UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2014

September Term, 2014

DR. JANI ASSOCIATES, LLC

v.

DANIEL S. SMITHPETER, M.D.

Meredith,
Nazarian,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: October 14, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In the spring of 2012, Dr. Jani Associates, LLC, appellant, entered into a contract to purchase all assets of a professional corporation named Daniel S. Smithpeter, M.D., P.C., which corporation was owned by Dr. Daniel Smithpeter, appellee. Two years later, Dr. Jani Associates, LLC, filed suit against Dr. Smithpeter in the Circuit Court for Wicomico County, asserting claims for breach of contract and intentional misrepresentation relative to an undisclosed threat of litigation. After Dr. Smithpeter objected to the Wicomico County venue, the case was transferred to the Circuit Court for Baltimore City because Dr. Smithpeter asserted that he was then residing "on a boat that has been piered at Baltimore Marine Centers at Harborview in Baltimore City, Maryland."

Dr. Smithpeter also moved for dismissal of the complaint (as well as the first amended complaint) for failing to state a claim upon which relief could be granted. After a hearing on that motion, the Circuit Court for Baltimore City granted the motion and dismissed the case with prejudice. This appeal followed.

QUESTIONS PRESENTED

Dr. Jani Associates, LLC, presents two questions for our review:

1. Did the trial court err in finding Jani Associates did not state a claim for breach of contract against Dr. Smithpeter?

2. Did the trial court err in finding Jani Associates did not state a claim for intentional misrepresentation against Dr. Smithpeter?

We answer both "no" to both questions, and affirm the judgment entered by the Circuit Court for Baltimore City.

FACTS AND PROCEDURAL HISTORY

The first amended complaint alleged the following. In 1998, Dr. Daniel Smithpeter, a psychiatrist, formed a Maryland professional corporation named "Daniel S. Smithpeter, M.D., P.C.," for the purpose of providing mental-health services in communities on the Eastern Shore. Dr. Smithpeter's corporation operated under the tradename "Delmarva Family Resources," and had clinics in Wicomico, Dorchester, and Queen Anne's Counties. In late 2011, Dr. Smithpeter's license to practice medicine was suspended by the Maryland Board of Physicians.[1]

In 2003, Dr. Niranjan N. Jani, formed a limited liability company named "Dr. Jani Associates, LLC," to practice medicine in Maryland. This entity provided medical services in Wicomico County.

By written contract entered into on or about April 12, 2012, Dr. Jani Associates, LLC, agreed to purchase all assets of "Daniel S. Smithpeter, MD PC D/B/A Delmarva Family Resources." The agreement was signed on April 10, 2012, by Dr. Jani, as the managing member of the LLC, and the contract stated in Subsection I that the effective date of the agreement was April 11, 2012, but the signature page reflects that the contract was not executed by the seller until April 12, 2012, when Dr. Smithpeter signed as "Principal" of Daniel S. Smithpeter, MD PC D/B/A Delmarva Family Resources. A copy of the written agreement was attached to, and incorporated by reference into, the first amended complaint.

[1] Dr. Smithpeter's medical license has since been reinstated.

In the first amended complaint, appellant alleged that Dr. Smithpeter personally failed to disclose the fact that Tyantha Randall had threatened to file a suit against the corporation "arising from the P.C.'s rescission of its offer of employment to Ms. Randall." The asset sale agreement included a representation of no-known potential claims in Section IV, subsection C, captioned "Claims and Litigation," which stated:

> There are no claims, actions, suits, proceedings or investigations pending or, to the knowledge of Seller, threatened against Seller or any of its properties or businesses, at law or in equity, before any court of [sic] Governmental agency, and Seller does not know of any circumstances which would give rise to any such claim, action, suit, proceeding or investigation. Seller nor any of its properties is subject to any order, writ, injunction, decree or judgment of any court or Governmental agency.

In fact, Ms. Randall had sent Dr. Smithpeter a letter dated December 11, 2011, threatening legal action against the corporation, and she had filed suit against the corporation on April 2, 2012, although the summons was not served until sometime in May 2012.

The first amended complaint acknowledges that, "[n]owhere in the [sale agreement] does it suggest that the P.C.'s stock is being transferred to Jani Associates, thus indicating that upon the conclusion of closing under the [sale agreement], Jani Associates would own all the tangible assets of the P.C., as well as its trade name, corporate identity numbers for federal and state taxes and state medical licenses, **but not the entity itself**." (Emphasis added.) Nevertheless, the first amended complaint alleges, Dr. Jani elected to take several actions that would have been appropriate only if his LLC had in fact become the controlling shareholder of Daniel S. Smithpeter, M.D., P.C., including the following:

12. Shortly after closing, Niranjan N. Jani, M.D. ("Dr. Jani") individually executed documents with the State of Maryland changing the name of the [Daniel S. Smithpeter, M.D., P.C.] to "Delmarva Family Resources, P.C." and later again executed documents changing the P.C. name to "Dr. Jani Associates." On both occasions Dr. Jani executed the State corporate documents as President and Secretary and indicated that both the Board of Directors and Shareholders approved the name change.

13. In addition to changing the P.C.'s name, Dr. Jani changed the resident agent to [his attorney who had drafted the asset sale agreement].

14. Despite Dr. Jani unilaterally exerting total control over the P.C. in an individual capacity, Dr. Smithpeter has never once, not even after being sued herein, challenged the actions of Dr. Jani with regard to the P.C.

* * *

22. Shortly after closing, Dr. Jani, individually and on behalf of Jani Associates began taking actions consistent with his owning the P.C.

23. On April 16, 2012, Jani Associates filed "Articles of Amendment for a limited liability company" with the State Department of Assessments and Taxation identifying "Daniel S. Smithpeter, MD, PC" "as the limited liability company," and reciting that "Dr. Jani Associates, LLC owns one hundred percent (100%) of Daniel S. Smithpeter, M.D., P.C. d/b/a Delmarva Family Resources." The [asset purchase agreement] was attached to the Articles filed with the State.

24. On the same day, a bank account was opened at M & T Bank in the name of "Dr. Jani Associates, LLC t/a Delmarva Family Resources," and using the P.C.'s Federal Tax Identification Number ("EIN") purchased as part of the terms of the Contract.

25. Despite service of process of the Randall Claim, neither Dr. Smithpeter, nor the P.C. initially participated in the litigation and, on a motion by Ms. Randall, the Court entered [default] judgment against the P.C. on July 2, 2012.

26. A hearing on the issue of damages was later held on October 5, 2012. Dr. Smithpeter for the first time since closing under the Contract appeared at the hearing without counsel and holding himself out as the owner of the P.C.,

> argued against the Randall Claim. At the conclusion of the hearing, the Court entered judgment against the P.C. in the amount of $93,000.

As appellant stipulated at the hearing on the motion to dismiss, the summons issued in the Randall litigation was actually served upon Dr. Jani's wife (Sushma Jani) on May 10, 2012. But appellant ignored the Randall complaint, and Ms. Randall obtained a default judgment against Daniel S. Smithpeter, M.D., P.C., in the amount of $93,000.

In attempting to collect payment of the judgment, Ms. Randall served a writ of garnishment on M&T Bank "as to any accounts being held [by the bank] in the name of the P.C." Because the bank account Dr. Jani opened on April 16, 2012, bore the same EIN as the Smithpeter, P.C., the Circuit Court for Wicomico County determined in the garnishment proceedings in the Randall case that the bank account Dr. Jani had opened was subject to Ms. Randall's garnishment relative to the judgment she had obtained against Daniel S. Smithpeter, M.D., P.C. Consequently, the funds Dr. Jani had accumulated in that M&T Bank account were seized to pay Ms. Randall's judgment.

In November 2013, Dr. Jani Associates, LLC, filed a two-count complaint against Dr. Smithpeter, asserting in Count I that Dr. Smithpeter had breached the asset sale agreement because he knew of the potential Randall claim at the time of closing, yet failed to disclose it, and he signed the contract that included representations that there were no known claims against the professional corporation. In Count II, appellant alleged that Dr. Smithpeter intentionally misrepresented that there were "no claims in existence at the time of closing" to induce Dr. Jani Associates, LLC to proceed to closing, and that, as a

consequence of its justifiable reliance upon that misrepresentation, Dr. Jani Associates, LLC, had "suffered damages as a direct result of the reliance upon the misrepresentation."

Dr. Smithpeter filed a motion to dismiss, arguing that, because Dr. Smithpeter personally was not a party to the agreement with appellant, there could be no personal liability for a breach of that contract's provisions. With respect to the intentional misrepresentation alleged in Count II of the first amended complaint, Dr. Smithpeter argued, among other points, that the allegations in the complaint demonstrated that all of appellant's alleged damages flowed from the unilateral actions taken by Dr. Jani after closing.

At the hearing on appellee's motion to dismiss, the circuit court ruled from the bench, and explained that it was granting the motion for the following reasons:

> [THE COURT]: . . . [T]his case is a bit of a mess. . . .
>
> But I cannot get past the point that there are a number of inconsistencies in the course of conduct involved in this case. It would certainly have made perfectly good sense, particularly when you have the sale of a --- assets of a business, or sale of a medical practice where the owner has had his license suspended, that you would do that, you would structure that as an asset purchase, and you'd be pretty clear about that. And the reason is obviously that you don't know what --- I don't know what the basis is for [Dr. Smithpeter's license] suspension. But if there was a patient component, as an example to the suspension, you don't want to take on whatever malpractice or other kinds of liability there may be, or other kinds of business liability, whatever. So structuring it as an asset purchase makes perfectly good sense.
>
> Had it been simply an asset purchase, and had all the course of conduct been consistent with an asset purchase, then even though there might have been a problem with the warranty in that the warranty specifically refers to threatened proceedings, and not just actual filings of things, it would have been of no importance, because they --- [Ms. Randall] could still not have

gotten at the new purchaser, because their new purchaser would not have signed on for any of the liability. So the claim would have been only against the surviving corporation, which at that point would have had minimal assets. In fact, as I understand, since the accounts would have been purchased, it would have had no assets. . . . It would have been a dry well. So what changes things, and **what changes things is the additional step of [Dr. Jani] going to the SDAT and assuming ownership, if you will, of the PC.**

* * *

I believe that the intent of the contract is what the contract itself purports to state, which is **this was an asset sale**. And although the language about representations and warranties, which I grant is confusing, although it does refer to threatened actions, had the contract been honored on the face of the contract, it would have been of no moment because there would not have been liability in any event, particularly where the --- it appears that the ---- whatever the dispute was, was literally with the PC, which remained in existence after the sale.

It was the unjustified --- I'm not going to say theft, because I think that's more pejorative than it needs to be, **but it is the subsequent conduct [of Dr. Jani] which was inconsistent with what was purchased in the agreement that essentially created the liability, which is the subject of this lawsuit. That was not something that was agreed to by [Dr. Smithpeter] in this case.** And as a result, I am not comfortable with the notion that [Dr. Smithpeter is] going to be liable for that conduct.

And although, as I said, there are many issues with this, and I have to take facts as they are most favorable to [Dr. Jani Associates, LLC], nevertheless it does seem to me that **under the facts of this case, I don't think you would be able to establish liability on the part of [Dr. Smithpeter]**, under the specific circumstances of this case. For that reason, I'm going to be granting the Motion to Dismiss . . . Counts I and II, and this will be with prejudice . . . .

(Emphasis added.)

This appeal followed.

STANDARD OF REVIEW

In *Higginbotham v. Public Service Com'n of Maryland*, 171 Md. App. 254, 264-65 (2006), we said:

> The following standard of review applies on appeal from the grant of a motion to dismiss:
>
> > "The proper standard for reviewing the grant of a motion to dismiss is whether the trial court was legally correct. In reviewing the grant of a motion to dismiss, we must determine whether the complaint, on its face, discloses a legally sufficient cause of action." In reviewing the complaint, we must "presume the truth of all well-pleaded facts in the complaint, along with any reasonable inferences derived therefrom." "Dismissal is proper only if the facts and allegations, so viewed, would nevertheless fail to afford plaintiff relief if proven."
>
> *Britton v. Meier,* 148 Md. App. 419, 425, 812 A.2d 1082 (2002) (citations omitted) (quoting *Fioretti v. Md. State Bd. of Dental Exam'rs,* 351 Md. 66, 71–72, 716 A.2d 258 (1998); *Faya v. Almaraz,* 329 Md. 435, 443, 620 A.2d 327 (1993)).

DISCUSSION[2]

[2] In appellee's brief in this Court, he urges us to apply the doctrine of judicial estoppel to bar appellant from attributing the loss to Dr. Smithpeter while simultaneously pursuing a legal malpractice claim against the attorney who drafted the asset purchase agreement and provided other legal advice that led to Ms. Randall's successful garnishment of funds of appellant. Appellee asserts that, in the legal malpractice litigation, Dr. Jani has alleged that his losses were caused by his attorney's failure "to properly and adequately prepare" the sales agreement, and to take certain post-sale actions, including filing Articles of Transfer with the State Department of Assessments and Taxation, and ensuring that the Smithpeter P.C.'s tax identification number was not used on the M & T account opened by Dr. Jani on April 16, 2012. But, because the basis of the appellee's claim for judicial estoppel does not appear in the circuit court's record in this case, we decline to address the issue in this appeal. *See Dashiell v. Meeks*, 396 Md. 149, 176 (2006) (recognizing the general rule that an appellate court will not "travel outside the record of the case before it" to take judicial notice of proceedings in other cases).

I. Breach of Contract

Appellant urges us to rule that Dr. Smithpeter could be personally liable for a breach of the asset sale agreement he signed on behalf of his professional corporation. We agree with the circuit court that the first amended complaint provides no basis for Dr. Smithpeter to have personal liability for a breach of that contract.

The contract plainly states that it is an agreement "by and between Dr Jani Associates, LLC (hereinafter referred to as 'Buyer'), a corporation [sic] organized under the laws of the State of Maryland and Daniel S. Smithpeter, MD PC D/B/A Delmarva Family Resources (hereinafter referred to as 'Seller')." The signature page reflects a single signature on behalf of the seller: beneath the words "Daniel S. Smithpeter, MD. PC D/B/A Delmarva Family Resources" is a signature line under which the words "By: Dr. Daniel S. Smithpeter, Principal" appear, and then beneath that signature line, the corporation's name is repeated. Dr. Smithpeter signed solely in a representative capacity as an agent for a disclosed principal, and incurred no personal liability in doing so. *See, e.g., Curtis G. Testerman Company v. Buck*, 340 Md. 569, 576-77 (1995) ("The rule in Maryland is clear that 'if an agent fully discloses the identity of his principal to the third party, then, absent an agreement to the contrary, he is insulated from liability.'" (Quoting *A.S. Abell Co. v. Skeen*, 265 Md. 53, 56 (1972)).

The circuit court did not err in granting the motion to dismiss Count I of the first amended complaint.

II. Intentional Misrepresentation

Appellant correctly observes that a corporate officer may be held personally liable for the officer's own tortious conduct. *Metromedia v. WCBM Maryland*, 327 Md. 514, 519-20 (1992). But Dr. Smithpeter argues that, even if the appellant adequately alleged a failure on his part to disclose the fact that Ms. Randall had threatened to sue the corporation, there would have been no loss to the appellant had it not been for the actions Dr. Jani took after the sale, such as assuming the role of a successor corporation, opening a bank account using the defunct P.C.'s tax identification number, failing to take any action after Sushma Jani was served with a summons in the Randall litigation, and leaving funds on deposit in the bank account after gaining actual knowledge of the Randall claim.

The elements of an intentional misrepresentation claim are:

> "(1) that a representation made by a party was false;
>
> (2) that either its falsity was known to that party or the misrepresentation was made with such reckless indifference to truth to impute knowledge to him;
>
> (3) that the misrepresentation was made for the purpose of defrauding some other person;
>
> (4) that **that person not only relied upon the misrepresentation but had the right to rely upon it with full belief of its truth**, and **that he would not have done the thing from which damage resulted if it had not been made**; and
>
> (5) that that person **suffered damage directly resulting from the misrepresentation**."

Brass Metal Products, Inc. v. E-J Enterprises, Inc., 189 Md. App. 310, 353 (2009) (spacing and emphasis added) (quoting *B.N. v. K.K*., 312 Md. 135, 149 (1988)).

Causation of actual damages is an element of a claim for intentional misrepresentation that must be proved by a plaintiff, and must be alleged in a complaint. "[I]t is clear in Maryland that in order to recover for fraud, the plaintiff must show not only that he would not have performed the act from which the injury resulted but for the misrepresentation, but also that the fact misrepresented was the proximate cause of the injury." *Lustine Chevrolet v. Cadeaux*, 19 Md. App. 30, 35 (1973).

As we recognized in *Martin v. TWP Enterprises Inc*., 227 Md. App. 33, 49-53 (2016), the purchaser of a corporation's assets is ordinarily not liable for claims against the seller:

> Generally, "a corporation which acquires the assets of another corporation is not liable for the debts and liabilities of the predecessor corporation."*Baltimore Luggage Co. v. Holtzman,* 80 Md. App. 282, 290, 562 A.2d 1286 (1989); *see also Ramlall v. MobilePro Corp.,* 202 Md. App. 20, 34–35, 30 A.3d 1003 (2011); *Smith v. Navistar Intern. Transp. Corp.,* 737 F.Supp. 1446, 1448 (D.Md.1988); 15 Fletcher Cyc. Corp. § 7122 (2015) ("The general rule, which is well settled, is that where one company sells or otherwise transfers all of its assets to another company, the latter is not liable for the debts and liabilities of the transferor.").

In this case, the damage alleged in the first amended complaint was the successful garnishment in the Randall case that resulted in the seizure of funds appellant had accumulated in the checking account opened with references to Dr. Smithpeter's professional corporation. We see no possibility that a reasoning jury could rationally conclude that appellant's loss of those funds was directly caused by the alleged failure of Dr. Smithpeter to disclose the fact that Ms. Randall had threatened (or even initiated) litigation. Even if we assume the truth of all well-pleaded allegations in the first amended

complaint, appellant has not alleged facts that would permit a rational trier of fact to conclude that Dr. Smithpeter's alleged misrepresentation was the direct *cause* of appellant's funds being garnished by Ms. Randall.

It was conceded by appellant's counsel that Mrs. Jani was served with the summons in the Randall lawsuit on May 10, 2012, just 38 days after the Randall lawsuit was filed. Appellant acknowledges that Dr. Jani had actual notice of the Randall claim in its early stages, before there was a default determination of liability, and before any judgment was entered against Dr. Smithpeter's corporation. Appellant was fully aware by May 10, 2012, that Dr. Smithpeter's alleged assurances about the lack of outstanding or threatened claims could no longer be relied upon.

But, as the first amended complaint alleges, appellant took no action to protect its funds against possible successor liability. To the contrary, appellant undertook several actions that created the opportunity for Ms. Randall to garnish funds appellant had placed in the M&T Bank account.

Although appellant alleged in Count II of the first amended complaint that appellant "suffered damages as a direct result of the reliance upon the misrepresentation" of Dr. Smithpeter relative to the absence of threatened litigation, that sort of bald, conclusory allegation is not sufficient to establish the element of causation. *RRC Northeast, LLC v. BAA Maryland, Inc.,* 413 Md. 638, 644 (2010) ("bald assertions and conclusory statements by the pleader will not suffice"). Given the facts alleged in the first amended complaint regarding appellant's establishment of the M&T Bank account, the filings with the State

Department of Assessments and Taxation, and the failure to take any action to protect assets against Ms. Randall's claim even after being served with the summons, no reasonable trier of fact could reasonably conclude that Dr. Smithpeter's failure to disclose Ms. Randall's threatened suit was the cause of appellant's loss.

Accordingly, the motion to dismiss Count II was properly granted.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.