**COURT OF COMMON PLEAS**
**CLERMONT COUNTY, OHIO**

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| **RIVERHILLS BANK** | : | **CASE NO. 2017 CVH 01584** |
| Plaintiff | : | **Judge Jerry R. McBride** |
| vs. | : | **DECISION/ENTRY** |
| **GRASSWORKS LANDSCAPING INC., ET AL.** | : | |
| Defendants | : | |

Michael A. Galasso, counsel for the plaintiff Riverhills Bank, 7 West Seventh Street, Suite 1400, Cincinnati, Ohio 45202.

Kathleen D. Mezher, counsel for the defendant Zbest Landscape and Property Maintenance, LLC, 8075 Beechmont Avenue, Cincinnati, Ohio 45255.

This cause is before the court for consideration of the Bank's motion for summary judgment filed by the plaintiff Riverhills Bank on April 25, 2018. Oral arguments of counsel as to the motion were heard on July 27, 2018, after which time the court took the motion under advisement.

Upon consideration of the motion for summary judgment, the written and oral arguments of counsel, the record of this case, the evidence submitted for the court's consideration, and the applicable law, the court renders this written decision.

## UNDISPUTED FACTS

Susan Zwerin was the sole shareholder and founder of Grassworks Landscaping Incorporated (hereinafter referred to as "Grassworks"), which was formed in 2004.[1] She was the president and her husband was the vice president.[2] Grassworks serviced foreclosed, commercial, and residential properties, providing services such as mowing lawns, landscaping, and fertilization.[3]

Grassworks executed a promissory note to the plaintiff Riverhills Bank in relation to a loan of $100,000.[4] In a separate security agreement, Grassworks secured the loan with all of its assets.[5] Grassworks listed among its assets four motor vehicles and two trailers.[6]

Subsequently, Grassworks defaulted under the terms of the promissory note and loan agreement.[7] As of December 6, 2017, Grassworks owed the plaintiff a principal balance of $83,509.23, late charges of $145.94, accrued interest of $1,590.14, together with interest accruing thereafter at a rate of 6% per annum ($13.92 per diem), plus other amounts that would become due under the terms of the instruments.[8]

In or around 2017, 50% of Grassworks' business declined, making it difficult for it to make payments.[9] In August or September 2017, a creditor of Grassworks garnished

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[1] Susan Zwerin Dep., pg. 16.
[2] S. Zwerin Dep., pgs. 16-17.
[3] S. Zwerin Dep., pg. 20.
[4] Ex. B to Susan Zwerin Dep.
[5] Ex. B to Susan Zwerin Dep.
[6] Ex. C to S. Zwerin Dep.; S. Zwerin Dep., pg. 32.
[7] J. Leonardi Aff., ¶ 7.
[8] J. Leonardi Aff., ¶ 8.
[9] S. Zwerin Dep., pg. 17.

its bank account and also began sending certified letters to its customers, notifying the customers of its loan agreement with Grassworks.[10] The creditor attempted to redirect Grassworks receivables from its customers to pay the loan for which Grassworks was in default.[11] The efforts of the creditor, in turn, caused Grassworks to lose more customers.[12] Due to the difficulties created by the creditor, Grassworks ceased operations in September 2017.[13] Grassworks was ultimately unable to pay multiple creditors, including the plaintiff.[14]

Zwerin formed Zbest Landscape and Property Maintenance, LLC (hereinafter referred to as "Zbest") in September 2017, so that Grassworks' former customers could continue to write checks for the services they had received.[15] Zwerin is the sole member of Zbest.[16] Zbest has three part-time employees and uses two independent contractors.[17] Zbest provides services to bank-owned properties, such as cleaning homes, winterizing properties, mowing grass, removing snow, etc.[18] Its customers include Web Fair, Inc., Dr. Edward Parobek, Richard Godfrey, Truth Community Church, and Highlands Homeowners Association.[19] Web Fair and Highlands Homeowners Association were formerly Grassworks' customers.[20]

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[10] S. Zwerin Dep., pgs. 17-18.
[11] S. Zwerin Dep., pg. 18.
[12] S. Zwerin Dep., pg. 20.
[13] S. Zwerin Dep., pg. 17.
[14] S. Zwerin Dep., pg. 44; J. Leonardi Aff., ¶ 8.
[15] S. Zwerin Dep., pgs. 6, 44.
[16] S. Zwerin Dep., pg. 7.
[17] S Zwerin Dep., pgs. 7-9.
[18] S. Zwerin Dep., pgs. 9-11.
[19] S. Zwerin Dep., pg. 11.
[20] S. Zwerin Dep., pgs. 22-23.

The principal place of business for Zbest is Zwerin's home address.[21] However, its principal place of business was 1083 Ohio Pike until that property was surrendered to the plaintiff in December 2017.[22] Zbest has a bank account at Fifth Third.[23] Zbest now stores its assets in a storage space.[24] Most of the assets stored there previously belonged to Grassworks.[25]

Among Zbest's assets are four motor vehicles and two trailers.[26] The motor vehicles, which were previously listed by Grassworks as assets in 2015 and were titled to Grassworks, are as follows: (1) 2011 GMC VIN No. 1GT02XCGXBF125692, (2) 2008 Dodge VIN No. WD0PE745385300037, (3) 2007 Dodge VIN No. 3D6WH48AX7G804345, and (4) 2005 Chevrolet VIN No. 1GCHK29U15E132497.[27] Two of the trailers that were listed among Grassworks' assets in 2015 were also titled to it as well.[28] Grassworks used all of these motor vehicles and trailers for its business operations.[29] Grassworks transferred the titles of these vehicles to Zbest for no money or consideration.[30] Zwerin transferred the titles of the vehicles because she was concerned that her creditor, which had been collecting her account receivables for Grassworks, would attempt to seize the vehicles.[31] Grassworks has no income, no receivables, and no source from which to pay any creditors.[32]

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[21] S. Zwerin Dep., pg. 12.
[22] S. Zwerin Dep., pg. 12.
[23] S. Zwerin Dep., pgs. 15-16.
[24] S. Zwerin Dep., pg. 13.
[25] S. Zwerin Dep., pgs. 27-28.
[26] S. Zwerin Dep., pg. 15.
[27] Ex. C. to S. Zwerin Dep.; S. Zwerin Dep., pg. 32.
[28] Ex. C. to S. Zwerin Dep.; S. Zwerin Dep., pg. 32.
[29] S. Zwerin Dep., pgs. 38-39.
[30] Ex. D to S. Zwerin Dep.; S. Zwerin Dep., pg. 47.
[31] S. Zwerin Dep., pg. 47.
[32] S. Zwerin Dep., pg. 56.

## PROCEDURAL BACKGROUND

On December 15, 2017, the plaintiff Riverhills Bank filed suit against the defendant Zbest. The complaint included two causes of action against Zbest: (1) statutory fraudulent transfer and (2) successor liability.

The complaint also named several other defendants, including Grassworks Landscaping, Inc., Zbest Investments, LLC, Global Merchant Cash, Inc., and Corporation Service Company. These latter defendants failed to answer the complaint, and on April 6, 2018 the court issued a default judgment against them. The judgment was in the principal amount of $83,609.23, with accrued interest of $1,590.14, together with interest accruing from December 6, 2017 at the rate of 6% per annum ($13.92 per diem), plus the costs of this action.

The only remaining defendant, Zbest, filed its answer and counterclaim on January 5, 2018. Its counterclaim asks the court for a declaratory judgment finding that it is not liable for the debts of other entities and that the plaintiff cannot have a lien on any assets, whether tangible or intangible, including but not limited to all mowers and other equipment, or accounts receivable, currently owned by Zbest.

On April 25, 2018, the plaintiff filed a motion for summary judgment on its remaining claims against Zbest, as well as with relation to Zbest's counterclaim for a declaratory judgment. In terms of relief, the plaintiff requests in its motion (1) an order that it be permitted under R.C. 1336.07 to execute against business assets of Zbest to include four motor vehicles and two trailers through attachment and a levy, (2) for judgment against

Zbest finding it jointly and severally liable for the amounts Grassworks owes it, and (3) for an injunction under R.C. 1336.07(A)(3)(a) enjoining Zbest from transferring any of the assets at issue.

On May 9, 2018, a notice of bankruptcy was filed in this case. The bankruptcy is a Chapter 7 Bankruptcy regarding Zwerin as an individual. The bankruptcy stay enjoined the plaintiff from exerting control or taking possession of property in which Zwerin has an interest.

Zbest filed its response in opposition to the plaintiff's summary judgment motion on May 9, 2018, and the plaintiff filed its reply in support on May 22nd. The court held oral argument on the motion on July 27th, after which it took the motion under advisement.

## LEGAL STANDARD

The court must grant summary judgment, as requested by a moving party when:

> "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to the party opposing the motion."[33]

The court must view the evidence in a light most favorable to the nonmoving party.[34] Even the inferences drawn from the evidence and underlying facts must be

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[33] *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). *See Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144 (1993) (holding same); Civ.R. 56(C).
[34] *Welco Indus. Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 356, 617 N.E.2d 1129 (1993); *Willis v. Frank Hoover Supply*, 26 Ohio St.3d 186, 188, 497 N.E.2d 1118 (1986); *Williams v. First United Church of Christ*, 37 Ohio St.2d 150, 152, 309 N.E.2d 924 (1974).

construed in favor of the nonmoving party, such as inferences drawn from affidavits, depositions, etc.[35] A fact is material when, under the governing substantive law, the facts "might affect the outcome of the suit."[36]

Whether a genuine issue exists is answered by the following inquiry: Does the evidence present "a sufficient disagreement to require submission to a jury" or is it "so one-sided that the party must prevail as a matter of law"?[37] This threshold inquiry determines whether there are "any genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[38]

The movant bears the burden to show that no genuine issue exists as to any material fact, and it is entitled to judgment as a matter of law.[39] This burden requires the movant to "specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond."[40] "To this end, the movant must be able to point to evidentiary materials of the type listed in Civ.R. 56(C) that a court is to consider in rendering summary judgment."[41] If the movant fails to satisfy its initial burden, the motion for summary judgment must be denied.[42]

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[35] *Hannah v. Dayton Power & Light Co.*, 82 Ohio St.3d 482, 485, 696 N.E.2d 1044 (1998), citing *Turner v. Turner*, 67 Ohio St.3d 337, 341, 617 N.E.2d 1123 (1993).
[36] *Anderson v. Liberty-Lobby Inc.* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986).
[37] Id. at 251-52.
[38] Id. at 250.
[39] *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).
[40] *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus.
[41] *Heard v. Dayton View Commons Homes*, 2d Dist. No. 27706, 2018-Ohio-606, 106 N.E.3d 327, ¶ 7, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996).
[42] Id. *See HSBC Mtge. Serve. v. Williams*, 12th Dist. Butler No. CA2013-09-174, 2014-Ohio-3778, ¶ 8 (holding same).

However, if the movant satisfies this burden, then the nonmoving party has a "reciprocal burden" to set forth specific facts, beyond the allegations and denials in his pleadings, demonstrating that a "triable issue of fact" remains.[43] The duty of the nonmoving party is more than that of resisting the motion's allegations.[44] Instead, this burden requires the nonmoving party to "produce evidence on any issue for which [the nonmoving] party bears the burden of production at trial."[45] The nonmoving party must present documentary evidence of specific facts showing that there is a genuine issue for trial.[46] It may not rely on the pleadings or unsupported allegations.[47]

Under Civ.R. 56(C), the only evidence that may be considered when ruling on a motion for summary judgment is "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action."[48] The trial court maintains the sound discretion to admit or exclude relevant evidence.[49] When a document falls outside the enumerated categories in Civ.R. 56(C), the correct method to introduce the document is to incorporate it by reference into a properly framed affidavit.[50]

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[43] *Dresher*, 75 Ohio St.3d at 293.
[44] *Wells Fargo*, 2013-Ohio-855 at ¶ 25.
[45] (Citation omitted.) *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991), paragraph three of the syllabus; *See Welco Indus., Inc.*, 67 Ohio St.3d at 346 (holding same).
[46] *Williams*, 2014-Ohio-3778 at ¶ 8. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).
[47] Id.
[48] *See Wells Fargo*, 2013-Ohio-855 at ¶ 15, citing *State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-2010, 2011-Ohio-3904, ¶ 7 ("Civ.R. 56(C) provides an exclusive list of materials that a trial court may consider when deciding a motion for summary judgment.").
[49] *Green Tree Servicing, L.L.C. v. Roberts*, 12th Dist. Butler No. CA2013-03-039, 2013-Ohio-5362, ¶ 18, quoting *U.S. Bank v. Bryant*, 12th Dist. Butler No. CA2012-12-266, 2013-Ohio-3993, ¶ 10.
[50] *Martin v. Central Ohio Transit Auth.*, 70 Ohio App.3d 83, 89, 590 N.E.2d 411 (10th Dist.1990); *Biskupich v. Westbay Manor Nursing Home*, 33 Ohio App.3d 220, 222, 515 N.E.2d 632 (8th Dist.1986).

Opposing and supporting affidavits must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must affirmatively show that the affiant is competent to testify on the matters in the affidavit.[51] "Personal knowledge" is defined as "[k]nowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay."[52] "Absent evidence to the contrary, an affiant's statement that his affidavit is based on personal knowledge will suffice to meet the requirements of Civ.R. 56(E)."[53] Furthermore, if the affiant does not specifically state that he or she has personal knowledge, "personal knowledge may be inferred from the contents of the affidavit."[54]

By contrast, if certain statements in the affidavit "suggest that it is unlikely that the affiant had personal knowledge" of the facts, then "something more than a conclusory averment that the affiant has personal knowledge would be required."[55] Likewise, affidavits that merely set forth legal conclusions or opinions without stating supporting facts are insufficient to satisfy Civ.R. 56(E).[56]

Civ.R. 56(E) provides that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." Thus, documents referenced in the affidavit "must be attached to the affidavit."[57] If the affiant "relies" on

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[51] Civ.R. 56(E); *Wells Fargo v. Smith*, Blue Sky L. Rep. P 75.026, 2013-Ohio-855, ¶ 16 (12th Dist.).
[52] *Wells Fargo*, 2013-Ohio-855 at ¶ 16.
[53] Id., citing *Churchill v. G.M.C.*, 12th Dist. No. CA2002-10-263, 2003-Ohio-4001, ¶ 11.
[54] Id.
[55] Id., quoting *Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, ¶ 14.
[56] *Stamper v. Middletown Hosp. Assn.*, 65 Ohio App.3d 65, 69, 582 N.E.2d 1040 (12th Dist. 1989).
[57] *Wells Fargo*, 2013-Ohio-855 at ¶ 17, citing Civ.R. 56(E).

documents in the affidavit but fails to attach those documents, "the portions of the affidavit that reference those document[s] must be stricken."[58]

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must be resolved in favor of the nonmoving party.[59] Summary judgment is inappropriate when the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.[60]

## LEGAL ANALYSIS

### I. PLAINTIFF'S CLAIM FOR STATUTORY FRAUDULENT TRANSFER

"Ohio's Uniform Fraudulent Transfer Act, codified in R.C. Chapter 1336, creates a right of action for a creditor to set aside a fraudulent transfer of assets to the extent necessary to satisfy the creditor's claim."[61] "The Act defines certain types of transfers from a debtor to a transferee as fraudulent."[62] When the elements of R.C. Chapter 1336 are met, fraud is imputed.[63]

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[58] Id. at ¶ 16, citing *Third Federal S. & L. Assn. of Cleveland v. Farno*, 12th Dist. No. CA2012-04-028, 2012-Ohio-5245, ¶ 10. *See State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-010, 2011-Ohio-3904 (striking portions of affidavit where documents were reviewed and relied upon in drafting affidavit but not attached to the affidavit or served with it).
[59] *Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.
[60] *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150 (1985).
[61] *Kingston of Miamisburg LLC v. Jeffery*, 2d Dist. Montgomery No. 28087, 2019-Ohio-1905, ¶ 17, citing *UAP-Columbus JV326132 v. Young*, 10th Dist. Franklin No. 09AP-646, 2010-Ohio-485, ¶ 25.
[62] *DiBlasio v. Sinclair*, 7th Dist. Mahoning No. 08-MA-23, 2012-Ohio-5848, ¶ 33, citing R.C. 1336.04(A) & R.C. 1336.05.
[63] *Kingston of Miamisburg LLC*, 2019-Ohio-1905 at ¶ 17, citing *In re Youngstown Osteopathic Hosp. Assn.*, 280 B.R. 400, 408 (Bankr.N.D.Ohio 2002).

"R.C. 1336.05 governs fraudulent transfers as to creditors whose claims arose before a transfer was made."[64] R.C. 1336.05(A) provides:

> "A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation."[65]

Thus, establishing a claim under R.C. 1336.05(A) "requires both prongs: lack of reasonably equivalent value and insolvency."[66] As used in R.C. Chapter 1336, a "debtor is insolvent if the sum of the debts of the debtor is greater than all of the assets of the debtor at a fair valuation", and a "debtor who generally is not paying his debts as they become due is presumed to be insolvent."[67] Importantly, R.C. 1336.05(A) is silent on the debtor's intent, which need not be proved.[68]

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[64] *United Bank, Div. of the Park Natl. Bank v. Expressway Auto Parts, Ltd.*, 5th Dist. No. 15CA51, 2015-Ohio-4554, 49 N.E.3d 776, ¶ 39. *See Kingston of Miamisburg LLC*, 2019-Ohio-1905 at ¶ 18, citing *E. Sav. Bank v. Bucci*, 7th Dist. Mahoning No. 08 MA 28, 2008-Ohio-6363, ¶ 93 ("As to a debt that existed when the debtor made the contested asset transfer, a creditor may prove that the transfer met the R.C. 1336.05(A) elements, and, thus, was a fraudulent transfer as statutorily defined."); *First Fin. Bank v. Combs*, 12th Dist. Butler No. CA2013-02-024, 2013-Ohio-4126, ¶ 12 ("R.C. 1336.05 specifically addresses claims arising before the transfer or obligation occurred.").

[65] R.C. 1336.05(A).

[66] *Individual Business Servs. v. Carmack*, 2d Dist. Montgomery No. 24085, 2011-Ohio-1824, ¶ 69. *See E. Sav. Bank v. Bucci*, 7th Dist. Mahoning No. 08 MA 28, 2008-Ohio-6363, ¶ 94, citing R.C. 1336.05(A) (summarizing fraudulent transfer under R.C. 1336.05(A): "a transfer made by a debtor is fraudulent if the debtor made the transfer without receiving a reasonably equivalent value in exchange for the transfer and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer.").

[67] R.C. 1336.02(A).

[68] *Kingston of Miamisburg LLC*, 2019-Ohio-1905 at ¶ 20. *See Commonwealth Land Title Ins. Co. v. Choice Title Agency, Inc.*, 9th Dist. Lorain No. 11CA009981, 2012-Ohio-2824, ¶ 11, citing *Ford v. Star Bank, N.A.*, 4th Dist. No. 97CA39, 1998 WL 553003, *4 (Aug. 27, 1998) ("A creditor does not need to prove intent on the part of the transferee to establish a claim for fraudulent conveyance * * *.").

"If a transfer is fraudulent, then a creditor has the right to sue the original transferee and any subsequent transferee for the value of the transferred property, subject to certain defenses."[69] The statute is designed to allow for a remedy against the transferee, as opposed to the debtor, "because the debtor is judgment-proof and the transfer was made to hide the property from the creditor in most fraudulent transfer cases, which is why the transfer is defined as fraudulent in the first place."[70]

R.C. 1336.07 "guides courts regarding what a creditor may recover in an action against a debtor who has engaged in fraudulent conveyances."[71] R.C. 1336.07 provides, in relevant part:

> "(A) In an action for relief arising out of a transfer or an obligation that is fraudulent under section 1336.04 or 1336.05 of the Revised Code, a creditor or a child support enforcement agency on behalf of a support creditor, subject to the limitations in section 1336.08 of the Revised Code, may obtain one of the following:
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> (1) Avoidance of the transfer or obligation to the extent necessary to satisfy the claim of the creditor;
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> (2) An attachment or garnishment against the asset transferred or other property of the transferee in accordance with Chapters 2715. and 2716. of the Revised Code;
>
> (3) Subject to the applicable principles of equity and in accordance with the Rules of Civil Procedure, any of the following:
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> (a) An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

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[69] *DiBlasio*, 2012-Ohio-5848 at ¶ 33, citing *Esteco, Inc. v. Kimpel*, 7th Dist. No. 07 CO 3, 2007–Ohio–7201, ¶ 8. *See Kingston of Miamisburg LLC*, 2019-Ohio-1905 at ¶ 21, quoting *Esteco, Inc.*, 2007-Ohio-7201 at ¶ 8 (holding same).

[70] *Esteco, Inc.*, 2007-Ohio-7201 at ¶ 9.

[71] *Individual Business Servs. v. Carmack*, 2d Dist. Montgomery No. 25286, 2013-Ohio-4819, ¶ 43.

(b) Appointment of a receiver to take charge of the asset transferred or of other property of the transferee;

(c) Any other relief that the circumstances may require."[72]

In examining the present case, there are no genuine issues of material fact and the plaintiff is entitled to judgment as a matter of law on its fraudulent transfer claim because reasonable minds can only conclude that Zbest has made a fraudulent transfer as defined in R.C. 1336.05(A). The transfer of the four motor vehicles and two trailers at issue is fraudulent because Zbest was insolvent when it transferred the vehicles without reasonably equivalent value.[73] It is undisputed that, at the time of the transfer, Zbest was insolvent, as it had no income, no receivables, and no source to pay any of its creditors. Indeed, the transfer was made to protect the vehicles from Grassworks' creditors. Further, Zbest did not pay any consideration for the vehicles, and thus Grassworks did not receive their reasonably equivalent value. Because both prongs of R.C. 1336.05(A) are satisfied, fraud is imputed upon Grassworks, and the plaintiff is entitled to the remedies available in R.C. 1336.07(A) that it has requested.

Zbest has offered several unavailing arguments as to why the plaintiff should not receive relief for fraudulent transfer. At oral argument, counsel argued that Zwerin did not have fraudulent intent. However, as cited above, fraudulent intent is not a required element under R.C. 1336.05(A). Thus, Zwerin's intent is immaterial.

Second, Zbest has argued that the plaintiff cannot receive the assets at issue because the plaintiff is not named as a lienholder on the certificates of title for the assets. However, R.C. 1336.07 does not require the plaintiff to have been named as a lienholder

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[72] R.C. 1336.07(A).
[73] R.C. 1336.05(A).

on certificates of title for assets that were fraudulently transferred in order to receive a remedy under R.C. 1336.07(A). Moreover, Zbest has not identified any case law indicating otherwise.

Lastly, Zbest posits that Zwerin's bankruptcy stay protects the assets of Zbest at issue. This argument is unavailing. Property of a limited liability company, like Zbest's assets, is required to be owned and held by the company under R.C. 1705.34.[74] "Ohio courts have interpreted these provisions of the Ohio Revised Code to mean that property owned by a limited liability company is property of the company, not property of the members of the company."[75] Instead, a member of a limited liability company only has a property interest in his or her membership interest.[76] Thus, Zwerin does not own the assets at issue, which instead belong to Zbest. Instead, her only interest in Zbest, which is her personal property, is her membership interest in Zbest.

And, as the Eleventh District Court of Appeals has observed, "* * * a bankruptcy stay only precludes further action regarding the debtor involved in the bankruptcy action: '[w]e agree with the overwhelming weight of authority that the automatic stay provisions only extend to the debtor filing bankruptcy proceedings and not to non-bankrupt codefendants.'"[77] In other words, the automatic stay provision in the bankruptcy code only impacts Zwerin's property and does not stay obligations of non-debtors, such as

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[74] R.C. 1705.34.
[75] *In re Bolon*, 538 B.R. 391, 397-398 (Bankr.S.D.Ohio 2015), citing *Ogle v. Hocking Cty*, 4th Dist. Hocking No. 14CA3, 2014-Ohio-5422.
[76] *In re Bolon*, 538 B.R. at 397-398, citing *Bd. of Educ. of the Whitehall City School Dist. v. Franklin Cty. Bd. of Revision*, 10th Dist. Franklin No. 01AP-878, 2002 WL 416953, *2 (Mar. 19, 2002).
[77] (Internal quotations omitted.) *Miller v. Sun Castle Ents., Inc.*, 11th Dist. Trumbull No. 2007-T-0054, 2008-Ohio-4669, ¶ 28, quoting *Waco Scaffolding & Equip. Co. v. Schaffer & Sons*, 5th Dist. No. 2003CA00172, 2003–Ohio–6775, ¶ 21.

Zbest.[78] As such, her stay does not impact the plaintiff's fraudulent transfer claim or the relief it is entitled for that claim.

## II. PLAINTIFF'S CLAIM FOR SUCCESSOR LIABILITY

In *Welco Industries, Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 617 N.E.2d 1129 (1993), the Supreme Court of Ohio reiterated the well-established general rule of successor liability: the purchaser of a corporation's assets is not liable for the debts and obligations of the seller corporation, unless one of the exceptions applies.[79] A successor corporation may be held liable when: "(1) the buyer corporation expressly or impliedly agrees to assume such liability; (2) the transaction amounts to a de facto consolidation or merger; (3) the buyer corporation is merely a continuation of the seller corporation; or (4) the transaction is entered into fraudulently for the purpose of escaping liability."[80]

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[78] *See also Manson v. Friedberg*, S.D.N.Y. No. 09 Civ. 3890(RO), 2013 WL 2896971, *3 (June 13, 2013) (finding that, by its terms, 11 U.S.C. § 362 applies only to the property of the debtor or property of the estate and as such does not apply to stay proceedings against non-debtors, and holding that a debtor did not have an ownership interest in the assets of an LLC in which he had an ownership interest); *In re Penn*, Bankr.N.D.Ga., 2010 WL 9445533, *2 (Apr. 2, 2010) (finding that a debtor's automatic stay in bankruptcy did not extend to property owned by a limited liability company in which he held an individual ownership interest); *In re Furlong*, 437 B.R. 712, 721 (D. Mass. 2010) ("And unless a corporation is itself a bankruptcy debtor, the automatic stay afforded to an individual debtor under § 362(a) does not extend to the assets of a corporation in which the debtor has an interest * * *."); *In re Adams*, Bankr.D.Neb. Nos. BK07–42287–TLS, A09–4002–TLS, 2009 WL 3681850, *3 (Sept. 25, 2009) (finding that a debtor's membership interest in an LLC did not extend the debtor's bankruptcy stay to the LLC's property); *In re Sheu*, Bankr.E.D.N.Y. No. 1–09–43929, 2009 WL 1794473 (June 16, 2009) (finding that the debtor's bankruptcy stay was confined to protecting his individual, intangible ownership rights in a separate business entity); *In re Calhoun*, 312 B.R. 380, 384 (Bankr. N.D. Iowa 2004) ("The automatic stay does not stay actions against separate entities associated with the debtor.").

[79] *Welco Industries, Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 346-347, 617 N.E.2d 1129 (1993).

[80] Id. at 347.

The plaintiff contends the mere continuation exception applies here. Regarding the "mere continuation" exception, the Court in *Welco* explained that the "basis of this theory is the continuation of the corporate entity, not the business operation, after the transaction."[81] Such would be the case when "one corporation sells its assets to another corporation with the same people owning both corporations. Thus, the acquiring corporation is just a new hat for, or reincarnation of, the acquired corporation. This is actually a reorganization."[82] Since such transaction is done to escape liabilities of the predecessor corporation, "inadequacy of consideration is one of the indicia of mere continuation."[83] The *Welco* Court rejected the expanded mere-continuation theory used in other states, and as such it is immaterial whether the new corporation has the same physical location, officers, employees, or products.[84] Ohio courts continue to apply the narrow version of the mere continuation rule articulated in *Welco*.[85]

In examining the case at bar, the mere continuation exception to successor liability applies. Zwerin was the sole shareholder and president of Grassworks. When she ceased operations for Grassworks, she formed Zbest, where she is the sole member. Although Grassworks transferred its remaining assets to Zbest, it received no

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[81] Id. at 350.
[82] Id.
[83] Id.
[84] Id.
[85] *See Dana Partners, L.L.C. v. Koivisto Constructors & Erectors, Inc.*, 11th Dist. Trumbull No. 2011-T-0029, 2012-Ohio-6294, ¶ 41 (applying *Welco* and finding mere continuation rule inapplicable where there was no transfer of assets between the old and new corporations); *Pottschmidt v. Klosterman*, 169 Ohio App.3d 824, 2006-Ohio-6964, 865 N.E.2d 111, ¶ 26 (9th Dist.), citing *Dowey v. RCA Rubber Co.*, 9th Dist. Nos. 18170, 18566, 1997 WL 803090, *2 (Dec. 24, 1997) ("*Flaugher*, as followed by *Welco*, sets forth the controlling law in Ohio on corporate successor liability."); *Howell v. Atlantic-Meeco, Inc.*, 2d Dist. Clark No. 01CA0084, 2002 WL 857685, *4 (Apr. 26, 2002) (applying *Welco* and finding that the mere continuation rule did not apply because the buyers and sellers of a corporation were not the same).

consideration. As such, the mere continuation exception applies, and Zbest is liable for the debts and obligations Grassworks owed to the plaintiff.

## III. DEFENDANT'S COUNTERCLAIM FOR DECLARATORY JUDGMENT

Lastly, the plaintiff moved for summary judgment on Zbest's counterclaim for declaratory judgment. Zbest seeks a declaratory judgment finding that it is not liable for the debts of other entities, and that the plaintiff cannot have a lien on any assets, whether tangible or intangible, including but not limited to all mowers and other equipment, or accounts receivable, currently owned by Zbest.

As discussed above, however, the court has found that Zbest is liable for Grassworks' debt to the plaintiff, and the plaintiff has a right to attachment for the four motor vehicles and two trailers at issue. Summary judgment should be granted because there are no genuine issues of material fact regarding declaratory judgment remaining, and reasonable minds can only conclude that declaratory judgment cannot be granted in Zbest's favor.

## CONCLUSION

For the foregoing reasons, the plaintiff's motion for summary judgment on the defendant's counterclaims is well-taken and hereby granted.

**IT IS SO ORDERED.**

DATED: 6-14-19

Judge Jerry R. McBride

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing were sent on this 14th day of June 2019 by e-mail to Michael A. Galasso, Attorney for the Plaintiff, at mgalasso@rkpt.com, and Kathleen D. Mezher, Attorney for the Defendants Zbest Investments LLC and Zbest Landscape and Property Maintenance LLC, at kathleen@mezherlaw.com, and by regular U.S. Mail to Grassworks Landscaping, Inc., Defendant, 4230 English Oaks Ct., Batavia, Ohio 45103, Global Merchant Cash Inc., Defendant, 64 Beaver Street, New York, New York 10004, and Corporation Service Company, P.O. Box 2576, Springfield, Ohio 62708.

Judicial Assistant to Judge McBride