UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In Re:	)	Chapter 11
	)	
NATIONAL PIPE & PLASTICS, INC.	)	Case No. 96-1676 (PJW)
	)	
Debtor.	)	
_____	)	
	)	
NATIONAL PIPE & PLASTICS, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Adv. Proc. No. A-99-12
	)	
N.P.P. LIQUIDATION COMPANY, DMS CONSTRUCTION CO., INC., and THE JACK FARRELLY COMPANY,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Joseph Grey
Stevens & Lee
300 Delaware Avenue
Suite 800
Wilmington, DE 19801

Richard S. Taffet
Elizabeth A. Jaffe
Golenbock, Eiseman, Assor & Bell
437 Madison Avenue
New York, New York 10022-7302

Counsel for National Pipe & Plastics, Inc.

Brendan L. Shannon
Young, Conaway, Stargatt & Taylor
Rodney Square North - 11th Floor
P.O. Box 391
Wilmington, DE 19899-0391

Brett D. Fallon
Morris, James, Hitchens & & Williams
222 Delaware Avenue
P.O. Box 2306
Wilmington, DE 19899-2306

Michele C. Gott
Smith, Katzenstein & Furlow LLP
800 Delaware Avenue
P.O. Box 410
Wilmington, DE 19899

Carole W. Briggs
Dwight E. Timbers
Timbers & Briggs, P.C.
45 Glastonbury Boulevard
Glastonbury, CT 06033

Counsel for Defendant DMS Construction Co., Inc.

Stark & Stark
Princeton Pike Corporate Center
993 Lenox Drive
P.O. Box 5315
Princeton, New Jersey 08543-5315

Co-Counsel for Defendant N.P.P.
Liquidation Company

Date: September 25, 2000

WALSH, J.

Before the Court is a motion for summary judgment by plaintiff, National Pipe & Plastics, Inc. (also known as NPP Acquisition, Inc., henceforth "NPP Acquisition")(Doc. # 15); a cross-motion for summary judgment by the debtor N.P.P. Liquidation Company (formerly known as National Pipe & Plastics, Inc., henceforth "Debtor" or "NPP Liquidation")(Doc. #27); and a cross-motion for summary judgment by judgment creditor DMS Construction, Inc. ("DMS")(Doc. # 20). NPP Acquisition seeks (i) a declaration that it is not liable to DMS on DMS' state court judgment against the Debtor because NPP Acquisition is not a successor-in-interest to the Debtor as a matter of law; (ii) a declaration that if DMS has a claim against NPP Acquisition, then Debtor must indemnify NPP Acquisition against the claim under an asset purchase agreement ("Asset Purchase Agreement") between NPP Acquisition and the Debtor and this Court's order approving the sale of substantially all of the Debtor's assets (the "Sale Order"); and (iii) entry of a default judgment against defendant The Jack Farrelly Company ("Farrelly"). The Debtor's motion also seeks entry of default judgment against Farrelly and agrees that NPP Acquisition is not the Debtor's successor-in-interest. However, the Debtor disagrees that it must indemnify NPP Acquisition and seeks an order accordingly. It also requests a declaration that DMS' claim is solely against the Debtor and thus discharged. DMS seeks an order

that NPP Acquisition is the Debtor's successor-in-interest and therefore is liable to DMS on its judgment against the Debtor. Alternatively, DMS asks the Court for more time to take discovery and develop the record.

For the reasons set forth below (1) summary judgment will be denied on the issue of successor-in-interest liability, (2) summary judgment will be granted as to NPP Acquisition's indemnification rights against NPP Liquidation, and (3) a default judgment will be entered against Farrelly.

FACTS

Prior to concluding a voluntary reorganization commenced in 1991 in the United States Bankruptcy Court for the District of New Jersey (the "New Jersey Chapter 11"), NPP Liquidation was known as LCP, an entity engaged principally in the manufacture and distribution of PVC pipe. In 1992, while still in its New Jersey Chapter 11, LCP manufactured and sold through Farrelly, one of its key distributors, approximately 1,040 feet of eight-inch PVC sewer pipe to DMS for installation as a municipal sewer line in Farmington, Connecticut. LCP emerged from its New Jersey Chapter 11 in 1993 as National Pipe & Plastics, Inc. As a result of the present Chapter 11 case, it is now known as NPP Liquidation.[1]

---

[1] LCP emerged from its New Jersey Chapter 11 as National Pipe & Plastics, Inc. In September, 1996, it filed the present Chapter 11 bankruptcy in Delaware and sold substantially all of its assets, including the "National Pipe & Plastics" name, to NPP Acquisition. Following the asset sale, the Debtor changed its name to NPP Liquidation.

After DMS installed the eight-inch sewer pipe, the Town of Farmington experienced problems at the installation site and a subsequent investigation revealed that the pipe was defectively manufactured with sub-standard wall thickness. See Field Complaint Report, Ex. 1, (Doc. # 22). Representatives of LCP, the Town of Farmington, Farrelly, and DMS concurred that total replacement of the defective pipe was required. See id. In the fall of 1994, DMS removed and replaced the defective pipe. DMS was instructed to compute the cost of repairs and forward the information to LCP through Farrelly for review. See id. DMS forwarded the repair cost information to LCP in January 1995 but was never paid for the removal and replacement of the defective PVC pipe.

On January 23, 1996, DMS instituted a breach of contract and warranty action against LCP and Farrelly in Connecticut Superior Court (the "1996 Connecticut State Action"), mistakenly believing that LCP was the correct name of the entity that had emerged from the New Jersey Chapter 11. See Connecticut Superior Court Complaint, Ex. J, (Doc. # 17). On May 28, 1996, Attorney Robert J. O'Brien ("O'Brien") filed an appearance on behalf of LCP in the 1996 Connecticut State Action but withdrew that appearance in April, 1998. See Notice of Appearance, Ex. 2, (Doc. # 22). On July 10, 1998, a default judgment was entered by the Connecticut Superior Court against LCP (the "Default Judgment") in the amount of $308,245.65. The Default Judgment became final on November 10, 1998.

In September 1996, while the 1996 Connecticut State Action was still pending, LCP, then known as National Pipe & Plastics, filed for bankruptcy relief in Delaware (the "Delaware Chapter 11"). DMS was not notified of the Debtor's Delaware Chapter 11 nor was it listed as a creditor in the Delaware Chapter 11. See List of Creditors, (Doc. # 18, Case No. 96-1676 [PJW]). The Debtor did not notify this Court of the pending DMS litigation in Connecticut, nor did the Debtor directly notify DMS of its pending Asset Purchase Agreement. However, Farrelly, although not listed among Debtor's creditors, was provided direct notice of the proposed sale of substantially all of Debtor's assets. See id. ; see also Notice of Hearing on Sale Motion, Ex. A, (Doc. # 28, Case No. 96-1676 [PJW]). A notice of the proposed sale was also published in the Wall Street Journal on November 1, 1996.

NPP Acquisition, a subsidiary of Nissho Iwai American Corporation ("NIAC"), is the party to whom Debtor sold substantially all its assets for approximately $13,750,000 pursuant to the Asset Purchase Agreement. The sale to NPP Acquisition was contemplated by Debtor and NIAC in negotiations and agreements reached prior to the commencement of Debtor's Delaware Chapter 11. See Affidavit of J. Allan McLean at 1, ¶ 3, (Doc. # 14, Case No. 96-1676 [PJW]). The proposed sale could not have been consummated outside of bankruptcy because Debtor, in the New Jersey Chapter 11, covenanted not to sell all of its assets without the approval of all of its shareholders and creditors, approval Debtor believed

would have been difficult if not impossible to obtain. See id. at 2, ¶ 6. Debtor had tried to effect the same sale in the context of the New Jersey Chapter 11 but was denied permission to modify its New Jersey plan because that plan had been substantially consummated. See id. at 2, ¶ 7.

Under the terms of the Asset Purchase Agreement, NPP Acquisition expressly purchased certain assets from NPP Liquidation and expressly identified those assets it was not purchasing (the "Excluded Assets"). See Asset Purchase Agreement at ¶¶ 2.1 and 2.2, Ex. A, (Doc. # 17). Those assets purchased included, inter alia, NPP Liquidation's "Equipment," "Intangible Assets," "Inventory," "Real Property," "Contracts," and "Other Personalty." See id. at ¶ 2.1. The Excluded Assets included, inter alia, "any proceeds," "all accounts receivable," "any minute books . . . and similar corporate records," of Debtor and "real property of [Debtor] located in Carrolton, Ohio." See id. at ¶ 2.2.

The Asset Purchase Agreement further provided that, pursuant to its purchase of specified assets of NPP Liquidation, NPP Acquisition was only assuming certain liabilities of NPP Liquidation. See id. at 2.3. Other than those liabilities so specified, NPP Acquisition assumed:

> no liability or obligation whatsoever, at any time, [for] any or all Liabilities arising from the operation of, or any act or omission occurring in respect of, the Business or the ownership of the transferred Assets prior to the [effective date of the Asset Purchase Agreement.]

See Asset Purchase Agreement at ¶ 2.4. The Asset Purchase Agreement defines "Liability" to mean "any debt, liability, commitment, or obligation of any kind, character, or nature whatsoever . . . ." See id. at ¶ 1.1(be). "Business" is defined as "[NPP Liquidation's] business of manufacturing, distributing, marketing and selling [PVC] pipes." See id. at ¶ 1.1(q).

Paragraph 11.2 of the Asset Purchase Agreement provides that:

> [NPP Liquidation] and its successors and assigns shall jointly and severally indemnify and hold harmless and defend [NPP Acquisition] . . . from and against any and all Damages incurred thereby or caused thereto based on, arising from, or relating to:
>
> > (a) any Excluded Liability including [NPP Liquidation's] failure to pay or satisfy any such Liability . . .

See id. at ¶ 11.2. Concerning matters involving third parties, NPP Liquidation had the right to take over the defense of any indemnified claim. To the extent it did not, NPP Acquisition was permitted to defend against such claims while "preserving its rights to indemnification . . . including without limitation for the cost of such defense." See id. at ¶ 11.5(b). However, the Asset Purchase Agreement requires that the party which seeks indemnity must provide timely notice to the indemnifier of any action which might give rise to an indemnification claim. See id. at ¶ 11.5(a). Failure to do so would reduce the indemnification

claim to the extent the indemnifying party is prejudiced by the delay. See id.

Additionally, the Asset Purchase Agreement provides, inter alia, that an escrow fund (the "Escrow Fund") would be established in the sum of $2 million from which to satisfy indemnification claims submitted by NPP Acquisition within the 18 months immediately following entry of the Asset Purchase Agreement. See id. at ¶¶ 2.7 and 11.4(c); see also Escrow Agreement, Ex. A, (Doc. # 17). Any funds not so directed during that 18 month period are to be made available for general distribution to NPP Liquidation's creditors. See Escrow Agreement at ¶ 4. The distribution of the Escrow Fund has been delayed pending outcome of the present dispute.

Additionally, the Asset Purchase Agreement provides that any dispute, controversy or claim by and between NPP Liquidation and NPP Acquisition are to be submitted to any state or Federal court in New York state. See Asset Purchase Agreement, ¶ 13.7(b).

The Sale Order approving NPP Acquisition's purchase of NPP Liquidation's assets pursuant to the Asset Purchase Agreement contained, inter alia, the following express findings by the Court:

> (1) Proper, timely, adequate and sufficient notice of the [motion to approve the sale] and the [hearing relating to the sale] has been provided . . .;
>
> (2) No further notice [of the sale motion and hearing]. . . is necessary;
>
> (3) A reasonable opportunity to object or to be heard regarding [the Asset Purchase Agreement] has been

afforded to all interested persons and entities, including, but not limited to, (a) all parties who claim interests in or liens upon the Transferred Assets . . .;

* * *

(8) [NPP Acquisition] is a good faith purchaser within the meaning of the Section 365(m) of the Bankruptcy Code;

(9) [NPP Acquisition] is not a successor to [NPP Liquidation] or its estate.

> (a) The consummation of the Asset Purchase Agreement will not amount to a consolidation, merger and/or de facto merger of [NPP Acquisition] and [NPP Liquidation] or its estate.
>
> (b) [NPP Acquisition] is not a continuation of [NPP Liquidation] or its estate, there is not a substantial continuity among [NPP Acquisition] and [NPP Liquidation], and there is no continuity of enterprise among [NPP Liquidation] and [NPP Acquisition].
>
> (c) [NPP Acquisition] is not purchasing all of [NPP Liquidation's] assets. [NPP Acquisition] is not purchasing any of [NPP Liquidation's] capital stock, cash, cash equivalents, accounts receivable, bank deposits, insurance rights, or claims arising prior to [the closing of the Asset Purchase Agreement] . . . or any other Excluded Assets . . .;
>
> (d) the transactions approved hereby are not being entered into fraudulently. The sale approved hereunder has been properly noticed and all aspects thereof have been adequately disclosed.
>
> (e) [NPP Acquisition] is not required to hire any individuals employed by [NPP Liquidation] prior to the [closing of the Asset Purchase Agreement] . . . . [NPP Acquisition] is similarly not required to hire any of [NPP Liquidation's] supervisory personnel.
>
> (f) those of [NPP Liquidation's] employees who are to be retained by [NPP Acquisition] are

> being hired under new employment contracts and/or other employment arrangements . . . [NPP Acquisition] is not assuming any of [NPP Liquidation's] obligations to its employees.
>
> (g) No common identity of incorporators, officers, directors or material stockholders exists among [NPP Acquisition] and [NPP Liquidation].

See Findings of Fact, Sale Order, ¶¶ 1, 2, 3, 8, and 9(a)-(g), Ex. A, (Doc. # 17). Based upon these findings of fact, the Sale Order authorized the sale of NPP Liquidation's specified assets to NPP Acquisition

> free and clear of any and all liens, claims, including without limitation, any theory of successor liability, de facto merger, or substantial continuity, whether based in law or equity . . . ."

See id. Orders, at 5. The Sale Order further provides that:

> (3) [NPP Acquisition] shall have no liability or responsibility for any liability or obligation of [NPP Liquidation] under or related to the Transferred Assets other than for the Purchase Price . . .;
>
> (4) [NPP Acquisition] is not a successor to [NPP Liquidation] or its estate by any reason of any theory of law or equity and [NPP Acquisition] shall not assume or in any way be responsible for any liability or obligation of [NPP Liquidation] . . . except as otherwise expressly provided in the Asset Purchase Agreement;
>
> (5) . . . all persons and entities, including . . . [NPP Liquidation] and/or its creditors . . . shall be permanently and forever barred . . . from commencing or continuing in any manner any action or other proceeding of any kind against [NPP Acquisition] as alleged

> successor of [NPP Liquidation], or otherwise with respect to any Liens, Claims, and Encumbrances.

See id. at 6-7.

On November 15, 1996, the Sale Order was entered approving the sale of substantially all of Debtor's assets to NPP Acquisition pursuant to the terms of the Asset Purchase Agreement. NPP Acquisition then commenced to carry on in the manufacture of PVC pipe as had NPP Liquidation before it. NPP Liquidation's liquidating Chapter 11 Plan (the "Plan") was confirmed on April 25, 1997.

When this Court was made aware that DMS had received no notice of NPP Liquidation's Delaware Chapter 11, DMS was granted permission to file a proof of claim (the "DMS Claim") in February 1998, almost one year after the established claims bar date. Farrelly also filed a late proof of claim (the "Farrelly Claim"). Both the DMS Claim and the Farrelly Claim seek $308,245.65, the damages attributed to the sale of the defective PVC pipe as fixed by the Connecticut state court Default Judgment. The Debtor filed no objection to those claims. Both DMS and NPP Acquisition have made requests on NPP Liquidation for payment of the DMS Claim out of the Escrow Fund. NPP Liquidation has refused to make the requested indemnification payments.

On August 14, 1998, DMS instituted an action against NPP Acquisition in Connecticut (the "1998 Connecticut State Action") seeking to hold NPP Acquisition liable as successor-in-interest to

NPP Liquidation on the Default Judgment. The 1998 Connecticut State Action was stayed by that court on November 30, 1998 on the motion of NPP Acquisition, pending resolution of the outstanding issues in this Court. See Connecticut Stay Order, Ex. L, (Doc. # 17). On June 26, 1998, NPP Acquisition commenced an action in the Supreme Court of New York (the "New York State Action") against NPP Liquidation, DMS, and Farrelly, the substance of which forms the basis for the case sub judice. The New York State Action was subsequently removed to United State District Court for the Southern District of New York, transferred to United States District Court in Delaware, and referred to this Court on November 25, 1998.

DISCUSSION

All parties seek summary judgment pursuant to Federal Rules of Civil Procedure 56(c) as incorporated in Rule 7056 of the Federal Rules of Bankruptcy Procedure. Rule 56(c) provides that:

> summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Fed. Rules Civ. Proc. 56(c); see also Clark v. Neal, 890 F. Supp. 345, 348 (D. Del. 1995). In ruling on a motion for summary judgment the evidence must be viewed in a light most favorable to the nonmoving party. See, e.g., Cheilitis Corp. v. Citrate, 477

U.S. 317, 322 (1986); Anderson v. Liberty Lobby, Inc., 447 U.S. 242, 255 (1986); Matsushita EEC. Incus. Co. v. Zenith Radio Co., 475 U.S. 574, 587 (1986). A genuine issue of material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Liberty Lobby, 447 U.S. at 256.

Successor-in-interest liability.

NPP Acquisition argues, and NPP Liquidation concurs, that there can be no dispute, in light of the express language of the Asset Purchase Agreement and Sale Order, that NPP Acquisition is not a successor-in-interest to NPP Liquidation. NPP Liquidation contends that, as DMS is a creditor of NPP Liquidation pursuant to its filing of a proof of claim in the Delaware Chapter 11, and the Sale Order expressly prohibits NPP Liquidation's creditors from commencing or continuing any action against NPP Acquisition as an alleged successor to NPP Liquidation, the present action against NPP Acquisition is prohibited by the law of the case. See Sale Order at ¶¶ 7 and 12.

Additionally, NPP Acquisition argues that DMS is incapable of establishing the legal elements required to demonstrate that NPP Acquisition is a successor-in-interest to NPP Liquidation. NPP Acquisition maintains that, as a general proposition, a company that purchases the assets of another company does not take on the liabilities of the seller company. See, e.g., In re Asbestos Litigation, 1994 WL 89643 at *3 (Del. Super. Ct., Feb. 4, 1994); Fountain v. Colonial Chevrolet, 1988 WL 40019 at *7

(Del. Super. Ct., April 13, 1988). An exception to this general rule arises when (i) the purchaser expressly or impliedly assumes such liabilities; (ii) the transaction amounts to a consolidation or merger of the seller and purchaser; (iii) the purchaser is merely a continuation of the seller; or (iv) the transaction has been fraudulently consummated. See id. NPP Acquisition argues that DMS cannot establish any of these enumerated exceptions, and thus this Court must reach the legal conclusion that NPP Acquisition is not a successor-in-interest to NPP Liquidation and it should enter summary judgment on the issue of successor liability.

NPP Acquisition contends that the Asset Purchase Agreement provides, and the Sale Order supports, that NPP Acquisition did not expressly or impliedly assume NPP Liquidation's liabilities. See Asset Purchase Agreement at ¶ 2.4(c); Sale Order at 6. In fact, argues NPP Acquisition, the Asset Purchase Agreement expressly provides that NPP Acquisition did not assume the type of liability at issue arising from NPP Liquidation's, or LCP's, sale of defective PVC pipe prior to the effective date of the Asset Purchase Agreement. See id.

NPP Acquisition points to the "Assumption of Liabilities" language in the Asset Purchase Agreement that expressly provides that NPP Acquisition is liable only for claims based on allegedly defective manufacturing that are asserted after the Asset Purchase Agreement becomes effective, not those, such as DMS' claim against

LCP that arose in 1994 on products manufactured in 1992. See Asset Purchase Agreement at ¶ 2.3(c).

According to NPP Acquisition, the Sale Order also precludes application of the consolidation or merger exception to the general successor-in-interest liability rule by expressly providing that the transaction between NPP Acquisition and NPP Liquidation was not a consolidation, merger, or de facto merger of the two entities. See Sale Order at 3. The Sale Order also provides that NPP Acquisition was not a continuation of NPP Liquidation and there was no continuity of enterprise between the parties. See id. at 4. Nor, according to the Sale Order did NPP Acquisition purchase all of NPP Liquidation's assets as evidenced by the Asset Purchase Agreement that expressly excluded the purchase of, inter alia, NPP Liquidation's capital stock, cash, cash equivalents, and accounts receivable. See id. at 4.

NPP Acquisition contends that further support of its argument against successor-in-interest liability is found in that, pursuant to the Sale Order, NPP Acquisition was not required to hire any of NPP Liquidation's employees or supervisory personnel, retaining only those employees it chose to retain under new employment agreements that became effective only after the transaction was completed. See id. Additionally, NPP Acquisition points to the fact that the Sale Order provides that there was no finding of common identity of incorporators, officers, directors, or material shareholders between NPP Acquisition and NPP

Liquidation to bolster its claim that it is not a successor-in-interest to NPP Liquidation. See id. at 5.

Further, NPP Acquisition maintains that the Court's findings as expressed in the Sale Order overcome any claim that the sale was fraudulently consummated. The Sale Order provides that the sale was not fraudulent, that proper, timely, and adequate notice was provided to all interested parties, that no further notice was required, and that a reasonable opportunity to be heard regarding the proposed transaction had been afforded all parties. See id. at 2.

NPP Acquisition also argues that, even assuming that notice of the Sale hearing to DMS was inadequate, the relief available to DMS would not be to overturn the findings in the Sale Order that NPP Acquisition is not a successor-in-interest to NPP Liquidation. NPP Acquisition maintains that the purpose of notice in an asset sale context is to assure that a fair price is obtained for a debtor's assets and DMS did not challenge the fairness of price found in the Asset Purchase Agreement. See, e.g., In re Paris Indus. Corp., 132 B.R. 504, 508 (Bankr. D. Me. 1991). NPP Acquisition suggests that DMS is merely trying to use the successor-in-interest theory to obtain an indemnification payment from the Escrow Fund because it would otherwise receive nothing under Debtor's Plan as a general unsecured creditor.

Moreover, NPP Acquisition maintains that DMS has demonstrated no way in which it was prejudiced by the alleged

insufficient notice given that DMS was allowed to file a proof of claim in Debtor's bankruptcy case and is entitled to payment on that claim as provided in Debtor's Plan. NPP Acquisition contends that DMS has yet to provide any information to rebut the clear language and specific findings of the Sale Order and the Asset Purchase Agreement suggesting that NPP Acquisition is not a successor-in-interest to NPP Liquidation.

NPP Liquidation supports NPP Acquisition's summary judgment motion regarding DMS' assertion that NPP Acquisition is liable to DMS as a successor-in-interest to NPP Liquidation, adding that the distinct ownership interests of NPP Liquidation and NPP Acquisition lend further support to the contention that NPP Acquisition is not a successor-in-interest to NPP Liquidation. NPP Liquidation's common stock was owned by its employees (55%) and by an investment group (45%), whereas NPP Acquisition's common stock is owned by Nissho Iwai, NIAC, Canneka and other entities with no relationship to NPP Liquidation. According to NPP Liquidation, DMS'argument fails because the test for establishing successor liability is not mere continuation of the business operation but "continuation of the corporate entity" and DMS can show no such continuation of the corporate entity between NPP Liquidation and NPP Acquisition. See, e.g., In re Asbestos Litigation, 1994 WL 89643 at *3.

Further, NPP Liquidation contends that, because Farrelly was noticed on the proposed sale of Debtor's assets pursuant to the

Asset Sale Agreement, and Farrelly has historically provided an interface between NPP Liquidation and DMS in all of the parties' prior business dealings, DMS was assumed to have been put on notice by Farrelly for purposes of participating in Debtor's bankruptcy.

Finally, NPP Liquidation asserts that it failed to provide direct notice to DMS by including DMS on the service list for the sale hearing because of an oversight or lack of communication between its bankruptcy counsel and the attorneys hired to defend the 1998 Connecticut State Action. Because, argues NPP Liquidation, it was essentially unaware of DMS'claim as a result of this oversight, it failed to directly notice DMS in the Delaware Chapter 11 but, nevertheless, provided sufficient notice by publication.

DMS argues it should not be bound by the Sale Order or Asset Purchase Agreement because it was not provided with sufficient notice to contest the factual findings of the Sale Order or to oppose the Asset Purchase Agreement. Therefore, DMS had no meaningful opportunity to be heard on these matters and should not be bound by the unchallenged positions that NPP Acquisition is not a successor-in-interest to NPP Liquidation. Additionally, DMS asserts that the language of the Asset Purchase Agreement and Sale Order suggest that NPP Acquisition is a successor-in-interest to NPP Liquidation.

DMS argues that direct notice to all parties in interest, not just notice by publication, is essential when addressing an

order approving the sale of a debtor's assets that purportedly cuts off successor liability. See, e.g., In re Savage Indus., Inc., 43 F.3d 714, 720 (1st Cir. 1994).[2] DMS maintains that neither NPP Acquisition nor NPP Liquidation contest that DMS is a party-in-interest entitled to notice, but rather NPP Acquisition and NPP Liquidation assert that the notice given was sufficient. DMS disputes that sufficiency of notice.

DMS argues that the 1996 Connecticut State Action was in progress when NPP Liquidation filed its Delaware Chapter 11, yet NPP Liquidation did not notice DMS regarding the bankruptcy case or the sale motion. DMS further maintains that it was not listed as a creditor on Debtor's schedules and did not receive notice of the sale of Debtor's assets to NPP Acquisition until almost a year after the Sale Order had been entered.

DMS asserts that claims to sufficiency of notice by publication in this matter are without merit, arguing that sufficiency of notice requires that notice be "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present objections." See, e.g., Mullane v. Central Hanover Bank and Trust Co., 339 U.S 306, 314 (1950); In re Grand Union Co., 204

---

[2] DMS points out that § 363 of the Bankruptcy Code is among the many governing provisions requiring adequate notice to interested parties before the sale of estate assets can be affected in bankruptcy. See 11 U.S.C. § 363; see also 11 U.S.C. § 1109(b); Fed. R. Bankr. P. 6004(a); Fed. R. Bankr. P. 2002(a)(2).

B.R. 864, 871 (Bankr. D. Del. 1997). DMS argues that notice by publication is an insufficient method of notifying known creditors. See, e.g., In the Matter of Crystal Oil Co., 158 F.3d 291. 297 (5th Cir. 1998) citing City of New York v. New York, N.H. & H.R. Co., 334 U.S. 293, 296 (1953); Chemtron Corp. v. Jones, 72 F.3d 341, 345 (3d Cir. 1995) cert denied 517 U.S. 1137 (1996); In re Grand Union Co,, 204 B.R. at 871. Because, DMS argues, it was a known creditor prior to Debtor's bankruptcy here in Delaware and prior to the sale hearing, DMS was entitled to direct notice of the proposed sale and anything less would not constitute sufficient notice.

Additionally, DMS contends that NPP Acquisition admits in its complaint that its "predecessor in interest" was NPP Liquidation and NPP Acquisition should be bound by this admission to accept its status as successor-in-interest. See Complaint at ¶ 2, Ex. A, (Doc. # 17).

DMS further argues that NPP Acquisition's admission to successor liability is supported by the language of the Asset Purchase Agreement which provides that NPP Liquidation assumed all liabilities to "repair or replace . . . products presently manufactured by [NPP Liquidation] . . ." and because the DMS claim is based upon the repair and replacement of defective PVC pipe manufactured by NPP Liquidation of a kind still manufactured by NPP Acquisition, NPP Acquisition is liable to DMS as a successor-in-interest by express assumption. See Asset Purchase Agreement at ¶ 2.3(c). DMS maintains that the excluded liability language in

paragraph 2.4 of the Asset Purchase Agreement relied upon by NPP Acquisition to deflect successor liability is inapplicable because that language addresses liability arising from damages to persons or property caused by defective goods and such a claim did not form the basis of DMS'action against LCP. See id. at ¶ 2.4.

DMS also argues that NPP Acquisition is merely a continuation of NPP Liquidation and therefore the Court can find successor liability under the present facts. DMS directs the Court's attention to the three traditional tests employed to determine if "mere continuation" status exists in a particular case; (i) the "identity test" by which a court looks for "the existence of a single corporation after the transfer of assets, with an identity of stock, stockholders, and directors between successor and predecessor corporations," see B.F. Goodrich v. Betkoski, 99 F.3d 505, 519 (2d Cir. 1996); (ii) the "continuity of enterprise" test by which the court examines whether the putative successor "maintains the same business, with the same employees doing the same jobs, under the same supervisors, working conditions, and production processes, and produces the same products for the same customers," see id.; or (iii) the "product line" test by which the court looks to see whether "a successor which continued to manufacture the same product line as the predecessor, under the same name, with no outward indication of any change of ownership of the business could be held liable on a products liability claim resulting from products manufactured by

the predecessor." See Mozingo v. Correct Mfg. Corp., 752 F.2d 168, 175 (5th Cir. 1985).

DMS suggests that application of any of the aforementioned tests to the present facts would lead to the conclusion that NPP Acquisition is a successor-in-interest to NPP Liquidation. DMS contends that: the companies are operated under the same name, National Pipe & Plastics, Inc; they operate out of the same facility in Vestal, New York; the business of the two entities is unchanged post-transfer; O'Brien represented LCP in the 1996 Connecticut State Action and represented NPP Acquisition on DMS'successor liability claim in the 1998 Connecticut State Action; and, upon information and belief, management, including Chief Executive Officer J. Allan McLean, is the same for both entities. DMS also suggests that the lack of direct notice to DMS indicates that the two entities conspired to bar DMS from participating in the sale hearing.

Alternatively, DMS asks that if summary judgment on successor liability is premature, this Court allow discovery so that DMS might more fully challenge the assertion by NPP Acquisition and NPP Liquidation that no successor liability exists as to the DMS Claim. Given the alleged insufficiency of notice and the fact that no discovery has yet been taken in this matter, DMS argues that it would be appropriate to allow discovery so that the parties might develop a record as to the nature and extent of

successor liability that might exist between NPP Acquisition and NPP Liquidation.

I find that summary judgment is inappropriate as it relates to the question of successor liability. I agree with DMS that the notice provided to it by NPP Liquidation prior to the hearing on the Sale Order was insufficient, despite findings in the Sale Order to the contrary. The findings in the Sale Order were premised on the notion that all known creditors of Debtor had been adequately, that is directly, notified. DMS was a known creditor at the time of the commencement of the Delaware Chapter 11. Debtor was actively involved in the 1996 Connecticut State Action with DMS. Surely, Debtor knew that DMS had a colorable claim in its bankruptcy and was therefore entitled to written notice. Moreover, it is difficult to imagine that Debtor would have overlooked the DMS Claim given that, if allowed, the DMS Claim would rank among Debtor's twenty largest unsecured creditors. See Voluntary Petition for Bankruptcy Relief (Doc. # 1, 96-1676 [PJW]).

I do not believe that notice by publication is an appropriate means for sending notice of important matters to known creditors and parties-in-interest. See, e.g., Crystal Oil Co., 158 F.3d at 297; New York v. New York, N.H. & H.R. Co., 334 U.S. at 296; Chemtron Corp. v. Jones, 72 F.3d at 345; In re Grand Union Co,, 204 B.R. at 871. Notice by publication is designed as a sort of safety net, cast out to draw in those creditors and potential parties-in-interest of whom a debtor is unaware, to give those

parties a meaningful opportunity to participate in matters, the outcome of which, might have an impact on their interests. For example, notice by publication is often designed to notify the potential tort claimant who, unbeknownst to the debtor, is preparing a products liability action. However, notice by publication is not designed to act as a substitute for direct notice to known creditors. See id. A debtor who pursues such a course of notice is remiss in its duties and acts at its peril.

I find incredible Debtor's assertion that its failure to directly notify DMS of the bankruptcy case and the sale hearing was the result of internal oversight or lack of communication. Debtor was an active participant in DMS'1996 Connecticut State Action. O'Brien, the same attorney who represented LCP in the 1996 Connecticut State Action also entered an appearance on behalf of NPP Acquisition in the 1998 Connecticut State Action.

Nor do I accept Debtor's explanation that its notice to Farrelly somehow served as notice to DMS based on past business relationships. Debtor was aware of DMS and its claim and should have provided direct notice to DMS as it did its other known creditors, including Farrelly. Regardless of past dealings among the parties, Farrelly could not reasonably be taken as a legitimate proxy for DMS regarding notification in Debtor's bankruptcy, particularly as DMS and Farrelly held adverse interests.

Because notice to DMS was deficient, DMS did not have a meaningful opportunity to contest the findings in the Sale Order

that purport to stand for the proposition that NPP Acquisition is not successor-in-interest to NPP Liquidation. Therefore, DMS cannot be held bound by those findings and granting NPP Acquisition summary judgment on the basis of those findings is inappropriate.

However, DMS has not demonstrated that summary judgment in its favor on the issue of successor liability is appropriate. While I discount NPP Acquisition's reliance on the findings of fact in the Sale Order because DMS was unable to mount a meaningful challenge to those findings, I find that the mere assertions put forth by DMS that there is continuity of operation and management between NPP Acquisition and NPP Liquidation, based upon the alleged retention by NPP Acquisition of certain of NPP Liquidation's employees and officers and a continuation of Debtor's business operations by NPP Acquisition, are not enough to demonstrate that DMS is entitled to summary judgment. Significant material factual issues remain unresolved.

For example, while it appears that there are two distinct ownership groups of the putative predecessor and successor entities, DMS maintains that there might be significant overlap of directors, supervisors and employees. I note that at a November 14, 1996 hearing, Debtor asserted that "the president of [NPP Liquidation] and three officers of [NPP Liquidation] will be retained [by NPP Acquisition] for a period of one year . . . ." See November 14, 1996 Hearing Transcript at 10:15-18, (Doc. # 59, Case No. 96-1676 [PJW]). Additionally, Debtor admitted at an

October 23, 1996 hearing that "[NPP Acquisition] will retain, and plans to retain, employees, retain officers. . . . They'll remain as employees of the company going forward." See October 23, 1996 Hearing Transcript at 9:4-11, (Doc. # 50, Case No. 96-1676 [PJW]). Although not conclusive of successor liability, plans for employee or officer retention raise issues of continuity that are not amenable to resolution by summary judgment. The issue, by its very nature, is fact specific and many relevant, material facts are either contested or undeveloped. Consequently, I am unable, on the basis of the record before me, to determine conclusively the extent to which NPP Acquisition might be a successor-in-interest to NPP Liquidation.

Therefore, I am denying NPP Acquisition's motion seeking a judgment in its favor on the issue of successor liability. Additionally, I am denying summary judgment on DMS' motion on the issue of successor liability because I find that DMS has not presented an undisputed factual record to adequately demonstrate continuity between NPP Acquisition and NPP Liquidation. Given the presence of genuine factual disputes and the insufficiency of notice as to the Sale Order hearing, the parties may proceed with discovery to develop the record on the issue of successor liability.

NPP Acquisition's Indemnification Claim.

NPP Acquisition also seeks summary judgment declaring that the DMS claim against NPP Acquisition, based upon DMS'default

judgment against LCP, is indemnified by NPP Liquidation pursuant to the Asset Purchase Agreement. NPP Acquisition argues that, regardless of the outcome of the successor liability issue before the Court, the unambiguous language of the Asset Purchase Agreement requires NPP Liquidation to indemnify NPP Acquisition should the Court allow DMS to obtain payment on its claim from NPP Acquisition.

NPP Acquisition maintains that paragraph 11.2(a) of the Asset Purchase Agreement establishes NPP Liquidation's obligation to indemnify and hold harmless NPP Acquisition from and against any and all "Damages" based on or arising from an "Excluded Liability." See Asset Purchase Agreement at ¶ 11.2. According to the Asset Purchase Agreement, "Excluded Liabilities" include those arising out of the claims made against NPP Liquidation for defective products manufactured by NPP Liquidation prior to November 15, 1996, the effective date of the Asset Purchase Agreement. See id. at ¶ 2.4. Furthermore, NPP Acquisition argues that "Damages" encompass the cost and expense incurred in relation to the DMS claim, and nothing in the Asset Purchase Agreement limits those damages to costs and expenses incurred in bankruptcy court or those incurred in contesting an actual law suit. See id. at ¶ 1.1.

NPP Acquisition contends that the DMS Claim falls within the scope of indemnified claims because the allegedly defective pipe was manufactured by LCP, sold to DMS, installed by DMS, and found defective and removed by DMS prior to the effective date of

the Asset Purchase Agreement. As such, argues NPP Acquisition, the DMS Claim is among those claims indemnified by NPP Liquidation.

Additionally, NPP Acquisition argues that any expenses incurred defending against the DMS and Farrelly Claims should be indemnified pursuant to the Asset Purchase Agreement. Paragraph 1.1(x) defines "Damages" to include:

> Any claim, loss, deficiency (financial or otherwise), Liability, cost or expense (including without limitation, reasonable attorneys' and accountants' fees, costs and expenses) or damages of any kind or nature.

Asset Purchase Agreement at ¶1.1(x) (Emphasis added). Thus, contends NPP Acquisition, NPP Liquidation is expressly obligated to indemnify NPP Acquisition for fees and expenses associated with the DMS Claim and Farrelly Claim.

NPP Acquisition also asserts that it followed the prescribed procedure for noticing and asserting a claim for indemnification pursuant to the Asset Purchase Agreement despite having initially advanced its indemnification claim and contested the DMS Claim and Farrelly Claim in New York. The Asset Purchase Agreement expressly provides that the parties agree to the "exclusive jurisdiction of any New York State and Federal Court . . . in any action arising out of or relating to [the Asset Purchase Agreement]." See id. at ¶ 13.7(b). Moreover, to the extent NPP Liquidation was prejudiced by NPP Acquisition's notice in contesting these matters, the Asset Purchase Agreement provides a remedy in that the indemnification claim would be reduced. See id.

at ¶ 11.4. Nor does NPP Acquisition believe that the indemnification provisions arise only upon DMS asserting a successful claim against NPP Acquisition because the "Damages" language in the Asset Purchase Agreement contains no such limiting language.

NPP Liquidation counters that the indemnification claims asserted on the DMS Claim and Farrelly Claim are invalid because those claims did not survive the Asset Sale Agreement or Plan confirmation and thus DMS and Farrelly are simply entitled to general unsecured creditor status under Debtor's Plan. NPP Liquidation maintains that neither DMS nor Farrelly have a claim against NPP Acquisition that would give rise to an indemnification claim by NPP Acquisition against NPP Liquidation under the terms of the Asset Purchase Agreement.

Moreover, NPP Liquidation argues that, to the extent the Court finds that the DMS Claim and Farrelly Claim give rise to viable claims for indemnification, NPP Acquisition should be prohibited from seeking all of its attorneys fees and expenses under the indemnification provisions of the Asset Purchase Agreement because NPP Acquisition failed to provide Debtor with an opportunity to defend the action in this Court when NPP Acquisition first sought relief in the New York State Action requiring Debtor to remove the action to this Court.

I find that, to the extent the DMS claim is found to survive the Asset Purchase Agreement on a successor liability

theory, NPP Liquidation is obligated to indemnify NPP Acquisition pursuant to the clear language of the Asset Purchase Agreement, including all appropriate costs and expenses related to the claims. The DMS Claim is precisely the type of claim contemplated by the Asset Purchase Agreement's indemnification provisions; the DMS Claim is based upon repair and replacement of defectively manufactured products; those products were manufactured by NPP Liquidation; DMS first asserted its claim on the allegedly defective products before the effective date of the Asset Purchase Agreement and the claim involves NPP Liquidation's products manufactured entirely before the effective date of the Asset Purchase Agreement.

The Farrelly Company.

Both NPP Acquisition and NPP Liquidation argue that, because Farrelly has failed to answer or otherwise respond to NPP Acquisition's complaint, NPP Acquisition is entitled to default judgment against Farrelly. Moreover, NPP Acquisition maintains that Farrelly's failure to respond is not through oversight or inadvertence but rather by affirmative decision. See Letter to Farrelly, Ex. M, (Doc. # 17). Given Farrelly's failure to respond to the complaint, a default judgment against Farrelly will be entered such that Farrelly will be bound by the terms of the Sale Order and Asset Purchase Agreement and is, therefore, entitled to treatment only as a general unsecured creditor of NPP Liquidation pursuant to the Plan.

CONCLUSION

For the reasons set forth above (1) NPP Acquisition's motion will be denied with respect to the successor-in-interest liability issue, will be granted with respect to its indemnification rights against NPP Liquidation, and will be granted with respect to the default judgment against Farrelly, (2) DMS' motion will be denied as to the successor-in-interest liability issue, and (3) NPP Liquidation's motion will be denied with respect to the indemnification issue and granted with respect to the default judgment against Farrelly.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In Re:	)	Chapter 11
	)	
NATIONAL PIPE & PLASTICS, INC.	)	Case No. 96-1676 (PJW)
	)	
Debtor.	)	
_____	)	
	)	
NATIONAL PIPE & PLASTICS, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Adv. Proc. No. A-99-12
	)	
N.P.P. LIQUIDATION COMPANY, DMS CONSTRUCTION CO., INC., and THE JACK FARRELLY COMPANY,	)	
	)	
Defendants.	)	

ORDER

For the reasons set forth in the Court's Memorandum Opinion of this date, (a) National Pipe & Plastics, Inc.'s motion for summary judgment (Doc. # 15) is DENIED with respect to the successor-in-interest liability issue, GRANTED with respect to its indemnification rights against N.P.P. Liquidation Company in the event that it is determined that National Pipe & Pastics, Inc. is liable to DMS Construction Co., Inc., and GRANTED with respect to the default judgment against The Jack Farrelly Company, (b) DMS Construction Co., Inc.'s cross motion for summary judgment (Doc. # 20) is DENIED as to the successor-in-interest liability issue, and (c) N.P.P. Liquidation Company's summary judgment motion (Doc. # 27) is DENIED with respect to the indemnification issue and GRANTED

with respect to the default judgment against The Jack Farrelly Company.

_____
Peter J. Walsh
Bankruptcy Court Judge

Date: September 25, 2000