

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NORMAN EMANUEL	:	CIVIL ACTION
t/a EMANUEL TIRE COMPANY	:	
	:	
v.	:	
	:	
RENT-A-SCREEN, INC. and	:	
EXTEC USA, INC.	:	99-CV-5054

MEMORANDUM AND ORDER

J. M. KELLY, J.

APRIL , 2000

Presently before the Court is a motion by the Defendant Extec USA, Inc. (“Extec”) to dismiss the Complaint of the Plaintiff, Norman Emanuel (“Emanuel”), filed pursuant to Federal Rule of Civil Procedure 12(b)(6). For the following reasons, the motion is denied.

I. BACKGROUND

Accepting as true the facts alleged in the Plaintiff’s Complaint and all reasonable inferences that can be drawn there from, the facts of the case are as follows. Emanuel and Rent-A-Screen, Inc. (“Rent-A-Screen”) were parties to a sales contract. A dispute arose between the parties regarding the contract and, pursuant to the terms of the agreement, Emanuel filed a claim with the American Arbitration Association (“AAA”) against Rent-A-Screen. The matter was scheduled to be heard before an arbitrator on July 27 and 28, 1999.

On or around June 16, 1999, however, Emanuel amended his claim, adding Extec as a defendant in the arbitration. Upon being notified of the amended claim by Emanuel, Extec informed the arbitrator and Emanuel that it was not a party to the agreement and would therefore not agree to participate in the arbitration. Emanuel did not petition the court, pursuant to 9 U.S.C. § 4 (1994), to compel Extec to arbitrate. Instead, prior to the commencement of

testimony on July 27, 1999, the arbitrator heard testimony as to whether AAA had jurisdiction over Extec in this matter. Finding that Extec was not a party to the arbitration agreement, the arbitrator held Extec was not subject to its jurisdiction. The arbitration proceeded between Emanuel and Rent-A-Screen and the arbitrator held in favor of Emanuel, awarding him \$77,256.00.

Emanuel alleges instantly that Extec is liable for Rent-A-Screen's unfavorable judgment by the arbitrator. Specifically, Emanuel argues that Extec is a successor and/or continuation enterprise to Rent-A-Screen and is therefore liable to Rent-A-Screen's creditors. He further alleges that he is a creditor of Rent-A-Screen in the amount of \$77,256.00, based on the arbitrator's award. Therefore, Emanuel seeks to have judgment entered against Extec under a successor liability theory.

II. STANDARD OF REVIEW

In considering whether to dismiss a complaint for failing to state a claim upon which relief can be granted, the court may consider those facts alleged in the complaint as well as matters of public record, orders, facts in the record and exhibits attached to the complaint. See Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1391 (3d Cir. 1994). The court must accept those facts as true. See Hishon v. King & Spalding, 467 U.S. 69, 73 (1983). Moreover, the complaint is viewed in the light most favorable to the plaintiff. See Tunnell v. Wiley, 514 F.2d 971, 975 n.6 (3d Cir. 1975). In addition to these expansive parameters, the threshold a plaintiff must meet to satisfy pleading requirements is exceedingly low; a court may dismiss a complaint only if the plaintiff can prove no set of facts that would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

III. DISCUSSION

In its motion, Extec characterizes Emanuel's Complaint as one to confirm the arbitration award against it, even though it was not a party to the arbitration. In support of its position, Extec seems to argue that when it refused to go to arbitration, Emanuel should have filed a petition pursuant to 9 U.S.C. § 4 to compel it to arbitrate. By not doing so, and by virtue of the arbitrator's decision that Extec was not required by the terms of the Emanuel-Rent-A-Screen contract to arbitrate, Emanuel effectively waived any claims it had against Extec, including one for successor liability. The Court disagrees.

First, Emanuel was not required by 9 U.S.C. § 4 to attempt to compel Extec to arbitrate. Indeed, pursuant to its provisions, Emanuel appears to have had no grounds upon which to try to do so. Section 4 provides that "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." *Id.* In the present case, however, the arbitrator found and the parties do not appear to dispute that Extec was not a signatory to the agreement requiring Emanuel and Rent-A-Screen to arbitrate their dispute. Therefore, there was no underlying arbitration agreement between Emanuel and Extec upon which the former could have based a petition to compel arbitration. Certainly, then, Emanuel was not obligated to file such a petition, nor has he waived any rights against Extec by failing to do so. Further, in light of the fact that Extec is not a signatory to the arbitration agreement, it cannot be argued that Emanuel was required to arbitrate his dispute with Extec prior to filing suit in this Court.

Second, Emanuel clearly states a cause of action upon which relief can be granted. Taking the allegations in the Complaint as true, Emanuel alleges that Extec is liable for the judgment against Rent-A-Screen as its successor or transferee. Under Pennsylvania law, there are six exceptions to the general rule that a transferee of assets is not liable for the debts of the transferor. See Philadelphia Elec. Co. v. Hercules, Inc., 762 F.2d 303, 308 (3d Cir. 1985); Main, Inc. v. Blatstein, No. CIV. A. 98-5947, 1999 WL 424296, at *7-8 (E.D. Pa. June 23, 1999); Leffler, Inc. v. Hutter, 696 A.2d 157, 167 (Pa. Super. Ct. 1997). They apply when: (1) the successor corporation either expressly or impliedly agreed to assume the liabilities of the transferor corporation; (2) the sale is in effect a merger or consolidation; (3) the successor corporation is merely a continuation of the transferor corporation; (4) the transaction is fraudulently entered into to escape liability to creditors; (5) the sale or transfer was not made for adequate consideration and protections were not implemented for the benefit of the transferor corporation's creditors; or (6) in strict liability cases, the successor corporation undertakes the same manufacturing operation as the transferor. See Philadelphia Elec., 762 F.2d at 308-09. Only one exception need be satisfied in order to find successor liability. See Bogart v. Phase II Pasta Machs., Inc., 817 F. Supp. 547, 548 (E.D. Pa. 1997).

In his Complaint, Emanuel alleges facts sufficient to state a claim under five of the six exceptions. More specifically, the Complaint alleges that Extec agreed to assume the liabilities of Rent-A-Screen, the sale or transfer of Rent-A-Screen's assets to Extec was, in effect, a consolidation or merger, Extec is a "mere continuation" of Rent-A-Screen, the sale of Rent-A-Screen's assets was a fraudulent attempt to escape liability and the sale of Rent-A-Screen was not for adequate consideration and provisions were not made to protect Rent-A-Screen's creditors.

In light of these allegations, the Court cannot say that Emanuel has set forth no facts under which relief may be granted. Therefore, Extec's motion to dismiss is denied.

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ORDER

AND NOW, this day of April, 2000, in consideration of the Motion to Dismiss the Complaint of Plaintiff, Norman Emanuel t/a Emanuel Tire Company filed by Defendant Extec USA, Inc. (Doc. No. 4) and the response of the Plaintiff thereto, it is ORDERED that the motion is DENIED.

BY THE COURT:

JAMES MCGIRR KELLY, J.