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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

NATIONAL CONTINENTAL INSURANCE COMPANY, Plaintiff and Respondent, v. SWIFT TRUCKING USA, INC., Defendant and Appellant.	A131588 (Humboldt County Super. Ct. No. DR080600)

Defendant Swift Trucking USA, Inc. (USA) appeals from an order granting the motion of plaintiff National Continental Insurance Company (National) to add USA as a debtor on the judgment National obtained against Swift Trucking Services, LLC (Services). USA argues that it did not control the litigation against Services as required for the granting of National's motion, and that the motion should have been denied because it was brought with unclean hands. We agree with USA on the control issue, and reverse the order granting the motion.

I. BACKGROUND

National sold a liability insurance policy to Services, a trucking brokerage company, for the period from February 8, 2006 through February 8, 2007. In January 2007, the policy was cancelled for nonpayment of premiums.

National sued Services in June 2008 for unpaid premiums of $29,198, and prejudgment interest. On September 24, 2008, the complaint was served on Services's owner, manager, and agent for service of process, Ivy Chu, at 507 Penny Lane in Fortuna.

On October 16, 2008, USA filed its articles of incorporation with the Secretary of State and listed Tiffany Flockhart at 507 Penny Lane in Fortuna as its agent for service of process. Ivy Chu and Tiffany Flockhart are the same person, and we will refer to her as either Chu or Flockhart as appropriate to the context . Flockhart used the name Ivy Chu when she managed Services.

On November 12, 2008, Services purported to answer National's complaint. The answer, signed by Chu, listed 507 Penny Lane in Fortuna as the company's address.[1] The answer was accompanied by Chu's declaration stating that National's suit was "baseless" and "should be dismissed." The declaration attached documents concerning the allegedly unpaid premiums, which included: (1) a July 2006 notice to Services of an "added premium" of $63,610; (2) a September 2006 letter from Services to National stating that the amount of the added premium was nearly equal to Services's net profit for the prior year, with a request that the premiums be "re-evaluate[d]"; and (3) an accounting from National that lowered the premiums by $29,557, acknowledged receipt of $42,462 in premium payments from Services, and listed a balance due of $29,198.[2]

On November 13, 2008, USA filed a Statement of Information with the Secretary of State listing 507 Penny Lane in Fortuna as its principal executive office, with Flockhart as its agent for service of process at that address, and its sole officer and director.

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[1] Nothing in the record suggests that Chu is an attorney. In California, a corporation cannot represent itself in a court of record either in propria persona or through an officer or agent who is not an attorney. (*Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Bd.* (2002) 99 Cal.App.4th 1094, 1101.) In purporting to answer the complaint on behalf of Services, Chu was engaged in the unauthorized practice of law. (Bus. & Prof. Code, § 6125; *Merco Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 730.)

[2] The "Total Estimated Premium" listed on the policy was $7,300, but the policy originally covered two vehicles and two drivers, and the accounting reflected coverage for 17 vehicles and 22 drivers.

On January 19, 2009, Chu signed a Certificate of Cancellation dissolving Services and a declaration resigning as Services's agent for service of process. These documents were filed with Secretary of State on January 30 and February 2, 2009.

In May 2009, National moved for summary judgment against Services. The motion was unopposed and judgment was entered in August 2009 against Services for $36,837.96.

In January 2010, National moved to add USA as a judgment debtor. The motion was supported by the declaration of National's former counsel stating that when he attempted to collect on the judgment, he learned that Services was "now doing business as [USA]," at the same Penny Lane address. Counsel declared, "In my experience, such name changes to similar names are very common in the trucking business and they appear to be done in order to avoid paying legitimate debts, in every instance I am aware of." The motion was granted in February 2010.

In March 2010, National levied execution on USA's bank account in the amount $37,024.07, leaving a balance of $111.63 owed on the judgment.

In July 2010, USA moved to vacate the order adding it as a judgment debtor, alleging that it had not been served with National's motion. USA's motion was supported by Flockhart's declaration averring the lack of service, and stating:

"5. [Services] is no longer in existence, as it filed its Limited Liability Company Certificate of Cancellation with the California Secretary of State on February 2, 2009. While [Services] was actively engaged in business, it provided trucking brokerage services to shippers. However, it never owned the tractor or trailers that were used for shipments. Instead, it leased that equipment from their owners, who transported shipments [Services] assigned to them.

"6. [USA] also provides trucking brokerage services in the same general manner. That is, it does not own tractors or trailers used for shipments, but brokers those shipments by leasing tractors and trailers from their owners and having those owners transport assigned shipments.

"7. [USA], however, has never brokered trucking services for any of the shippers with which [Services] previously engaged in business. Moreover, [USA] was never assigned any contracts or leases by [Services], and it never received any bank accounts or receivables that previously belonged to [Services].

"8. When [Services] ceased to be actively involved in its business, it had a negative net worth. Furthermore, all receivable[s] [Services] was able to collect were used to pay its creditors."

USA's motion to set aside the order making it a judgment debtor was granted in September 2010.

In December 2010, National again moved to add USA as a judgment debtor. The motion was "made on the ground that [USA] is merely an alter ego of [Services] by and through their identical owner, Ivy Chu [aka Tiffany Flockhart]. Moreover, as Ms. Chu appeared in and controlled the underlying lawsuit, and thereby had the opportunity to litigate the issues therein, due process has been satisfied." USA opposed the motion on the principal grounds that USA did not have control of the prior litigation, and that National had unclean hands because it had refused to return the funds levied from USA's bank account. In support of the claim of unclean hands, USA's attorney declared that he had repeatedly demanded return of the money on behalf of USA. National responded that it had been diligent in renewing the motion to add USA as a judgment debtor, and filed a declaration of counsel showing that efforts on the new motion were initiated in November 2010. National promised to return the money immediately if the motion was denied.

The court granted the motion, finding that USA was an alter ego of Services, and that USA, through Flockhart, had control of the litigation that resulted in the judgment. As for unclean hands, the court found that National had "executed a valid judgment when funds were initially obtained from [USA's] bank account," and that a "[b]alancing of equities" favored National.

II. DISCUSSION

A. Addition of Judgment Debtors

"Section 187 of the Code of Civil Procedure grants to every court the power to use all means to carry its jurisdiction into effect, even if those means are not set out in the code. [Citation.] Under section 187, the court has the authority to amend a judgment to add additional judgment debtors. [Citation.]." (*NEC Electronics Inc. v. Hurt* (1989) 208 Cal.App.3d 772, 778 (*NEC*) [fn. omitted].)

The alter ego of a corporation against which a judgment has been entered may be added as a judgment debtor if the alter ego controlled the underlying litigation. (Ahart, Cal. Practice Guide: Enforcing Judgments and Debts (The Rutter Group 2011) ¶¶ 6:1564, 6:1568, pp. 6G-74 to 6G-75 (rev. #1 2011) (Ahart).) Alternatively, a corporation may be added as a judgment debtor as a successor corporation if it is a mere continuation of a predecessor that is liable on a judgment. (*Id.* at ¶ 6:1576a, p. 6g-79 (rev. #1 2008).)

National had the burden of proving by a preponderance of the evidence the facts necessary to add USA as a judgment debtor. (*Wollersheim v. Church of Scientology* (1999) 69 Cal.App.4th 1012, 1017.) We review the trial court's order granting National's motion for substantial evidence. (*McClellan v. Northridge Park Townhome Owners Ass'n., Inc.* (2001) 89 Cal.App.4th 746, 751-752 (*McClellan*).)

B. Control of the Litigation

National's brief highlights what it calls the "dubious" timing of USA's creation and Services's cancellation – after this case was filed and before entry of the judgment against Services – and submits that the sequence of events is indicative of "a probable fraud." However, these points pertain to USA's status as Services's alter ego, an issue that USA is not disputing in this appeal. USA maintains that it cannot be added as a judgment debtor, even if it is Services's alter ego, because it did not control the litigation against Services.

Addition of an alter ego as a judgment debtor "is an equitable procedure based on the theory that the court is not amending the judgment to add a new defendant but is

merely inserting the correct name of the real defendant. [Citations.] 'Such a procedure is an appropriate and complete method by which to bind new individual defendants where it can be demonstrated that in their capacity as alter ego of the corporation they in fact had control of the previous litigation, and thus were virtually represented in the lawsuit.' [Citation.] In other words, '[i]f the claim of individual liability is made at some later stage in the action, the judgment can be made individually binding on a person associated with the corporation only if the individual to be charged, personally or through a representative, had control of the litigation and occasion to conduct it with a diligence corresponding to the risk of personal liability that was involved.' [Citation.]" (*NEC, supra*, 208 Cal.App.3d at pp. 778-779.)

The *NEC* court reversed an order adding Peter Hurt, sole shareholder and chief executive officer of a corporation called Ph, as a debtor on a judgment NEC obtained against Ph. The corporation filed a general denial in the case, but did not appear at trial where its liability was adjudicated. Ph was having financial difficulties, and after the trial filed for bankruptcy. Substantial evidence supported findings that Hurt manipulated Ph's assets to the detriment of its creditors, and that he was Ph's alter ego. However, there was no showing that Hurt controlled the litigation against Ph, and he could not by motion be added as a judgment debtor consistent with due process. The court explained:

"[A]mendment [of the judgment to add Hurt as a debtor] is . . . improper in this case because Ph's interests and Hurt's interests were not the same. The evidence reveals that Ph believed it had a defense to the NEC action but nevertheless let the matter proceed uncontested because it planned to file a chapter 11 bankruptcy petition. Ph, having been sued in its corporate capacity, simply had no incentive to defend the NEC lawsuit because Ph was on the verge of bankruptcy. This situation contrasts with the usual scenario where the interests of the corporate defendant and its alter ego are similar so that the trial strategy of the corporate defendant effectively represents the interests of the alter ego. NEC's argument that Hurt had an opportunity to present a defense in the original action ignores these realities. Hurt was not named as a party, had no risk of personal liability and therefore was not required to intervene. [Citation.] Because the

interests of Ph and Hurt were different, we cannot say that Hurt had occasion to conduct the litigation with a diligence corresponding to the risk of personal liability that was involved or that Hurt was virtually represented in the lawsuit.

". . . there is insufficient evidence to show that Hurt controlled the defense of the litigation. There was no defense for Hurt to control. After Ph filed its general denial, no further proceedings were conducted. Neither party conducted any discovery. Most importantly, Ph did not appear at trial. . . .

" 'Control of the litigation sufficient to overcome due process objections may consist of a combination of factors, usually including the financing of the litigation, the hiring of attorneys, and control over the course of the litigation.' [Citation.] Clearly, some active defense of the underlying claim is contemplated. [Citation.]" (*NEC*, *supra*, 208 Cal.App.3d at pp. 780-781.)

The *NEC* court found the decision in *Motores de Mexicali v. Superior Court* (1958) 51 Cal.2d 172 (*Motores*) to be controlling. In *Motores*, the plaintiff sought to make individuals liable for a judgment against a corporation that was allegedly their alter ego. As in *NEC*, the corporation went bankrupt shortly after entry of the judgment. The judgment was entered "strictly by default," and the court held that adding the individuals as judgment debtors "would constitute a denial of due process of law. . . . To summarily add [the individuals] to the judgment heretofore running only against [the corporation], without allowing them to litigate any questions beyond their relation to the allegedly *alter ego* corporation would patently violate this constitutional safeguard. Nor is this difficulty overcome by the suggestion that [the individuals] should have intervened in the action brought solely against [the corporation] if they desired to assert any personal defenses . . . . They were under no duty to appear and defend personally in that action, since no claim had been made against them personally." (*Id.* at p. 176.)

NEC also relied on *Minton v. Cavaney* (1961) 56 Cal.2d 576 (*Minton*), where the plaintiffs sought to hold an individual liable for a wrongful death judgment against a corporation. The individual, Cavaney, was an officer, director, and attorney for the corporation. He filed an answer to the complaint for the corporation, but withdrew as

counsel before trial. The court determined that Cavaney could be found to be the corporation's alter ego, but that he was entitled to relitigate the issues of the corporation's negligence and the amount of the plaintiffs' damages. "Cavaney was not a party to the action against the corporation, and the judgment in that action is therefore not binding upon him unless he controlled the litigation. . . . The filing of an answer without any other participation is insufficient to bind Cavaney." (*Id.* at p. 581, citing *Motores*.)

Motores and *NEC* were applied in *Katzir's Floor and Home Design, Inc. v. M-MLS.com* (9th Cir. 2004) 394 F.3d 1143 (*Katzir's*), where a corporate defendant initially answered and defended a lawsuit, but eventually discharged its attorneys, suffered a default judgment, and went into receivership. The plaintiff obtained an amended judgment against the corporation's owner and sole shareholder. The plaintiff argued that the owner controlled the litigation against the corporation "because he hired the attorneys for [the corporation], appeared at settlement conferences, financed the litigation, and discharged the attorneys." (*Id.* at p. 1149.) However, as in *Motores* and *NEC*, control was lacking because the owner "was not named individually, knew [the corporation] was on the verge of dissolution . . . and had no personal duty to defend the underlying lawsuit." (*Id.* at p. 1150.)

The *Motores*, *NEC*, and *Kaztir's* line of cases is distinguishable from cases such as *Mirabito v. San Francisco Dairy Co.* (1935) 8 Cal.App.2d 54, 60 (*Mirabito*), where the underlying litigation "was fully and fairly tried," and "nothing appear[ed] in the record to show that [the alter ego] could have produced a scintilla of evidence that would have in any way affected the results of the trial." In that situation, failing to add the alter ego as a judgment debtor "would . . . deny [the plaintiff] the fruits of fairly contested litigation." (*Ibid.*)

The situation here is like those in *Motores*, *NEC*, and *Katzir's*, and unlike the one in *Mirabito*. Here, as in *Motores*, *NEC*, and *Katzir's*, Flockhart, the individual who allegedly controlled the case against Services, was not a party to the action and did not contest the corporation's liability. Insofar as it appears from the record, Services, like the corporations in those cases, had insufficient assets to warrant any defense. According to

Flockhart's declaration, the only evidence on the subject, all of Services receivables were used to pay its creditors, and Services had a negative net worth when it went out of business prior to entry of the judgment against it. In these circumstances, neither Flockhart nor USA as her alter ego had " 'occasion to conduct [the litigation] with a diligence corresponding to the risk of personal liability that was involved' " (*NEC*, *supra*, 208 Cal.App.3d at p. 779), and USA has the due process right to litigate questions beyond that of its alter ego status (*Motores*, *supra*, 51 Cal.2d at p. 176). This is not a case like *Mirabito* where nothing remains to be litigated and no evidence could possibly change the outcome. USA has indicated that it will contest the amount of the premiums due, as well as its alter ego status, if National pursues a case against it.

National contends that *Motores* is distinguishable because it involved a default judgment. Here, Services filed a purported answer and the judgment resulted from an uncontested summary judgment motion. However, while the judgment in *Motores* was entered "strictly by default," *Motores*'s reasoning was persuasively extended in *NEC* and *Katzir's* to apply in cases where answers were filed, but liability was not ultimately contested. (See Ahart, *supra*, ¶ 6:1567, pp. 6G-74 to 6G-75 (rev. #1 2011) [citing *NEC* as well as *Motores* for the rule that a judgment debtor cannot be added to a default judgment because of due process concerns]; see also *Minton*, *supra*, 56 Cal.2d at p. 581 [filing of answer did not render alter ego liable for the judgment].) USA could not, through Flockhart, be deemed to have controlled the litigation against Services merely because Flockhart purported to file an answer to the complaint.

National argues that *NEC* is distinguishable because, "as the sole owner of [Services], [Flockhart] had personal exposure in the underlying litigation . . . ." But Flockhart's exposure here was the same as that of Hurt, the sole owner and alleged alter ego in *NEC*. As we have explained, the reasons why Hurt could not be deemed to have controlled the litigation in *NEC* apply equally to Flockhart and the litigation in this case.

Accordingly, there was insufficient evidence to allow the trial court to find that USA controlled the litigation against Services, and the order adding USA as a judgment debtor deprived USA of due process.

C. Successor Liability

A corporation that is the "mere continuation" of another corporation that is liable on a judgment can be added as a judgment debtor irrespective of whether it controlled the prior litigation. (*McClellan, supra,* 89 Cal.App.4th at p. 756.) National does not argue that USA is liable for the judgment against Services on this ground, but as we must affirm a trial court decision if it is correct on any theory (e.g., *Robles v. Chalilpoyil* (2010) 181 Cal.App.4th 566, 573), we reject any claim that USA is liable as a successor corporation on this record.

Successor liability on a mere continuation theory generally requires a transfer of assets to the new corporation for inadequate consideration. (*Katzir's*, *supra*, 394 F.3d at pp. 1150-1151; see also Friedman, Cal. Practice Guide: Corporations (The Rutter Group 2011) § 8:661, p. 8-88.7 (rev. #1 2011) [a "sham sale" has occurred].) There is no proof of any such transfer in this case. The only evidence is Flockhart's declaration, which states that USA did not succeed to any of Services's bank accounts, receivables, leases, or other contracts. Flockhart further states that USA has different clients than Services. On this record, USA cannot be found to be a mere continuation of Services.[3]

[3] Since we conclude that National did not carry its burden of establishing a basis for adding USA as a judgment debtor, we need not reach USA's unclean hands argument.

III. DISPOSITION

The order adding USA as a judgment debtor is reversed.

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Siggins, J.

We concur:

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McGuiness, P.J.

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Pollak, J.