

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

CASE NO. 4D2023-2973

THERMO COMMUNICATIONS FUNDING, LLC
Appellant,

v.

EUGENE MASCARENHAS, et. al.
Appellee.

APPEAL FROM A FINAL JUDGMENT
NINETEENTH JUDICIAL CIRCUIT IN AND FOR
INDIAN RIVER COUNTY, FLORIDA

CASE NO. 312019CA000390

APPELLANT'S INITIAL BRIEF

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PREFACE

This appeal arises from the dismissal with prejudice of Count II for fraudulent transfers and Count V for conspiracy, in Plaintiff Thermo Communications Funding, LLC's Second Amended Supplemental Complaint against third-party defendant Eugene Mascarenhas, which completely dismissed him from the underlying case. (R:4350-51).

The following references will be used in this brief:

Thermo	Plaintiff/Appellant Thermo Communications Funding, LLC
Eugene	Third-Party Defendant/Appellee Eugene Mascarenhas
Ash	Defendant Ashvin Mascarenhas a/k/a Ash Mascarenhas
A-Tech	Defendant A-Tech, LLC
CSI	Defendant Civil Solutions Incorporated
Cognitiv	Third-Party Defendant Cognitiv, Inc.
Crystal	Defendant Crystal Falls and Investments, LLC
JFC	Jeff Neil Construction
Virtual Capital	Defendant Virtual Capital, LLC
Defendants	Ash, A-Tech, CSI and Crystal
(R:_)	Pages of the Record on Appeal

All emphasis is supplied by Thermo unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

In order to fully understand the import of the Supplemental Proceedings in this 4,400 page appellate record, the facts surrounding the entry of the underlying Final Judgments in this case are necessary.

The Underlying Loan

CSI was a construction company specializing in telecommunications infrastructure and charging stations. (R:2832). Its three shareholders in 2015 were Russell Natrass, Duane Kingma and Jonathan Bertram. (R:2832). In November, 2016, Kingma and Bertram purchased Natrass's shares giving them operational control of the company. (R:2833).

CSI was running a deficit at that time, so in order to do the buyout and continue doing business, CSI needed to be re-capitalized. (R:2833). On February 8, 2017, CSI entered into a Loan and Security Agreement with Thermo. (R:67-107, 2833). As part of the loan transaction, CSI executed two promissory notes in favor of Thermo. (R:51-65). One Note was for a revolving line of credit with a maximum draw of \$2,000,000, and the other Note was for a term loan with a maximum draw of \$1,000,000. (R:51-56, 67-107). Both were secured by all of CSI's assets at the time of closing as well as any new assets acquired during the two notes' terms. (R: 51-56, 67-107, 2833). On February 8, 2017, Kingma as then majority shareholder of

CSI, also executed a Personal Guaranty Agreement of CSI's obligations to Thermo as additional security. (58-65; 2834).

On July 26, 2017, Kingma, on behalf of CSI, signed a First Amendment to Loan and Security Agreement with Thermo which modified the Loan and Security Agreement in order to adjust the borrowing base calculations. (R:109-113, 366, 2834). A Factoring and Security Agreement was also signed, memorializing the sale and purchase of receivables from CSI to Thermo, establishing the purchase price and purchase commitment of \$1,500,000, and establishing a lockbox account into which all receivables of the accounts would be deposited. (R:115-132, 366).

In July, 2017, Ash through Jeff Neil Construction, d/b/a SageCom Construction, entered into a "Letter of Agreement" giving Ash use of CSI's customer Master Service Agreements, but paying 100% of his own operating costs. (R:2834). The "Royalty Fee" paid by Ash for using the Master List Agreements was allegedly earmarked to pay down Thermo's loan and cure the default. (R:2835). This was a temporary agreement while Kingma and Ash worked on a share purchase agreement for Ash to buy CSI. (R:2835, 2928).

Ash was employed by Jeff Neil Construction ("JNC"), which is owned by his father Dr. Eugene Mascarenhas, a cardiologist. (R:3196 at 13, 3199

at 22, 3854, 3883-91). Eugene is listed as the General Partner and Ash as the Registered Agent in JNC's corporate filing with the Division of Corporations. (R:3900-91). By November, 2017, Ash produced roughly \$1,300,000 in gross revenue with approximately \$300,000 in gross profit. (R:2835).

On September 1, 2017 Thermo sent CSI and Kingma a notice of default but did not initiate foreclosure proceedings, although retaining the right to do so. (R:134-37, 366, 2834). This was followed by a second default notice on September 20, 2017. (R:139-43, 366).

A Second Amendment to the Loan and Security Agreement and First Amendment to the Factoring Agreement was entered into between Thermo and CSI on December 11, 2017, which approved the sale of Kingma's CSI stock to Ash. (R:145-49, 367). In the Stock Purchase Agreement, Ash gained controlling interest in the company. (R:3674). Ash assumed duties of CEO and agreed to execute a guaranty, as the agreement provided for the release of Kingma's personal guaranty. (R:145-49, 367). Ash also signed as guarantor on behalf of A-Tech and Crystal, companies that conduct business throughout Florida, that they would be responsible for and pay back CSI's debts to Thermo, and as Guarantors agreed to be jointly and severally liable for all debts. (R:151-80, 364, 367). Each

guarantor also "unconditionally and irrevocably guarantees to Lender the punctual payment when due..." (R:152, 162, 172).

On February 26, 2018, Thermo sent a "Demand for Assembly of Collateral re Default and Reservation of Rights" that formally demanded they assemble the collateral assigned under the agreements so Thermo could inventory it. (R:182-185, 367). The term "collateral" was given an expansive definition in the Loan and Security Agreement. (R:67-68).¹

Shortly thereafter, on March 8, 2018, CSI, in violation of the Factoring Agreement, went to sell all outstanding shares to Cognitiv. (R:367-68, 520-21, 2936-51). Cognitiv is a Florida public company trading on the OTC-QB under the trading symbol of "COGV" which was formed in 2001. (R: 2752, 2778, 2837). Included in that agreement was the issuance of convertible preferred shares to Ash. (R:520). Cognitiv appointed Ash as its President and as a Director. (R:2837). When questioned about Cognitiv's shares

¹ Just a partial list of the Agreement's definition of collateral includes: all present and future accounts, commodity contracts, chattel paper, financial assets, receivables, intellectual property, investment property, letters of credit, securities, security entitlements, all present and hereinafter acquired inventory and goods, all equipment and fixtures of whatever kind and character, together with all replacements, accessories, additions, substitutions, and accessories to all the foregoing, records relating to the foregoing, all books, computer software, tapes, systems, discs, programs, source codes, and all rights to retrieve data and other information pertaining directly or indirectly to the Collateral from third parties, any other property or assets, real or personal, tangible or intangible, now existing or hereafter acquired, of any Obligor. (R:67-68, 375-76).

marketability, Ash testified the OTC Markets state: "Warning, this company may not be making information publicly available. Buying or selling of security on the basis of nonpublic material information is prohibited." (R:3203 at 41).

In attempting to cure the outstanding default and controversy between CSI, Cognitiv, and Thermo, and prevent Thermo from foreclosing on the defaulted indebtedness, Thermo and Virtual Capital entered into a Claims Purchase Agreement on June 8, 2018 whereby Thermo agreed not to foreclose if Virtual Capital purchased the debt for \$1,470,000, paying in monthly installments of \$150,000 after the first \$100,000 payment. (R:368, 523-31, 2837). Contemporaneously with that agreement, Virtual Capital executed a promissory note for \$1,420,000. (R:368, 523, 533-36).

A Federal declaratory action was filed by Virtual Capital against Cognitiv, Thermo, and CSI to have the court approve the Claims Purchase Agreement as an "exempt transaction" under Section 3(a)(10) of the Securities Act of 1933, as amended. (523, 2837, 2829-2986). Once approved, \$50,000 of Virtual Capital's alleged funds that were being held in escrow by Eilers Law Group, P.A. would be released to Thermo. (R:523). In an Escrow Agreement between Eilers Law Group, P.A., Thermo and Virtual Capital, William Eilers was to be the escrow agent for all future

Virtual Capital payments. (R:2970). However, the money that was put into the escrow account did not come from Virtual Capital, but from Ash's father Eugene. (R:3204 at 42-43, 3219 at 102). Virtual Capital had to borrow the funds from Eugene, who wrote a check on behalf of Virtual Capital, so the deal could be done. (R:3204 at 44, 3205 at 47). This was confirmed by

Ash:

Q. Okay. But I believe you had testified earlier that in order to pay the money into the William Eilers account, since none of the stock of Cognitiv had actually been sold or transferred to nonshareholders, that your father loaned the money to pay the - first the \$50,000 and then another \$25,000. Is that correct?

A. I don't remember the exact amounts. I don't understand. My father loaned the money through William Eiler's escrow account to Virtual Capital to do the 3(a)(10). (R:3218 at 100).

It was further pointed out that Virtual Capital gave the appearance of being able to pay back the \$1,470,000 CSI debt when it did not even have the funds to pay the initial escrow amount:

Q. They [Thermo] were owed -- accordance to Virtual Capital, they [Thermo] were supposed to be paid \$1,470,000. And they got 75,000, under the pretense it came from Virtual Capital. And none of it came from Virtual Capital. Isn't that correct?

A. Sir, the -- Virtual Capital (inaudible) where the contract lays.

COURT REPORTER: Sorry, sir, you broke up. "Virtual Capital..." and then you broke up.

THE WITNESS: Virtual Capital borrowed the money from my father to execute to get this contract done. (R:3205 at 47).

Thereafter, Virtual Capital did not make any payments. (R:368, 3204 at 44).

Thermo's trial counsel informed the court it was discovered during William Eiler's deposition that the whole Virtual Capital structure Ash created was a fraud, as there was no transaction; it was never effected. (R:3375).

On February 26, 2019, Thermo sent CSI, Ash, Crystal and A-Tech a "Notice of Events of Default" which formally delineated the defaults of the Note, Loan Agreement, Factoring Agreement, Guarantees and all subsequent loan documents and amendments. (R:368, 538-41). Notice was also provided that the full amount under the Note and Loan Agreements were due, including default of the individual guarantee. (R:187-90). It was further pointed out that an inventory was not provided within thirty days after the end of each calendar month as required by the Loan Agreement. (R:187-90). However, Thermo's best knowledge of the value of CSI's assets was \$1,023,108.88. (R:48, 191-284).

During Ash's December 16, 2020 deposition, he testified CSI was out of business for over a year. (R:3198 at 21). Ash is the resident agent for JNC and works for JNC as its General Manager, but alleged he does not receive a salary, wages or commissions from JNC. (R:3741, 3905 at 21-

3906 at 22, 4138). Instead, Eugene supports Ash by paying his living expenses. (R:4140). JNC's business is cell phone tower construction and maintenance, the exact same business previously operated by CSI. (R:4131, 4138).

Eugene confirmed that Ash controls the company Eugene owns. (R:4139). Eugene has zero background in telecommunications, and claimed to have done nothing for the company other than investing in it in 2016. (R:4135, 4137, 4139).

Q. And how did you come to invest in Jeff Neill Construction?

A. My son has been in telecommunication and cell tower construction for seven years, and he wanted me to buy into Jeff Neill Construction. And with great internal guilt, because I do not think I spent enough time to raise my children, I was absorbed in medicine. I was recruited to start cardiac surgery in Broward County, a big responsibility then. All patients from Broward went to Mount Sinai in Jackson.

So I literally slept in the hospital with a team together, three cardiac surgeons, my partner, and myself. So I dedicated my life to my medical profession to the negligence of my children and my two ex-wives.

So unfortunately I carry what I would like to term paternal guilt. (R:4135).

Q. So you indicated that you invested in Jeff Neill Construction because your son asked you to; is that correct?

A. That's correct.

Q. And why did he need you to invest in Jeff Neill Construction?

A. He did not have the money. He was in the business of cell towers, et cetera, and he thought this would be a good opportunity for him. (R:4136).

Q. Jeff Neill Construction is in business to make a profit, is it not?

A. Yes. (R:4140).

Although Eugene claims he did not have a direct involvement in JNC, his 2018 and 2019 tax return reflects he was paid a total of over \$500,000 as salary by some company in those years. (R:4137-38, 4168). Thermo believes Eugene was paid those monies by JNC, since he failed to produce his 2016 and 2017 tax returns, as well as any W-2 or 1099 statements for 2016-2020 that would reflect who paid that salary. (R:4168).

The Underlying Litigation

The underlying litigation was one of delay, delay, delay by the Defendants, who with the exception of Virtual Capital, were all represented by the same counsel. (R:352-57. 638-46).

Thermo first filed the action in the Eleventh Circuit. (R:294). Filing an overdue response from the time specified in an agreed order, Defendants sought dismissal for lack of venue, claiming proper venue was Vero Beach. (R:294). Rather than contest venue, Thermo refiled the same complaint in Indian River County. (R:36-284, 295).

After Thermo filed its Complaint on May 13, 2019, the Defendants' first lawyer filed an appearance on the due date of a response, and requested an enlargement of time. (R:285-89). Subsequently, the attorney moved to withdraw, requesting Defendants be given fifteen days to obtain new counsel. (R:290-92). A second attorney filed an appearance and Defendants answered on July 15, 2019. (R:348-357).

Thermo ultimately traveled on a ten count Amended Complaint against CSI, A-Tech, Crystal, Ash, and Virtual Capital. (R:358-635). A Default Final Judgment was entered only against Virtual Capital for \$1,745,430.80. (R:638-84, 692-97). On April 23, 2020, Defendants' second counsel filed a motion to withdraw. (R:698-99).

On May 4, 2020, Thermo filed a motion to compel discovery that had been due in February. (R:700-1611). Thermo also opposed the withdrawal of Defendants' counsel until Defendants responded to the discovery or required new counsel within twenty days. (R:1613-2539). The court granted the withdrawal motion, required Defendants obtain new counsel within twenty days, and provide all outstanding discovery within twenty-five days of the July 14, 2020 order. (R:2544-46). That same day, Defendants' third counsel, Meredith Chaiken, filed her appearance. (R:2547-48).

Subsequently, there was an agreed case management plan and

order with the last day for deposition set for October 22, 2020 and the docket call for December 11, 2020 for an estimated three-day trial. (R:2555-64). On October 22, 2020, Defendants filed an emergency motion for protective order, claiming Ash was ill and the victim of a crime overnight and could not attend his Zoom deposition scheduled that day. (R:2587-88, 2972).² Contemporaneously, Defendants' third attorney also filed a motion to withdraw. (R:2589-90).

Thermo conditionally opposed the withdrawal if it would prejudice the December 11, 2020 trial date. (R:2591-93). Thermo also filed a motion for contempt and sanctions for Ash's failure to appear. (R:2594-2621). Ash filed a responsive Affidavit on November 11, 2020, and later an unsworn doctor's note which was found to be "wholly insufficient." (R:2648, 2783, 2797-98).

Thermo filed renewed and amended renewed motions to compel discovery, which were granted. (R: 2629-33, 2727-80, 3087-88). The court amended the Case Management Plan with a special set trial date of

² A previously coordinated deposition was scheduled for September 30, 2020, with Defendants having made multiple unfulfilled promises to provide documents at least one week before the deposition. (R:2595-97). Regardless of the court order and time limits imposed, Defendants provided 1,254 documents less than 24 hours prior to the deposition, and during the deposition, Ash feigned ignorance as to the documents he just produced. (R:2595). Because of this, Ash's deposition was continued and rescheduled for October 22, 2020. (R:2595).

January 19-21, 2021 and denied Defendant's counsel's motion to withdraw so close to trial "where there appears a pattern and practice of removal counsel as a trial strategy". (R:2655-57, 2673-74).

On December 15, 2020, Thermo filed an emergency fourth motion to compel discovery and for sanctions. (R:2998-3083). After a hearing the following day, the court entered an order on December 23, 2020, finding Defendants "engaged in pervasive discovery misconduct in this action." (R:3288). The detailed order set forth the history of where "Defendants have evaded, delayed, and refused discovery by failing to adequately respond to Thermo's discovery requests" and "determined that Defendants repeated violations of all of the Court's orders compelling discovery establish that their disobedience was willful, deliberate," resulting in the court striking the Defendants' defenses in this action. (R:3288, 3295, 3287-96).

On December 22, 2020, Thermo filed an emergency fifth motion. (R:3093-3286). After a hearing the next day, the court entered an order on December 30, 2020, setting forth the background of "pervasive discovery misconduct," stating it "will allow Defendants once last chance to fully comply with discovery" no later than December 30, 2020 at noon. (R:3307-08, 3297-3309). "Failing this, judgment on liability shall be entered upon a

good faith affidavit of Plaintiff's counsel, verifying that discovery has not been fully complied with." (R:3308-09).

After Defendants failed to comply, Thermo's counsel filed a good faith affidavit of non-compliance and a final judgment was entered on liability against CSI, A-Tech, Crystal, and Ash on January 6, 2021. (R:3351-54). The case was going to trial on liquidated damages and attorney's fees. (R:3353).

On January 12, 2020, Thermo filed a transaction summary and amounts owed, which had previously been provided to Defendants in October. (R:3412-28, 3441). Thermo also filed a Bench Memorandum of Law, setting forth the factual background and informing the court that during Ash's deposition, he admitted to receiving the summary but acknowledged not reviewing it. (R:3442). At Ash's final deposition which was completed on January 13th, he stated he had no further questions or disputes as to the Summary of Transactions and Amounts Owed, and acquiesced to the figures. (R:3443).

After the trial, a Final Judgment was entered against CSI, A-Tech, Crystal, and Ash for \$2,123,447.69, plus reasonable attorney's fees and costs, bearing statutory post judgment interest rate from the date of the judgment. (R:3696). Defendants were ordered to turn over any of the

Collateral in their care, custody, or control, as defined in the Loan and Security Agreement and its subsequent amendments, the Promissory Note between Thermo and CSI, and the Guaranty Agreements that were provided to Thermo. (R:3696). Any recovered Collateral was to be sold to offset damages to the extent the judgment was not satisfied. (R:3696). The court also ordered Defendants to complete the Form 1.977 Fact Information Sheet and maintained jurisdiction for proper Execution and/or Garnishment as well as to determine reasonable attorney's fees and costs. (R:3697). Ash's refusal to comply with the court's order to fill out this form eventually resulted in an order of contempt being entered that directed the clerk to issue a writ of bodily attachment should Ash continue to remain non-compliant. (R:3970-73). On June 4, 2021, the bodily attachment writ was issued. (R:3975).

An Amended Default Final Judgment was also entered against Virtual Capital in the amount of \$1,420,000. (R:3699-3701).

Thermo filed a Motion for Writ of Garnishment, alleging JNC "is indebted to, or has tangible or intangible property of Judgment Debtors in its hands, possession, or control, including but not limited to non-exempt bank and/or investment accounts." (R:3721). A Writ of Garnishment was issued against JNC. (R:3732-38). JNC answered the garnishment writ,

alleging Ash is JNC's Registered Agent and also acts as the General Manager with third parties, but does not receive a salary, wages, or commissions. (R:3741). JNC also alleged it is not indebted to any of the Judgment Debtors, nor does it hold property, whether real or personal or intangible that is owned by any of the Judgment Debtors. (R:3742).

As part of the post-judgment proceedings, Eugene acknowledged Thermo rightfully desires to take his deposition as a principal of JNC. (R:3850). However, Eugene filed a motion to excuse attendance at a scheduled deposition, claiming he is 81 years old, is physically and mentally unable to sit through a deposition, and his physician believes Eugene may inadvertently perjure himself due to his short-term memory loss. (R:3850). A doctor's note was provided to Thermo's counsel, but was not attached to the motion. (R:3850-51).

Thermo's response was that Dr. Schwartz's note was not only unsworn, but failed to describe what conditions Eugene possesses to prevent him from testifying by a Zoom deposition, or that Dr. Schwartz was a colleague cardiologist, practicing in the same field. (R:3854). Eugene, who specialized in cardiovascular disease and internal medicine, only resigned from North Shore Medical Center and Florida Medical Center in 2020. (R:3960). Thermo pointed out that despite claims of incapacitation,

Eugene voluntarily attended and participated in his son's mediation on December 28, 2021 in which potential settlement was discussed. (R:3854). He appeared to be well and fit, with a good demeanor and spoke intelligently and well situated to time and space. (R:3854). The court denied Eugene's motion to excuse his deposition attendance. (R:3892).

The Supplemental Proceedings

On April 1, 2022, Thermo filed a Motion to Commence Proceedings Supplementary. (R:4069-4069). An affidavit filed by Steven J. Gutter, Esq., stated he was the attorney and authorized agent for the Judgment Holder and has personal knowledge that the court entered a judgment in favor of Thermo. (R:4070). Mr. Gutter further affirmed the "the Secretary of State holds a docket Judgment for \$2,123,447.69 plus interest from January 27, 2021, the Judgment date, which Judgment remains valid and outstanding." (R:4070). The Affidavit was provided as a condition to proceedings supplementary. (R:4070). On April 13, 2022, the court entered an order authorizing commencement of proceedings supplementary by filing and serving the Supplemental Complaint. (R:4071).

Thermo filed an initial three count supplemental complaint, which Eugene and JNC sought to dismiss. (R:4080-98). The court orally granted the motion at a hearing, but Thermo filed a five count Amended

Supplemental Complaint prior to the order being entered. (R:4210-18). Eugene and JNC's filed motions to dismiss alleging the Amended Supplemental Complaint failed to state a cause of action. (R:4219-26).

Themo filed a Memorandum in opposition to the motions to dismiss, citing case law and attaching another circuit court's order upholding a similar Supplemental Complaint for fraudulent transfer, successor liability, and conspiracy. (R:4227-74, 4265-71).

The court granted the motion to dismiss and Themo was given fifteen days to amend. (R:4275-76). A Second Amended Supplemental Complaint ("Complaint") was timely filed, which is the complaint at issue in this appeal. (R:4311-4337).

Paragraph 4 of the Complaint contains general allegations that Eugene was Ash's father and JNC's General partner and both were Insiders under the Florida Uniform Fraudulent Transfer Act as defined by Section 726.102(8), Fla. Stat. (R:4311-12). The Complaint further alleges:

5. CSI was encountering financial problems in 2016 when Ash ceased its operations and shut it down. (R:4312). Ash acquired JNC in 2016 for the express purpose of continuing the CSI cell tower construction and maintenance business ("the Business"). After acquiring JNC, Ash installed Eugene as JNC's owner/General Partner, and caused an insolvent CSI to fraudulently transfer to JNC the Business and all CSI assets used in the cell tower construction business, including construction equipment, trucks and other miscellaneous construction equipment as reflected on the attached lists, CSI

customers, and CSI goodwill, all without CSI receiving reasonably equivalent value. The aggregation of these lists is attached as Exhibit "B." (R:4312).

Paragraph 6 of the Complaint asserted that due to CSI's ongoing non-compliance with discovery orders, Thermo could not provide greater specificity in describing the actual assets. (R:4312). The Complaint further asserted that a more detailed description was not required in fraudulent transfer cases because "creditor fraud" is not common law fraud, citing to *Turner Murphy Company v. Specialty Constructors Inc.*, 659 So. 2d 1242 (Fla. 1st DCA 1995). (R:4312).

Paragraphs 7 and 8 set forth the statutory basis for fraudulent transfers under Section 726.105(1)(a) and (b), Fla. Stat. and Section 726.106(1), Fla. Stat. (R:4312-13).

Paragraph 9 of the Complaint cites to case law to show the distinction between fraudulent transfer from common fraud. (R:4313).

Paragraph 10 provides more factual allegations with Eugene as a "paternal extension" of Ash for the express purpose of insulating JNC's improper acquisitions of CSI's assets, the business, and the business income stream from CSI's and Ash's creditors like Thermo. (R:4313).

Paragraph 12's allegations supply how Ash attempted to insulate himself from creditors by taking no direct compensation from JNC such as

salary or shareholder draws so he would not show money or assets under his personal name that would be subject to creditor attachment or seizure. (R:4313). The paragraph also provides Eugene's complicity regarding Ash's income; alleging he and JNC paid all of Ash's personal expenses. (R:4313).

In setting forth a cause of action for fraudulent transfer against Eugene, the Complaint alleges that Eugene, as the owner of JNC, is a fraudulent transferee in an amount equal to the value of the assets and business operations CSI transferred to JNC. (R:4312).

In setting forth a cause of action for conspiracy jointly against Eugene and JNC, the Complaint alleges that Eugene, Ash, and CSI conspired to: have JNC operate as CSI's successor; fraudulently transfer CSI's assets and business to JNC; to use Eugene and JNC as legal shields to insulate the CSI's business, assets, and income stream from Ash's and CSI's creditors like Themo; and to use JNC's revenue to pay Ash's living expenses in lieu of paying him a salary, thereby shielding money from Ash's creditors. (R:4316). The Complaint further alleges Eugene has a personal financial stake in the success of the conspiracy, as Eugene has a capital account with JNC which has increased in value by millions of dollars when CSI's business and assets were transferred. (R:4316-17).

The Complaint also alleges damages to Thermo from the conspiracy by the removal of the assets and the business as well as the income stream from CSI and transferring it to JNC which would have otherwise been available to at least partially satisfy Thermo's needs as a creditor and a judgment holder. (R:4317).

Both Eugene and JNC moved to dismiss, alleging the Complaint contained the same unrecognized cause of action for successor liability. (R:4339, 4343). They both sought to dismiss the conspiracy count to the extent it relates to a conspiracy to commit "successor liability," which Eugene and JNC maintained is not a recognized cause of action under Florida law. (R:4340, 4344). They also maintained the alleged facts made the conspiracy claim futile. (R:4340, 4344). However, *there were no specific arguments directed to the Count II concerning fraudulent transfers in the motions.* (R: 4338-4345). Still, Eugene and JNC set forth the general allegation that Thermo failed to state a cause of action, so the Second Amended Supplemental Complaint should be dismissed with prejudice. (R: 4341, 4345).

At the September 6, 2023 hearing, counsel for Eugene and JNC spoke at length about matters outside of the four corners of the Complaint, discussing specific testimony in Eugene's deposition that was not included

in the Complaint. (R:4385, 4390-91). Counsel began his argument by telling the court that Eugene is a retired cardiologist "about 85 years old." (R:4383). He continued to play on Eugene's age as "an elderly man that's retired" and argued Thermo is trying to make him "responsible for the ills of his son when he didn't get anything out of it or know what was going on." (R:4393).

Eugene's counsel had no quarrel with Count I regarding a fraudulent transfer claim against JNC. (R:4386, 4393). There was a challenge regarding Eugene, who maintained there was no transfer to him. (R:4386, 4391-92). Eugene's counsel argued the complaint does not say anything about him receiving anything. (R:4392).

As to successor liability against JNC, Eugene's counsel argued there was no cause of action for successor liability. (R:4387-88). He told to the court, "I challenge Your Honor or anyone to find a claim that has the elements of successor liability as a cause of action, because they don't exist." (R:4388).

Eugene's counsel maintained in order to have a conspiracy, there has to be an agreement between the two parties, two parties agreeing to do something unlawful. (R:4389-90). Counsel pointed to paragraphs 5, 6, and 11 of the Complaint to argue Eugene knew nothing and was not

involved in the business. (R:4390-91). However, counsel did not address the other aspects of the conspiracy claim.

Thermo's counsel first addressed successor liability, arguing the traditional corporate law rule that "liability of a predecessor corporation does attach to the successor entity if the successor is a mere continuation of the predecessor, and the transaction is a fraudulent effort to avoid creditors." (R:4394). The Complaint alleged that JNC is a continuation of the business of the judgment debtor CSI, and is therefore liable as a successor entity. (R:4394-95).

Counsel further argued black letter law says the specificity requirement of a pleading is limited to common law fraud, and a fraudulent transfer is not common law fraud. (R:4396). The Complaint attached another circuit court decision from Orange County saying point blank "that the specificity rules of pleading fraud do not apply to fraudulent transfers, citing all the same cases we gave you." (R:4336, 4396). Thermo's counsel also disagreed with Eugene's counsel that the transferred assets were merely \$100,000 worth of junk. (R:4384-85). In relation to Eugene, "[i]t's for the value of the business that was transferred. And that, we'll get from tax returns and bank statements." (R:4396).

As to the count for conspiracy, Thermo's counsel argued:

Conspiracy, when you have a wrongful act, you can have a conspiracy to commit the wrongful act. And it doesn't matter what his client, the doctor, did or didn't know or did or did not say. It's what he did. And he let himself or he set himself up in conjunction with his son as the president of the successor business while his son still runs it. (R:4397).

...what more evidence do you need than both parties admitting they set up a successor to carry on the business? (R:4387).

Regarding Eugene's mental state, Thermo's counsel informed the court not to get too caught up in his mental state "because he only found that mental state after this claim went against him." (R:4398). "So this is suddenly a new mental state for Mr. Mascarenhas, Sr., because he was certainly lucid and on tip of his game," when his deposition was taken. (R:4398).

The court ruled at the end of the hearing, stating "[t]he Court adopts Mr. Kirk's arguments made herein and the case law cited." (R:4403). Counts 2, 4, and 5 were dismissed, and entitlement to fees and costs. was granted. (R:4403). The fees and costs were based on "the third bite at the apple with a complete failure to follow the law as it is listed in 2023." (R:4403). The court entered an order granting Eugene's motion, and for "the reasons stated orally in open court," dismissed Count II (Fraudulent Transfer) and V (Civil Conspiracy) with prejudice along with awarding Eugene entitlement to fees and costs. (R:4350-51).

Thermo timely served and filed a comprehensive motion for rehearing, which was denied by the court. (R:4352-59, 4413).

SUMMARY OF THE ARGUMENT

Whether a pleading is an original complaint or a proceeding supplementary, at the motion to dismiss stage the court must consider all allegations in the pleading as true and should only test the filing for legal sufficiency. However, and especially because the court adopted the arguments of Eugene's counsel as the reasons to dismiss with prejudice all counts against Eugene, this was not done.

It is instead apparent the court misconstrued the nature and requirements of the counts at issue. Both the conspiracy and fraudulent transfer to Eugene counts are at least partially intertwined with JNC's successor liability to CSI. Therefore, it is all the more apparent when, during the hearing, because the court did not accept successor liability, applied against co-defendant JNC, as a valid cause of action in Florida the court would less than correctly apply the law to counts at issue in this appeal for conspiracy and fraudulent transfer.

The Complaint set forth allegations of how Eugene conspired with Ash, CSI, and JNC in ways that damaged Thermo. This met the sufficiency of the elements to show multiple parties agreed to act; there were overt

acts related to the removal of CSI's assets, continuing CSI's business through JNC as a successor, as well as how Ash's expenses were paid, and that Thermo damaged by this.

As to how fraudulent transfer applies to Eugene, those allegations were also sufficiently demonstrated to state a cause of action in the Complaint. The allegations showed how Eugene was an "insider" under the fraudulent transfer statute. Since Eugene is an insider that facilitates proving the statutory requirements alleged in the general allegations. It was further set forth that because JNC operates as a successor to CSI, there is an intervening value transfer, for which Eugene himself is the recipient/transferee. That value can be the target of a fraudulent transfer action.

The final error in this case was how the trial court entered the dismissal with prejudice lacking appropriate findings, by only making the finding of using the reasons stated in open court. Worse, the only reason given during the hearing was to directly adopt the arguments of Eugene's and JNC's shared counsel, including arguments about matters outside the four corners of the complaint.

STANDARD OF REVIEW

Motions to dismiss are reviewed de novo. *Gilison v. Flagler Bank*, 303 So. 3d 999 (Fla. 4th DCA 2020).

ARGUMENT

THE TRIAL COURT ERRED IN DISMISSING WITH PREJUDICE ALL COUNTS IN THE SECOND AMENDED SUPPLEMENTAL COMPLAINT AGAINST EUGENE MASCARENHAS.

Eugene's son Ash, and Ash's business CSI, had a seven-figure judgment issued against them, and although Eugene has acted to help his son evade collection, the trial court improperly dismissed the entirety of the proceeding supplementary against Eugene.³ The specific claims against Eugene were that he was a fraudulent transferee of CSI's assets and conspired with Ash and JNC about continuing CSI through JNC as well as shielding Ash. After all the many problems, delays, and sanctions against Ash, what he did with Eugene was more of the same and should not bar Thermo from recovery.

³While part of the case against JNC is still ongoing, out of an abundance of caution, and as stated in the Notice of Appeal, an appeal was initiated over the dismissal of the case against Eugene since it disposed of the entirety of the counts directly against him. (R:4372). Stemming from related procedural considerations, while the dismissal judgment awarded entitlement to fees (R:4375), that is not presently being appealed because it is not yet ripe. *Valente v. Raissi*, 343 So. 3d 640, 643 (Fla. 2d DCA 2022) (despite the Second District's concern about the fees order, it was recognized as not yet being ripe for appeal due to lacking an awarded amount).

“A motion to dismiss is designed to test the legal sufficiency of the complaint, not to determine factual issues, and the allegations of the complaint must be taken as true and all reasonable inferences therefrom construed in favor of the nonmoving party.” *Kidwell Group, LLC v. Safepoint Insurance Company*, 376 So. 3d 48, 50-51 (Fla. 4th DCA 2023) (internal citation omitted) (reversal of dismissal based on court’s failure to properly construe complaint). It is plain the trial court was failing to properly construe the content of the second amended supplemental complaint when the court was not differentiating common law fraud from fraudulent transfers and would not recognize successor liability as a valid cause of action (whether supplemental or direct) under Florida law.

While successor liability is not directly on appeal at this time, as that count was only to JNC and some of the supplementary proceeding against JNC is still ongoing, a partial discussion is necessary as it was raised during the September 6, 2023 hearing and relates to the counts on appeal. Eugene's and JNC's shared counsel argued “I challenge Your Honor or anyone to find a claim that has the elements of successor liability as a cause of action because they don’t exist.” (R:4388). In the motion for rehearing, multiple cases were provided. In addition to *Bernard v. Kee Mfg. Co., Inc.*, 409 So. 2d 1047 (Fla. 1982), there was *Chicago Title Ins. Co. v.*

Alday-Donalson TitleCo. of Florida, Inc., 832 So. 2d 810, 814 (Fla. 2d DCA 2002), in which the court found to "reverse the dismissal of *the count for successor entity liability because Chicago Title has properly alleged a claim for successor entity liability* under either the de facto merger theory or the mere continuation theory." To provide a fairly recent case, the court was given *Oceanside Plaza Condominium Ass 'n v. Foam King Industries, Inc.*, 206 So. 3d 785, 787-88 (Fla. 3d DCA 2016) which held successor liability could be raised in the first instance rather than just a cause of action in a supplemental proceeding.

Three main ways to prove successor liability were present in the underlying case. There was a *de facto* merger when JNC took all of CSI's assets, which could not have happened without Eugene buying JNC, later making it available for asset transfer and not forcing the assets to be disgorged. Eugene admitted knowing that his son Ash, who managed CSI, was managing JNC. Further both entities were in the same cell phone tower business utilizing CSI's assets. Thirdly, CSI's assets came to JNC through a fraudulent transfer, which in addition to being a surviving count against JNC, as just referenced above happened without Eugene's objection. However, and considering that the trial court would not recognize successor liability, that almost certainly gave the trial court a

negative inclination towards the counts against Eugene no matter how they were pled to align with the well understood elements for those causes of action.

The elements to allege a person's or entity's involvement in a conspiracy are exceptionally basic as all one needs to show: 1) there was an agreement between two or more parties; 2) the agreement was to commit an unlawful act or a lawful one by unlawful means; 3) an overt act furthering the conspiracy; 4) resulting damages to a plaintiff. *Gilison v. Flagler Bank*, 303 So. 3d 999 (Fla. 4th DCA 2020). Further lowering the burden, this Court held in *Gilison* "a conspirator only needs to know of the scheme and assist it in some way to be held responsible for all the acts of his conspirators." *Id.* at 1004; see *MP, LLC v. Sterling Holdings, LLC*, 231 So. 3d 517, 522 (Fla. 3d DCA 2017).

Eugene is a father who has gone to great lengths to support Ash and CSI, lengths that have damaged Thermo. The Complaint set forth that Eugene is JNC's owner/General Partner. (R:4312). Eugene holds himself out as JNC's owner. As alleged in the proceeding supplementary, Eugene allowing JNC to operate as a successor entity to CSI (and allowing Ash to manage JNC in this fashion) furthers a conspiracy to hinder Thermo's ability to collect on its judgment against Ash and CSI. (R:4316). For Ash

and CSI, JNC is a means to shield assets and income from Thermo, an end which Eugene facilitates. (R:4316).

Subsequent to CSI's hollowing out and shuttering, Ash has worked for JNC, yet he is not paid for his labors in managing JNC and operating it as a continuation of CSI. (R:4316). Were he to receive wages or salary, this could be attacked by Thermo who stands as a long suffering judgment creditor against him. Eugene conspired to have Ash's living expenses paid in lieu of giving him a salary. (R:4313, 4316).

Equally obvious as participation in a conspiracy is that Eugene allowed JNC to receive CSI's assets and nothing in the record shows an attempt, let alone a strenuous attempt, by Eugene to disgorge those assets back to CSI. In *UTC Industries, Inc. v. Presidential Financial Corp.*, 976 So. 2d 92 (Fla. 3d DCA 2008), a dismissed conspiracy count was revived through allegations of transferring property to further a conspiracy that damaged the plaintiff. By the same token, one of two different restored conspiracy counts in *MP, LLC v. Sterling Holdings, LLC*, 231 So. 3d 517, 522 (Fla. 3d DCA 2017), involved a plan to sell property at a greatly reduced price while still allowing two majority members to retain an under the table interest in the property. Similarly, in the present case Eugene's allowing JNC to receive CSI's assets, which was an attempt to place these

assets beyond Thermo's reach to the company's detriment, especially as Ash still has the ability to use those assets.

No credence should have been given to the argument made during the hearing, and outside of the four corners of the Complaint, that Eugene is old or allegedly infirm, though as the court adopted his counsel's argument as the reason to dismiss, it would appear the court did. Certainly, when Eugene acquired JNC he was younger and still an actively practicing cardiologist. He could still have objected to the asset transfers when they happened or refused to pay his son's bills in lieu of his son taking a salary while working at JNC considering how immediately unusual and eyebrow raising that is.

Most importantly, nothing was put before the court to conclusively prove he lacked competency. Were infirmity actually an issue rather than an attempt to portray Eugene as somebody being taken advantage of by his son and pressed by Thermo, there would have been a guardian standing in for Eugene as defendant with appropriate medical records to support incompetence at the time the asset transfers were made payments to Ash started. Instead, Eugene stance of remaining aloof from JNC was a choice with consequences. For Eugene and JNC, his purposeful non-involvement in managing JNC is a worst-of-both-worlds scenario. On one

hand, letting Ash run JNC in the same business as CSI with CSI's assets makes JNC a successor to CSI, while at the same time doing nothing to insulate Eugene from conspiratorial acts in the original transfers or in paying Ash's bills.

Another aspect to the conspiracy count against Eugene is that so long as the fraudulent transfer claim against JNC persists and/or there is an active fraudulent transfer claim against Eugene then the conspiracy count must be allowed to continue forward. After this Court, in *Yaralli v. American Reprographics Company, LLC*, 165 So. 3d 765 (Fla. 4th DCA 2015), went through the process to explain why a fraudulent transfer claim was to be revived, the denial of a claim for a conspiracy related to the fraudulent transfer was also reversed just because of the reversal on the transfer claim.

Of course, the fraudulent transfer claim against Eugene for the value of CSI's assets and business operations should also still be allowed to proceed as the supplemental proceeding demonstrated he is definitionally an insider as set forth in Section 726.102(8), Fla. Stat. for fraudulent transfers.(R:4312, 4314-15). Being classified as an insider makes a transferee more readily fit under the fraudulent transfers statutes. Eugene actually fits several different statutory categories of insider as he is a

relative of Ash from the CSI side, and on the JNC side he is: an owner of the debtor (which puts him in control of it); a general partner; and even if control of JNC was deemed to rest with Ash, Eugene is still a relative of an officer, director, or person in control.

The Complaint explained how Sections 726.105(1)(a) and (b) along with 726.106(1), Fla. Stat. applied by tracking the statutes. Per paragraph 7, “a transfer made by a debtor is fraudulent as to a creditor, regardless of whether the creditor's claim arose before or after the transfer was made if the debtor made the transfer either: a) with an actual intent to hinder, delay, or defraud any creditor; or b) without receiving reasonably equivalent value in exchange.” (R:4312). Then per paragraph 8, “a transfer made by a debtor is: fraudulent as to a creditor whose claim arose before the transfer was made if the debtor made the transfer without receiving reasonably equivalent value in exchange and the debtor was insolvent at the time of the transfer.” (R:4312-13).

The review of a transfer includes a non-exclusive list of badges of fraud.⁴ These include a transfer to an insider, a debtor retaining control post-transfer, concealment of the transfer, the transfer being made after the

⁴The Second Amended Supplemental Complaint took extra steps to clarify the difference between common fraud and fraudulent transfers based on earlier considerations by the trial court mixing the two and requiring common fraud’s specificity in pleading.

debtor was sued or threatened with suit, a transfer of substantially all of the debtor's assets, the value paid, the debtor being insolvent or becoming insolvent shortly after a transfer was made or obligation incurred, the transfer happening around the time of incurring substantial debt, or the transfer of essential business assets. *Mane FL Corp. v. Beckman*, 355 So. 3d 418, 425-26 (Fla. 4th DCA 2023). This situation and these badges readily apply to Eugene.

Intra-familial fraudulent transfers are not unknown in Florida. In *Mane*, a father helped a son transfer proceeds for the sale of a condo with undisclosed mold issues. Then in *Manchec v. Manchec*, 951 So. 2d 1026 (Fla. 4th DCA 2007) a father transferred his ownership interest in a plane to his son to reduce his ability to pay a child support arrearage, which was set aside by the court.

The asset transfer to a successor entity meant that rather than just being a title transfer it becomes a distribution and reinvestment. This change results in an intervening value transfer to Eugene which still constitutes a fraudulent transfer.

JNC, the did not spring into being with CSI's assets, JNC sucked essentially anything and everything out of CSI, leaving CSI an empty husk without paying fair value for what was removed. *Laboratory Corporation of*

America v. Professional Recovery Network, 813 So. 2d 266 (Fla. 5th DCA 2002) involved intertwined fraudulent transfer and successor liability claims that were allowed to proceed following a reversal on summary judgment.⁵ Moreover, *Kelly v. American Precision Industries, Inc.*, 438 So. 2d 29 (Fla. 3d DCA 1983) recognized that a plaintiff could go directly against a stockholder or parent corporation when, among other situations, a subsidiary has been stripped of its assets or there is unjust loss or injury to a claimant from a subsidiary's insolvency.

During the September 6, 2023 hearing, Eugene's and JNC's shared counsel stated "[t]he fraudulent transfer claim against JNC, fine. If they want to pursue the \$100,000, fine. Go for it." (R:4393). This was an attempt by counsel to reframe the extent of the claims at issue and limit damages like a lizard detaching its tail to preserve the main body as the aggregate value transferred was likely far greater.

The items listed in the supplemental complaint were done in an attempt to appease the unwarranted demand for greater specificity in the pleading. Due to Ash's and CSI's extreme refusal to comply with

⁵The manner by which the directors in *P & S Co. LLC v. SJ Mak, LLC*, 254 So. 3d 535 (Fla. 3d DCA 2018) fraudulently transferred assets to their family allowed liability to attach to them, and by the same token the manner in which Eugene enabled the receipt of CSI's assets should have a similar direct cost.

discovery, leading to sanctions and eventually a judgment on liability, Thermo has never had a total picture on what CSI owned or transferred. However, a fraudulent transfer claim does not require the sort of specificity required of common law fraud. In *Yaralli, supra* at 787, the claimed transfers included clients, tangible assets, goodwill, business contacts, “and the like.” The underlying action’s claims about transfers included “all CSI assets used in the cell tower construction business, including construction equipment, trucks and other miscellaneous construction equipment as reflected on the attached lists, CSI customers, and CSI goodwill.” (R:4312). The sum total value of all this is treated as a value that applies to Eugene as a transferee.

The capstone to the defects requiring reversal in these supplementary proceedings is the deficiency in the dismissal judgment itself. The judgment contains no findings or reasons for the dismissal other than to state “[f]or the reasons stated orally in open Court, Counts II (Fraudulent Transfer) and V (Civil Conspiracy) are dismissed with prejudice.” (R:4375). Lack of findings can generally frustrate appellate review.

If the language “[f]or the reasons stated orally in open Court” were to be treated as sufficient, then the transcript of the hearing shows that to be

deficient order under *Perlow v. Berg-Perlow*, 875 So. 2d 383 (Fla. 2004). While the undersigned is normally reluctant to make a *Perlow* argument, the trial court's "reasons stated" should definitely show an improper delegation in the judgment. After announcing which of Thermo's counts were being dismissed with prejudice, the court's sole stated basis for ruling was "[t]he Court adopts Mr. Kirk's arguments made herein and the case law cited. Mr. Kirk is to prepare the order." (R:4403). This perforce also includes all of counsel's arguments that were beyond the four corners of the complaint. The whole cloth adoption of not just a proposed order, but to instead outright adopt counsel's arguments is not an appropriate exercising of judicial authority. This became all the more problematic because the court was passive during the hearing rather than actively questioning counsel or the parties.

From apparently not recognizing valid causes of action and not considering the real requirements to prove fraudulent transfers, to the court's lack of appreciation in taking the statements in the Second Amended Supplemental Complaint as true through the resulting oral ruling and written judgment, reversible problems afflict the underlying supplemental proceeding. A proper review of the common allegations and counts for conspiracy as well as fraudulent transfer merits a reversal of the


dismissal with prejudice.

CONCLUSION

Based on the record in this case, the authorities cited, and the arguments made herein, it is respectfully requested that the Court reverse the Order Granting Dr. Eugene Mascarenhas' Motion to Dismiss Plaintiff's Second Amended Supplemental Complaint and allow the dismissed with prejudice counts against Eugene for conspiracy and fraudulent transfer to proceed.


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CERTIFICATE OF SERVICE


I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using the Florida E-Portal and also served by email this 24th day of June, 2024 on: Donald R. Kirk, Esq. (dkirk@carltonfields.com); Meredith A. Chaiken, Esq. (meredith@granerlaw.com, ivy@granerlaw.com, kristin@granerlaw.com); Luis Konski, Esq. (lkonski@fowler-white.com, eruisanchez@fowler-white.com); Daniel A. Milian, Esq. (dmilian@fowler-white.com); Steven J. Gutter, Esq., (steven@sjgutterlaw.com, tara@sjgutterlaw.com); and by email and U.S. mail on Ash Mascarenhas, individually, and as corporate representative of Civil Solutions Incorporated, Crystal Falls and Investments LLC, and A-Tech, LLC (ash@crystalfallsllc.com) 6540 Pine Lane, Vero Beach, Florida 32967.


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CERTIFICATE OF FONT AND E-FILING COMPLIANCE

The undersigned counsel certifies that the brief complies with font requirements of Fla. R. App. P. 9.210(a)(2) as it is computer generated using Arial 14-point font and does not exceed the word count limits.

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