Opinion issued January 19, 2012.

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00113-CV

TYCO VALVES & CONTROLS, L.P., AND TV&C GP HOLDINGS, INC., Appellants

V.

ARSENIO COLORADO, STEVEN CRAIG, UMIT DAVULCU, RICHARD GONZALES, LANNY HEINRICH, LEONARD HILL, ANDY HUYNH, CHRIS KAHRIG, LAY KEONAKHONE, GREG LAMBOUSY, TUNG LE, CHRIS LUCKEY, FERNANDO MACIAS, JORGE MARTINEZ, RAUL MARTINEZ, KENNETH NASH, JIMMY PHOUMLAVANH, AND SOUK VONGSAMPHANH, Appellees

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On Appeal from the 125th District Court
Harris County, Texas
Trial Court Case No. 0819895

DISSENTING OPINION

I join the lead opinion's conclusion that this case is not preempted by ERISA, however, because I believe that Dresser Rand is not the "successor" to Tyco, I dissent. I would affirm the judgment of the trial court.

The Retention Incentive Agreements ("RIAs") provided that the Gimpel employees were to receive severance if they were not offered comparable employment with Tyco. The parties to the RIAs were Tyco Valves and Controls ("Tyco"), its successors and assigns, and the named employee in each RIA.

The Gimpel employees were not offered employment with Tyco after the sale of the plant. They were, however, offered employment with Dresser Rand, the company that bought the Gimpel Unit. Thus the only way to find that Tyco did not breach its contract with the Gimpel employees when it failed to pay the severance promised in the RIAs is to somehow find that Dresser Rand is the "successor" of Tyco.

The lead opinion makes this leap, despite that fact that Dresser Rand only bought an asset of Tyco, the Gimpel Unit, and that Tyco remained a corporation after its sale of the Gimpel Unit. It makes this leap despite the fact that the Asset Purchase Agreement specifically provided that Dresser Rand would not assume liability for:

> (i) any wages, salary, severance, bonuses . . . (ii) any duties, obligations or liabilities arising under any employee benefit plan, policy, or practice . . . or (iii) any other amounts due to any employees or former employees of the Business, in each case which accrue or arise prior to the Closing Date . . . .[1]

It makes this leap despite the fact that, pursuant to the Asset Purchase Agreement, after a prospective employee accepted an offer of employment with Dresser Rand, Tyco was to terminate that employee and ***retain*** responsibility for any severance or termination obligations due to the employee.[2]

In Texas, the term "successor corporation" has long been associated with the entity that succeeds to the property and corporate rights of a corporation. *See Thompson v. N. Tex. Nat'l Bank*, 37 S.W. 2d 735, 739 (Tex. Comm'n App. 1931, holding approved). A "successor corporation" is normally used in respect to "corporations becoming invested with the rights and assuming the burdens of another corporation by amalgamation, consolidation, or duly authorized legal succession." *Procter v. Foxmeyer Drug Co.*, 884 S.W.2d 853, 861 (Tex. App.—Dallas 1994, no writ). Furthermore, this Court has held that "[t]he term

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1 Asset Purchase Agreement, Section 1.5(b).

2 Asset Purchase Agreement, Section 4.1(d) ("Notwithstanding anything to the contrary contained in this Agreement, [Tyco] shall be solely responsible for the payment of any and all compensation, retention, separation, severance or similar payments due or to become due to any employee of [Tyco] (including any Prospective Employee or any Hired Employee) pursuant to any agreement, arrangement, commitment, applicable law, plan or course of dealing between such employee and [Tyco], including without limitation any termination payments or termination obligations arising in connection with this Agreement.").

'successor' has . . . been defined as 'one who takes the place that another has left, and sustains the like part or character.'" *Enchanted Estates Cmty. Ass'n, Inc. v. Timberlake Improvement Dist.*, 832 S.W.2d 800, 803 (Tex. App.—Houston [1st Dist.] 1992, no writ).

In this case, Dresser Rand did not become invested with the rights and/or assume the burden of Tyco by "amalgamation, consolidation, or duly authorized legal succession," nor did it take the place of Tyco. *Procter*, 884 S.W.2d at 861. Instead, it only bought assets from Tyco. Indeed, even within the context of hiring the Gimpel employees, it did not "assume the burden" of Tyco. *See id.* Dresser Rand merely agreed to hire Tyco's employees. It specifically did *not* take on Tyco's burdens concerning these employees. In fact, Dresser Rand specifically refused to assume liability for wages, salary, severance and bonuses due to the Gimpel employees, as well as for any duties or obligations arising under any employee benefit plans or severance packages. *See* Asset Purchase Agreement, Sections 1.5(b) and 4.1(d).

An agreement on the part of a corporation to hire employees pursuant to an asset acquisition with a second corporation is not tantamount to becoming the "successor" of that second corporation. The fact is that, pursuant to the Asset Purchase Agreement itself, Tyco was obligated to and did fire the Gimpel employees once Dresser Rand hired them. When Tyco fired the Gimpel

employees, Tyco remained liable to them for the severance it had promised them, as the trial court found. Because I would affirm the trial court's judgment, I dissent.

Jim Sharp
Justice

Panel consists of Justices Keyes, Sharp, and Massengale

Justice Sharp, dissenting.