seller. (*Marks v. Minnesota Mining & Manufacturing Co.* (1986) 187 Cal.App.3d 1429, 1435-1436 (*Marks*).) Factor 5 (assumption of liabilities to carry on business) is a restatement of factor 2 (same enterprise continued) where there is a pooling of interests and continuity of operations. (*Id.,* at pp. 1436-1437; *Franklin v. USX Corp, supra,* 87 Cal.App.4th at p. 625, fn. 6.)

Jury or Court Trial?

The trial court correctly ruled that successor liability is an equitable matter for the court to decide, not a jury. (*Rosales v. Thermex-Thermatron, Inc.* (1998) 67 Cal.App.4th 187, 196.) But the UFTA cause of action and successor liability are cumulative remedies based on the same fraudulent transfer.[1] (See *Cortez v. Vogt* (1997) 52 Cal.App.4th 917, 930.) A UFTA action "to recover a fraudulent conveyance of a determinate sum of money was triable by jury at common law in England in 1791" and "the California Constitution guarantees the right to jury trial in a similar action today." (*Wisden v. Superior Court* (2004) 124 Cal.App.4th 750, 760; see CACI No. 4200 (2009) Directions for Use, p. 959.)

Before trial, it was agreed that UFTA instructions be given to the jury.[2] The jury returned a special verdict with findings that: Moonstone transferred property to PCI; that Moonstone transferred property with the intent to hinder, delay, or defraud one or more of its creditors; that the transfer was a substantial factor in causing respondents' harm; that Moonstone did not receive reasonably equivalent value in exchange for the transfer; that Moonstone believed or reasonably should have believed that it would incur debts beyond its ability to pay as they became due; and there was a transaction between Moonstone and PCI that "amounts to a consolidation or merger of the two businesses."

Advisory Verdict

Appellants argue that the trial court erred in adopting the jury's merger determination without making its own findings on common law merger. (See *A-C Co. v. Security Pacific Nat. Bank* (1985) 173 Cal.App.3d 462, 474.) Any error is harmless.

(*Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1383, 1397.) Where legal issues are tried before equitable ones, jury findings on common issues of fact are binding on the trial court. (*Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 157-158.) Moreover, the trial court expressly agreed with the jury's merger finding.

The jury found that that PCI paid inadequate consideration for Moonstone's assets and that Moonstone was insolvent or rendered insolvent as a result of the transfers. Those findings were binding on the trial court and satisfy *Marks* factors 1 and 4 for common law merger. Factors 2 and 3 were established based on uncontroverted evidence that the shareholders of Moonstone and PCI were the same (i.e., **Winter**) and that PCI continued Moonstone's business enterprise.

On review, we presume that the trial court made every implied finding necessary to support the judgment. (See *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134.) It would be a waste of judicial resources to remand for further findings. (*Beasley v. Wells Fargo Bank, supra,* 235 Cal.App.3d at p. 1397.)

Statement of Decision

Appellants complain that the trial court did not respond to their "Request For Statement of Decision Re: Merger," filed the day after the verdicts were entered. Appellants requested findings on "whether a merger took place pursuant to Corporations Code sections 1100 et seq," also known as a statutory merger. (See Corp. Code, § 1107 [liabilities of "disappearing corporation" are transferred to surviving corporation]; *Marks, supra,* 187 Cal.App.3d at p. 1434; *Maudlin v. Pacific Decision Sciences Corp.* (2006) 137 Cal.App.4th 1001, 1016.) Appellants did not seek, and therefore waived the right to a statement of decision on common law de facto merger. (See Wegner & Epstein, Cal. Practice Guide (Rutter 2009) Civil Trials & Evidence ¶16:150, p. 16-34; *City of Coachella v. Riverside County Airport Land Use Com.* (1989) 210 Cal.App.3d 1277, 1292-1293.)

Appellants abandoned the request for statement of decision when they filed the JNOV motion. The trial court granted a partial JNOV and found "that a merger between Moonstone and Pacific Cambria occurred. The Court has reviewed [its] trial notes and now repudiates any comments made during trial.[3] The Court accepts the jury determination as advisory and agrees therewith. Therefore, Pacific Cambria is responsible for the judgments suffered by Moonstone. Critically, although Moonstone remains a corporation, the Plaintiffs established that Defendant **Winter** meant to `wind down' the operation completely so that no money held by Moonstone could ever be accessed by Plaintiffs . . . ."

After the JNOV was entered on March 13, 2009, appellants failed to renew their request for a statement of decision. Appellants are precluded from arguing, for the first time on appeal, that the trial court erred in not issuing a statement of decision. (See e.g., *In re Marriage of Cauley* (2006) 138 Cal.App.4th 1100, 1109 [request for statement of decision waived by not renewing request].)

Due Process

Appellants contend that judgment was entered without giving PCI the opportunity to defend itself. The contention is without merit. Successor liability was tried on alternative theories: common law merger and fraudulent transfer of asserts to avoid payment of the judgment. The trial court instructed that PCI did not assume Moonstone's liabilities unless: "(1) the transaction amounts to a consolidation or merger of the two businesses, or [¶] (2) the purchasing business is merely a continuation of the selling corporation, or (3) the transaction [was] entered into fraudulently to escape liability for debts." The jury received special instructions on "Factors to Consider in Determining Whether There Was A Merger" and "Factors to Consider in Determining Actual Intent to Defraud." The second instruction listed nine fraud factors which are codified in Civil Code section 3439.04, subdivision (b). (See *Filip v. Bucurenciu* (2005) 129 Cal.App.4th 825, 834 (*Filip*).)

Displeased with the verdict, PCI moved for nonsuit on the ground that common law merger/successor liability was not pled. Denying the motion, the trial court stated: "It's clear what the allegations were. It's clear what the defendant had to defend against. So from a legal standpoint, I suppose the [successor liability] issue was fairly raised by the complaint. The defendant was put on notice of what he had to defend against, and there were no surprises."

Appellants filed a motion for new trial three weeks later but made no offer of proof that there was new evidence to consider.[4] The trial court did not abuse its discretion in denying the motion. (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871-872.) We reject the argument that appellants have a due process right to a retrial on the same successor liability evidence.

Jury Instructions

Appellants argue that the jury instructions on merger were incomplete. Where the jury renders an advisory verdict, jury instruction error is not grounds for reversal. (*Cutter Laboratories v. R. W. Ogle & Co.* (1957) 151 Cal.App.2d 410, 419; *Wells Fargo Bank & Union Trust v. Brady* (1953) 116 Cal.App.2d 381, 402-403.) Even if the instructions were incomplete, any error is harmless. In addition the trial court heard the same evidence and agreed that PCI should be responsible for the Moonstone debts.

Substantial Evidence

Appellants claim there is no successor liability because the only assets transferred were furniture and computers which PCI purchased at fair market value. The trial court rejected the argument, and for good reason. After the sexual harassment judgment was entered in 2004, **Winter** consulted bankruptcy attorney Peter Susi to wind down Moonstone. Moonstone paid all its creditors in full except respondents. It also transferred $270,690 to PCI for back rent. Moonstone, however, was never charged rent and had never paid rent before the 2004 judgment. Attorney Susi, "didn't like the looks of it" and advised **Winter** to transfer the $270,000 back to Moonstone. The money was returned.

Moonstone transferred another $271,701.12 to PCI and claimed that it was a transfer of "liabilities." Like the other transfers, it left Moonstone insolvent.

In 2004-2005, Moonstone transferred $102,000 to indemnify Estrada on the underlying sexual harassment judgment, a transfer that the trial court determined was improper.

In 2004, before trial of the sexual harassment action, Moonstone transferred $236,500 to **Winter** as a "shareholder distribution."[5] **Winter's** attorney, Susi, did not think it was appropriate "for [the] company to be making any shareholder distributions to its owners."

Winter returned the $236,500 and claimed it was a "contribution" to Moonstone. Appellants' accounting expert testified that "the money came out and went back in[to Moonstone] in the same calendar year. So there was no ultimate distributions [sic, distribution] from Mr. **Winter** — to Mr. **Winter**."

The evidence further shows that PCI continued Moonstone's enterprise and took over Moonstone service contracts to provide accounting, payroll services, and information technology for **Winter's** hotels. PCI paid nothing to acquire these service contracts even though they had significant intrinsic value and generated $158,776 income during the first half of 2004.

Appellants contend that the wind down of Moonstone did not affect respondents' ability to collect on the judgment. Moonstone, however, paid all its creditors except respondents and transferred about $800,000 in assets without consideration before and after the 2004 judgment. Successor liability may be imposed where "the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts. [Citations.]" (*Ray v. Alad, supra,* 19 Cal.3d at p. 28; *Marks, supra,* 187 Cal.App.3d at pp. 1435-1436.)

Appellants argue that there can be no successor liability until Moonstone shareholders exchange stock with PCI and become PCI shareholders. We reject the argument because the shareholders of Moonstone and PCI are the same: **Winter**. No exchange of stock is required. (*Ray v. Alad, supra,* 19 Cal.3d at p. 29 [successor liability based on sale of corporate assets for inadequate consideration and/or one or more persons were officers, directors, or stockholders of both corporations].)

Appellants also argue that successor liability is unfair. Fairness is an equitable matter for the trial court to decide. (*Rosales v. Thermex Theramtron, Inc., supra,* 67 Cal.App.4th at p. 196 [successor liability involves broad equitable considerations]; *Baker v. Delta Air Lines, Inc.* (9th Cir. 1993) 6 F.3d 632, 637 [successor liability reviewed for abuse of discretion].) On review, all evidentiary conflicts are resolved in favor of the judgment. (*Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749, 771.) The evidence unquestionably shows that the transfers were without consideration and intended to render Moonstone insolvent so that respondents could not collect on the 2004 judgment.[6]

$102,000 Damages Against Winter

The trial court found that Moonstone's $102,000 payment to Estrada was a fraudulent transfer because "you can't indemnify somebody for sexually harassing two people." We concur. (See *Jacobus v. Krambo Corp.* (2000) 78 Cal.App.4th 1096, 1102.) But, we must reverse the money judgment because the UFTA does not permit an award of money damages.

In *Forum Ins. Co. v. Devere Ltd.* (C.D.Cal. 2001) 151 F.Supp.2d 1145, the United States District Court concluded that damages may not be awarded in a UFTA action because the words "liability" and "damages" do not appear in Civil Code section 3439.07, subdivision (a). (*Id.,* at p. 1148.) "Upon finding an UFTA violation, the court may cancel the transfer or impose a lien against the transferred property, but it may not award damages. [Citation.]" (*Ibid.*) The court noted: "This is the rule in the majority of jurisdictions." (*Id.,* at p. 1148, fn. 7.)

We apply the majority rule here. The UFTA provides: "Subject to applicable principles of equity," that a trial court may issue an injunction against the debtor or transferee, or order "any other relief the circumstances may require." (Civ. Code, § 3439.09, subd. (a).) Even if we agree to assume that an award of money damages is an equitable remedy, the $102,000 award is improper because **Winter** is not a debtor nor a transferee within the meaning of the UFTA. (*Forum Ins. Co. v. Devere Ltd., supra,* 151 F.Supp.2d at p. 1150.)

Respondents rely on *Qwest Communications Corp. v. Weisz* (S.D.Cal. 2003) 278 F.Supp.2d 1188 (*Qwest*) and argue that a judgment creditor may recover the value of a fraudulently transferred asset from the transferee or "the person for whose benefit the transfer was made." (Civ. Code, § 3439.08, subd. (b)(1).) In *Quest,* the debtor corporation fraudulently transferred assets to Robert Weisz, the father of the corporation's majority shareholder. The federal court stated: "It is a matter of common sense that the majority shareholder of a corporation (Jonathan Weisz) would stand to benefit if the assets of his failing business were fraudulently transferred to his father (Robert Weisz)." (*Id.,* at p. 1191)

Unlike *Quest,* there is no evidence that Moonstone transferred the $102,000 to benefit **Winter**. The only person benefiting from the transfer was Estrada who used the money to satisfy his portion of the judgment. The complaint in this action does not name Estrada as a defendant. Although the complaint alleges a conspiracy to transfer Moonstone assets, conspiracy theories do not permit an award for money damages in a fraudulent transfer action. (*Forum Ins. Co. v. Devere Ltd., supra,* 151 F.Supp.2d at pp. 1148-1149 & fn. 7.)

Conclusion

Winter is entitled to his myopic belief that the underlying judgment is "frivolous." But it is readily apparent that the superior court does not share this belief. Nor do we. At oral argument, counsel for respondents informed us that **Winter** has again moved assets to avoid the PCI judgment. The law takes a very dim view of those who thwart the judicial process. Appellant weaves in and out of the corporate protection with ease in his attempt to circumvent paying the underlying and final judgment. He fails to recognize that he is doing something in addition to litigating against the underlying plaintiffs. He is being disrespectful to the superior court and a superior court judgment. Just how many more rounds of this litigation will occur before the superior court resorts to a more drastic remedy on motion of respondents, or on its own motion, is unknown.

Ironically, **Winter** has no problem agreeing with our determination in the second action on alter ego liability. He will undoubtedly applaud our reversal of the money judgment against him in this third action. **Winter** might want to pause and reflect that in his zeal to avoid paying judgment, he is attacking the very court system and the judicial process that protects his assets.

In the meantime, we transmit a copy of this opinion to the California Corporation Commissioner for review. (See *In re Marriage of Calcaterra and Badakhsh* (2003) 132 Cal.App.4th 28, 38.) We express no opinion on what investigation, if any, should be conducted and leave the matter to the Commissioner's sole discretion. We do observe, however, that on its face, it appears that appellant may be using his corporations as shells to transfer money and assets to defeat justice. The law of corporations, both statutory and decisional, was not designed to achieve this goal.

The $102,000 judgment against **Winter** is reversed. The $1,177,752.86 successor liability judgment against PCI is affirmed. The parties shall bear their own costs on appeal. The clerk of this court is directed to transmit a copy of this opinion to the Commissioner of Corporations.

We concur:

COFFEE, J.

PERREN, J.

[1] A transfer is fraudulent under the UFTA if it is made either "[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor" (Civ. Code, § 3439.04, subd. (a)(1)) or "[w]ithout receiving a reasonably equivalent value in exchange for the transfer or obligation. . . ." (Civ. Code, § 3439.04, subd. (a)(2).)

[2] The trial court gave UFTA instructions on fraud (Civ. Code, § 3439.04, subd. (a)(1)), constructive fraud (Civ. Code, § 3439.04, subd. (a)(2)), and insolvency by constructive fraudulent transfer (Civ. Code, § 3439.05) (CALCRIM 4200, 4201, 4202, 4203.)

[3] While the jury deliberated, the trial court stated that it was reconsidering whether successor liability was a legal or an equitable remedy. "It is not a tort so it may be that a jury's verdict on damages, if they find any of this happened, it may be that the damages would be — my feeling now is if they came up with damages because of successor liability it is probably invalid. I left it in the verdict form because I thought they needed to answer the questions posed . . . . But whether it is damages, it sounds more like its equity."

Appellants contend that the trial court's comments impeach the judgment. Not so. (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th at 229, 268.) Judges are permitted to think aloud and clarify issues during oral argument. The use notes for the UFTA instructions provide little guidance about what issues are to decided by the jury or treated as an equitable matter. (Judicial Council of Cal. Civil Jury Instructions Calif. CACI No. 4200 (2009) Directions for Use, p. 959.)

[4] The motion for new trial to vacate "the order finding a merger. . . or in the alternative reopen the matter for additional evidence" was not based on newly discovered evidence. Counsel for PCI stated that he assumed the merger issue "would be tried *after* the jury deliberated. Had I had any idea the merger issue was going to the jury I would have introduced much more detailed evidence as to the differences between [Moonstone] and PCI before and after [Moonstone] closed its doors."

[5] A debtor-creditor relationship arises the moment the tort cause of action accrues. (*Hansen v. Cramer* (1952) 39 Cal.2d 321, 323.) The UFTA defines a creditor as a person who has a right to payment, whether or not the right is reduced to a judgment, is disputed, is liquidated or unliquidated . (Civ. Code, § 3439.01, subds. (b) & (c); see 8 Witkin, Cal. Procedure (5th ed. 2008) Enforcement of Judgment § 490, pp. 528-529.) Under the UFTA, a fraudulent transfer may occur while the underlying tort action is pending. (See *Cortez v. Vogt, supra,* 52 Cal.App.4th 917, 919 [fraudulent transfer of corporate assets before trial of wrongful termination action].)

[6] Appellants argue that the trial court erred in citing *Filip, supra,* 129 Cal.App.4th 825, as authority for successor liability. *Filip* is a UFTA case in which the defendant/judgment debtor hid assets in a family trust. The trial court acknowledged that "the facts in *Filip* were much different" but "the basic reasons for the judgment were the same: a debtor attempted to avoid paying a lawful judgment."