STATE OF VERMONT

SUPERIOR COURT **CIVIL DIVISION**
Rutland Unit **Docket No. 470-8-14 Rdcv**

State of Vermont,
Plaintiff

v.

John M. Ruggiero, Second City LLC,
Second City Properties LLC, 6 Hopkins LLC,
10 Cleveland LLC, 16 Meadow LLC,
32 Merchants LLC, 35 Elm LLC, 38 Elm LLC,
48 Strongs LLC, 49 Forest LLC, 54 Cherry LLC,
61 School LLC, 65 School LLC, 70 Grove LLC,
75 Harrison LLC, 76 Grove LLC, 79 School LLC,
84 Woodstock LLC, 114 Strongs LLC,
212 Columbian LLC, and 222 Stratton LLC,
Defendants

DECISION

Plaintiff's Motion for Summary Judgment on Liability (MPR 3)

This matter came before the court for reconsideration of summary judgment on liability. The Plaintiff, the State of Vermont, is represented by Assistant Attorneys General Gavin J. Boyles and Scot L. Kline. The Defendants are pro se. The court granted summary judgment on liability in favor of the Plaintiff, the State of Vermont, on May 11, 2015, having received no opposition materials from the Defendants. The Defendants filed a motion to reconsider and extend time on May 19, 2015, asking for additional time to respond to the summary judgment motion. The State did not oppose reconsideration and extension of time, and the court granted the Defendants' motion. The Defendants submitted opposition materials, and the State filed its reply. For the reasons set forth below, the court grants in part and denies in part the State's motion for summary judgment on liability.

Background and Undisputed Material Facts

This is an action by the State to recover environmental cleanup expenditures from the Defendants. The Defendants in this matter are an individual, John M. Ruggiero, and 21 LLCs that he created and through which he has conducted

business as a landlord in Rutland. Ruggiero has at all times been the sole shareholder and manager of each of the LLC Defendants. The State alleges that the Defendants are liable under the Waste Management Act, 10 V.S.A. §§ 6615(a)(1), 6615(a)(2), 6615(b), and 6616, for costs expended by the State to remediate environmental contamination caused by a plume of underground chemical contaminants originating from the property at 84 Woodstock Avenue in Rutland ("the Property"). Only issues of liability are presently before the court.

The following facts are undisputed by the parties. The Property was formerly the site of a dry cleaning business, and was also formerly the site of a gas station. It is contaminated with the dry-cleaning solvent tetrachloroethene, also known as perchloroethene, perc, or PCE, and its degradation byproducts. The property is also contaminated with petroleum volatile organic compounds. The tetrachloroethene compounds and petroleum compounds are hazardous materials.

Since 1989, Ruggiero has owned and operated numerous rental properties in Rutland. He operated his property rental business primarily through Second City LLC. He has at all relevant times been the sole shareholder and sole manager of Second City LLC.

In 2001, Ruggiero, purporting to act on behalf of an LLC called Property Recovery LLC, acquired the Property. Property Recovery LLC has never existed. At the time of the 2001 acquisition, Ruggiero was aware that the Property was contaminated and would require substantial cleanup. In 2002, while Property Recovery LLC was the titled owner of the Property, the Property went to tax sale. At this time, Ruggiero created Second City Properties LLC and, through this new entity, bought the Property at tax sale. Ruggiero has at all relevant times been the sole shareholder and sole manager of Second City Properties LLC. The sole purpose for which Second City Properties LLC was formed was to hold the Property.

The Property has been the subject of proceedings in the Environmental Division, with Second City LLC and Second City Properties LLC as named respondents, since at least July 19, 2011, on which date the Environmental Division ordered, by stipulation of the parties, that a corrective action plan be implemented to remedy the contamination emanating from the Property. Second City LLC and Second City Properties LLC stipulated in this order that they owned and operated the Property. They also agreed to commence excavation in accordance with the corrective action plan no later than August 22, 2011, and to complete implementation of the corrective action plan no later than October 1, 2011. They

never did so, lacking sufficient funds. The State subsequently undertook remediation, and now seeks reimbursement for its costs incurred in doing so.

In August 2011, Ruggiero restructured his property rental business and transferred ownership of a number of properties from Second City LLC to a number of newly created LLCs. He also transferred ownership of the Property from Second City Properties LLC to a newly created LLC called 84 Woodstock LLC, which he created specifically to hold the Property. None of these transfers were for consideration. 84 Woodstock LLC currently owns the Property.

As of 2001, there were two buildings on the Property. The smaller building, or front building, was approximately 15 feet by 30 feet in dimension. The larger building, or rear building, was a concrete building with approximate dimensions of 150 feet by 80 feet. Both of these buildings have since been demolished.

10 V.S.A. § 6615(a)(1), in conjunction with 10 V.S.A. § 6615(c), imposes strict joint and several liability on all owners and operators of facilities where hazardous waste has been released, without regard for fault. This rule embodies a legislative judgment to grant primacy to the State's interest in full reimbursement of costs outlaid for abatement, investigation, removal, and remediation of pollution to protect public health and the environment. 10 V.S.A. § 6615(a)(2) imposes liability on similar terms on owners and operators of facilities at times of actual or threatened releases. 10 V.S.A. § 6615(b) requires the imposition of treble damages on responsible parties who fail to comply with court orders mandating removal and remediation. 10 V.S.A. § 6616 prohibits release of hazardous materials.

The State has made voluminous submissions advancing a multitude of theories of liability under these statutes. The Defendants concede some of these and dispute others.

Summary Judgment Standard

Summary judgment is appropriate when the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. V.R.C.P. 56; *In re Holbrook*, 2016 VT 13, ¶ 28. "The nonmoving party is entitled to 'the benefit of all reasonable doubts and inferences.'" *McKinstry v. Fecteau Residential Homes, Inc.*, 2015 VT 125, ¶ 10 (quoting *Ianelli v. U.S. Bank*, 2010 VT 34, ¶ 7).

Analysis

I. Propriety of Defendants' Opposition Materials

As an initial matter, the State argues in its Reply that the pro se Defendants' response is unsupported by a sworn affidavit setting forth facts, and should therefore be disregarded.[1] The State correctly notes that V.R.C.P. 56(c) generally contemplates that parties will support factual assertions with sworn testimony and admissible evidence. However, the Supreme Court of Vermont has held that affidavits are not essential to oppose summary judgment. See *Bingham v. Tenney*, 154 Vt. 96, 101 (1990). It is sufficient for a pro se nonmoving party's response materials to place the court on notice that the nonmoving party "could have raised genuine issues of fact and that his failure to do so was one of form, not substance." *Id.* Because it may be an abuse of discretion for the court to disregard facts that could defeat a motion for summary judgment where the nonmoving party submits them in a manner arguably not in compliance with Rule 56, *id.,* and because it would not advance the resolution of the case to do otherwise, the Defendants' response materials have been evaluated on their merits.

II. Liability of 84 Woodstock LLC

84 Woodstock LLC is unique among the Defendants in that it has admitted liability. The Defendants' response materials concede that 84 Woodstock LLC is the current titled owner of the Property. Summary judgment in favor the State is therefore appropriate on the question of the liability of 84 Woodstock LLC as owner of the Property, and is granted.

III. Liability of John Ruggiero

The State puts forward three separate grounds on which it argues that Ruggiero himself should be found liable as an owner or operator. First, the State

[1] Defendant John M. Ruggiero was formerly licensed as an attorney in Vermont, but has not been so licensed since 2006. Notwithstanding Ruggiero's past legal training, the court will treat him and the other Defendants like other pro se litigants. Under 11 V.S.A. § 3012(d)(1), the court shall permit LLCs to appear through a nonattorney representative if three criteria are met: the representative is authorized by the LLC, the proposed representative has adequate legal knowledge and skills to represent the organization without unduly burdening the opposing party or the court, and the representative shares a common interest with the LLC. For now, the court finds that these criteria are satisfied such that Mr. Ruggiero may represent all the LLC Defendants in this case. The fact that he did not comply properly with the requirements of Rule 56 is somewhat concerning; however, for the reasons stated, the court addresses the issues on the merits. If, as the case progresses, there is reason to believe that not all requirements continue to be met, the issue may be raised by the Plaintiff or the court for further review.

argues that Ruggiero purchased the Property while purporting to act on behalf of an entity that did not exist, and that ownership of the Property should therefore be imputed to Ruggiero personally. Second, the State argues that the entities with titled ownership of the Property were and are mere alter-egos of Ruggiero, and that the corporate veil should be pierced to hold Ruggiero liable as their sole shareholder. Third, the State argues that Ruggiero should be held personally liable as an operator of the Property even without piercing the corporate veil because, as sole manager of the entities that owned and operated the property, he exercised actual control and authority over the Property. The court examines each of these theories of liability in turn.

a. Agent of Nonexistent Entity

Ruggiero concedes that he acquired the Property in 2001 while purporting to act on behalf of Property Recovery LLC. He also concedes that Property Recovery LLC did not exist at the time he purported to buy the Property on its behalf.

An agent who purports to act on behalf of a nonexistent principal is personally liable for obligations to which he purports to bind the principal. See *Fonda Group, Inc. v. Lewison*, 162 F.Supp.2d 292, 302 (D. Vt. 2001) ("the rule in New York is that individuals can be liable for obligations incurred while they 'purported to act on behalf of a corporation which had neither a de jure nor a de facto existence….'") (quoting *Brandes Meat Corp. v. Cromer*, 146 A.D.2d 666, 667, 537 N.Y.S.2d 177 (N.Y. App. Div. 1989)). This rule follows inescapably from basic axioms of agency law, and appears to be applied consistently across jurisdictions.[2]

Ruggiero insists that he never personally held title to the Property, but this is irrelevant. A nonexistent entity held title to the Property as a result of Ruggiero's

[2] See, e.g., *Karl Rove & Co. v. Thornburgh*, 39 F.3d 1273, 1285 (5th Cir. 1994) ("Under the law of agency, such a putative agent was and is held liable for the contract entered into on behalf of the nonexistent principal."); *Smith & Edwards v. Golden Spike Little League*, 577 P.2d 132, 134 (Utah 1978) ("The principle of law which is controlling under the circumstances shown herein is that where a person enters into a contract with another, under a representation that he is acting as agent for a principal, when there is in fact no such principal, he renders himself personally liable upon the contract. This is equally true if the named principal is fictitious, or nonexistent, or is not a legal entity which can be subjected to liability; and it is also true, even though the purported agent had no wrongful intent.") (footnotes and citations omitted); *Tim Covert & Electolite v. Kanieski*, 2011-Ohio-4170, ¶ 27 (Ohio Ct. App. 2011) ("An agent is also liable, '[w]here there is a fictitious or non-existent principal, or the principal is without legal capacity or status. If an agent purports to act on behalf of such a "principal," the agent will be liable to the third party as a party to the transaction.' One cannot be an agent for a nonexistent principal; there is no agency.") (quoting *James G. Smith & Associates, Inc. v. Everett*, 1 Ohio App. 3d 118 (Ohio Ct. App. 1981)).

actions. By operation of law, Ruggiero had actual ownership of the Property during the period when the titled owner was Property Recovery LLC. He stands personally in the place of the nonexistent entity on whose behalf he purported to act.

However, under 10 V.S.A. § 6615(a)(2), past owners and operators are liable only if they were owners or operators at the time of a release or threatened release of hazardous material. The only evidence the State puts forward of any release or threatened release is the evidence of the demolition of the back building of the property, and this demolition occurred between 2004 and 2008. Property Recovery LLC had ceased to be the titled owner of the Property in 2002. Even though Ruggiero must, as a matter of law, stand in the shoes of Property Recovery LLC during its period of purported ownership, the State has not demonstrated that any liability should thereby be imposed upon him on that basis.[3]

b. Piercing the Corporate Veil

The State argues that the court should pierce the corporate veils of both 84 Woodstock LLC and Second City Properties LLC to hold Ruggiero personally liable. Courts are empowered to "look beyond the corporation to its shareholders for liability, that is, pierce the corporate veil, where the corporate form has been used to perpetrate a fraud, and also where the needs of justice dictate." *Agway, Inc. v. Brooks*, 173 Vt. 259, 262 (2001). "In cases not involving fraudulent activity, the court will look to the facts and circumstances of each case to determine whether the corporate veil should be pierced in the interests of fairness, equity, and the public need." *Id.*

"An obvious inadequacy of capital, measured by the nature and magnitude of the corporate undertaking, has frequently been an important factor in cases denying stockholders their defense of limited liability." *Anderson v. Abbott et al.*, 321 U.S. 349, 362 (1944). The adequacy of the capitalization of the corporate entity is one of the most important factors in determining whether the corporate veil should be pierced, and shareholders have often been held liable "when they treat the assets of the corporation as their own and add or withdraw capital from the corporation at will…or when they provide inadequate capitalization and actively participate in the conduct of corporate affairs." *Minton v. Cavaney*, 56 Cal.2d 576, 579, 364 P.2d 473, 475 (Cal. 1961) (Traynor, J.).

[3] Further, as discussed below, the Defendants have raised a genuine issue as to the material facts relating to causation between the demolition and any alleged release.

As the State correctly argues, Second City Properties LLC and 84 Woodstock LLC were woefully undercapitalized for their intended purposes. It is undisputed that these two entities were created specifically to hold the Property. It is also undisputed that at the time of their creation, their creator, Ruggiero, knew of the contamination of the Property. Ownership of a parcel of real property contaminated with hazardous waste is a substantial liability. Adequate capitalization for this purpose would, at a minimum, include corporate ownership of assets sufficient to cover reasonably foreseeable cleanup expenses. The only asset held by either of these entities was the Property itself, which, being so contaminated, was of little value as it was subject to all reasonably foreseeable cleanup expenses.

The State points to *In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 675 F.Supp 22, 32 (D. Mass 1987), a well-reasoned case from the District of Massachusetts that rightly acknowledges the desirability and social value of brownfield redevelopment. The *Acushnet* court acknowledged that it is appropriate for the corporate form to afford protection to potential investors in redevelopment enterprises. However, the court also emphasized that the protection offered by the corporate form is predicated on adequate capitalization of the corporate entity. Here, as the undisputed evidence clearly shows, neither Second City Properties LLC nor 84 Woodstock LLC was adequately capitalized in light of the nature and magnitude of their undertakings.

Defendants acknowledge in their opposition materials that "Defendant Ruggiero provided funds to Second City Properties LLC as needed as loans to be repaid when the Property was cleaned and sold." Defendants' Response to State's Motion for Summary Judgment, 3. Later in their opposition materials, the Defendants again admit that "Defendant Ruggiero would loan monies to Second City Properties LLC, which would be paid back when the Property was sold." *Id.* at 7. Later still, the Defendants admit for the third time that "In terms of ownership 84 Woodstock LLC was the successor to Property Recovery LLC and Second City Properties LLC. As it had been since 2001, Defendant Ruggiero loaned monies to each owner of the Property expecting to be repaid when the Property was sold." *Id.* at 13. The Defendants have conceded that Second City Properties LLC and 84 Woodstock LLC essentially acted as shells through which Ruggiero passed funds and only when needed for his own eventual gain as sole owner of the LLC. This is another important factor militating strongly in favor of veil-piercing. See *Agway*, 173 Vt. at 263.

Neither the State nor Defendants have put forth evidence of improper corporate record keeping, commingling of accounts, or other traditional veil-piercing

factors, but the undisputed facts establish undercapitalization and funneling of funds, which are sufficient under the circumstances of this case to support veil-piercing. The needs of justice dictate that the corporate veils of 84 Woodstock LLC and Second City Properties LLC be pierced, and that Ruggiero, as the sole shareholder of those entities, be held personally liable as follows: through 84 Woodstock LLC as current owner of the Property from 2011 to the present, and through Second City Properties LLC to the extent of any liability established during its ownership from 2002 to 2011.

c. Direct Personal Liability as Operator

The State argues that Ruggiero should be held personally liable as an operator because, as sole shareholder and manager of the LLCs that owned the property, he had the authority and ability to remediate the contamination. The State argues that the court can and should hold Ruggiero personally liable in this way without piercing the corporate veil, and cites several federal CERCLA cases in which corporate decisionmakers were held personally liable as operators for environmental contamination of corporate property. In particular, the State points to *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985), where the sole shareholder and manager of a corporation formed to take possession of a contaminated site was held personally liable even without piercing the corporate veil on the basis of his control of corporate conduct and active participation in that conduct.

Though this expansive reading of the term "operator" appears to have enjoyed acceptance in some federal courts applying CERCLA, the Supreme Court of Vermont has not adopted, and has not given any indication that it would adopt, a rule that so stridently eviscerates the limitation of liability that is the fundamental essence of the corporate form without piercing the corporate veil. It would be a departure from the established law of Vermont for this court to rule as the State urges on this question. The court therefore declines to hold Ruggiero personally liable on these grounds.

IV. Liability of Second City LLC and Second City Properties LLC

The State argues that Second City LLC and Second City Properties LLC should be held liable under both 10 V.S.A. § 6615(a)(2), as past owners and operators, and under 10 V.S.A. § 6615(b), for treble damages for failure to comply with a court order requiring removal and remedial actions.

a. Past Owner/Operator Liability

The State argues that Second City LLC and Second City Properties LLC should be held liable because they stipulated to their status as owners and operators in the Environmental Court. The State has provided unrefuted evidence that Ruggiero, acting in his capacity as manager of Second City LLC and Second City Properties LLC, stipulated that "Second City Properties, LLC and Second City, LLC[4] are Vermont-registered corporations which own and operate property located at 84 Woodstock Avenue in Rutland, Vermont (the property)." The stipulation was signed by Ruggiero on July 18, 2011 and entered on July 19, 2011 in the matter of *Secretary, Vermont Agency of Natural Resources v. Second City Properties, LLC and Second City, LLC*, Docket No. 100-7-11 Vtec, in the Environmental Division of the Superior Court.

The Defendants concede that Second City Properties LLC was a titled owner of the Property, but protest that Second City LLC was never in the chain of title. This is true, but does not alter the outcome of the analysis. Even if it were proven conclusively that Second City LLC never owned the Property, and Second City LLC could not be found to be an owner of the Property within the meaning of 10 V.S.A. § 6615(a)(1), Second City LLC nevertheless stipulated in July of 2011 to being an operator of the Property.

The stipulation filed in the Environmental Division matter obviates any dispute as to whether Second City LLC and Second City Properties LLC were owners and operators of the Property.

Nevertheless, for liability to be imposed upon a past owner or operator under 10 V.S.A. § 6615(a)(2), there must be a showing of a release or threatened release of hazardous materials during the period of ownership or operation. Here, the State has made no such showing. The only evidence of release or threatened release that the State advances is the evidence of the demolition of the back building on the Property between 2004 and 2008. The State alleges that, at some time between 2004 and 2008, the Defendants demolished the large back building on the Property, a concrete building with approximate dimensions 150 feet by 80 feet, and thereby exposed the source area of the contamination to rainwater infiltration resulting in further contamination.

[4] The placement of commas in the corporate names "Second City Properties, LLC" and "Second City, LLC" does not raise any genuine issue as to the identity of the entities subject to the stipulation. The Defendants do not argue that these entities are distinct from the Defendants Second City Properties LLC and Second City LLC in this matter, and it is clear that the entities are the same.

The Defendants in opposition devote some energy to discussing demolition of the smaller front building on the Property, a building approximately 15 feet by 30 feet. This is largely immaterial to the State's allegations, which are based on demolition of the back building. However, the Defendants do assert that "[f]or years rain and the weather clearly had been pouring into the front and back buildings." Defendants' Response to State's Motion for Summary Judgment at 5-6. The Defendants assert that the back building was exposed to the elements prior to the Property coming into the Defendants' ownership and control, implying that it is not clear that the demolition of the back building in fact caused any further contamination that would qualify as a "release" during the period that Second City LLC and Second City Properties LLC were operator/owners.

The State protests that Ruggiero, a layperson, is not competent to rebut the technical testimony of its witness, Mr. Matthew Becker, as to the effect of the demolition of the back building on the migration of subsurface contaminants. However, the court does not evaluate the weight of evidence within the context of a summary judgment ruling. Defendants have made factual assertions in their opposition as to specific physical circumstances on and in the ground that challenge the facts asserted by Mr. Becker as to the details of an alleged release, and the court cannot ignore the existence of disputes of material fact. See *Bingham v. Tenney*, 154 Vt. 96, 101 (1990).

Moreover, Mr. Becker's testimony on this issue is not offered as expert testimony. Though Mr. Becker may well be qualified to testify as an expert, his qualifications are not set forth in the State's evidence, nor has the State offered any evidence by which the court could assess the reliability of the foundation of Mr. Becker's testimony or the validity of the scientific methodology by which he reached his conclusions. As presented on summary judgment, Mr. Becker's testimony is not based on technical expertise.

Furthermore, it is highly conclusory, lacking factual details and explanation of the process by which rainwater infiltration caused a release of hazardous material. The totality of his statement on whether and how a release occurred is simply, "The demolition of the building exposed the contaminant source area to rainwater infiltration resulting in the increased leaching of subsurface contaminants into groundwater." He does not identify the source of his knowledge about the property or the demolition. This statement is insufficient, when considered in the light of Defendants' assertions offered in opposition, for the court to conclude that it is undisputed that a release occurred during the period that Second City LLC and Second City Properties LLC were operator/owners.

Thus, the question of whether there was a release or threatened release while Second City LLC and Second City Properties LLC owned and operated the property cannot be decided on summary judgment. The overarching question of the liability of Second City LLC and Second City Properties LLC under 10 V.S.A. § 6615(a)(1) remains open for determination at trial.

b. Liability for Treble Damages for Failure to Comply with 2011 Court Order

The liability of Second City LLC and Second City Properties LLC under 10 V.S.A. § 6615(b), on the other hand, is clear. The stipulated order specifically required Second City LLC and Second City Properties LLC to commence and complete certain excavation and construction activities set forth in a Corrective Action Plan to remediate the contamination. The stipulated order was therefore an order requiring removal and remedial actions within the meaning of 10 V.S.A. § 6615(b). It is undisputed that Second City LLC and Second City Properties LLC failed to comply with the order.

Second City LLC is therefore liable under 10 V.S.A. § 6615(b), which imposes liability in an amount equal to three times the cost of removal for noncompliance with an order. Second City Properties LLC is also liable on the same basis, and because the corporate veil has been pierced as to Second City Properties LLC for the reasons stated above, Ruggiero is personally liable for such treble damages.

V. Liability of the Other LLC Defendants as Successors to Second City LLC

The State contends that the other LLCs named as defendants in this matter are mere continuations of Second City LLC, and should therefore be liable on the same terms as Second City LLC. The State also argues that the other LLC defendants hold assets that they acquired via fraudulent transfers, and that those transfers should be set aside.

a. Successor Liability

A business entity that is a mere continuation of a previous entity is subject to the liabilities of its predecessor. See *Gladstone v. Stuart Cinemas, Inc.*, 2005 VT 44, ¶ 14. Eight factors relevant to the determination of whether an entity that has taken ownership of the assets of another entity is a mere continuation of its predecessor are set forth in *Gladstone*, *id.* at ¶¶ 20-26. The court examines them in turn:

(1) *Whether the two entities have common officers, directors, and shareholders.* Here, it is undisputed that all of the entities involved are owned and

controlled solely by Ruggiero. This factor favors a finding of successor liability.

(2) Whether only the transferee entity survives after the transfer of assets. It is uncertain from the record the extent to which Second City LLC survived in any meaningful form after the transfers. The Defendants in their opposition materials state that Second City LLC remains an active ongoing concern with assets, although it appears that many (if not most or all) of the real estate assets that were the core of its business have been transferred to the other LLCs. If Second City LLC is still a going concern, it is operating without all the properties it transferred to the other LLCs. In describing the creation of the LLCs, Defendants wrote: "The transfers were part of a business plan to streamline all Properties owned or controlled by Defendant Ruggiero. Each property owned by Second City LLC would stand alone and be owned by a company formed solely to own that respective property." Defendants' Response to State's Motion for Summary Judgment, 16-17. Based on the nonspecific representation that Second City LLC remains active, and giving the Defendants the benefit of doubt, this factor disfavors a finding of successor liability, but only weakly. Moreover, the mere fact of continued existence is not fatal to a finding of successor liability. *Id.* at ¶¶ 21, 22.

(3) *Whether adequate consideration was provided for the transfer of assets.* Here, it is undisputed that no consideration was provided for the transfers. This factor favors a finding of successor liability.

(4) *Whether the two entities conduct the same business.* It is undisputed that Second City LLC conducted the business of managing rental properties, and that the other LLC defendants conduct the exact same business, managing the exact same rental properties for the exact same sole shareholder, Ruggiero. This factor favors a finding of successor liability.

(5) *Whether the two entities share phone numbers.* There is no evidence in the record relevant to this factor.

(6) *Whether the two entities have the same employees.* There is no evidence in the record relevant to this factor.[5]

(7) *Whether the transferee entity selectively pays the transferor's debts to its own advantage.* There is no evidence of selective repayment of Second City LLC's debts by any of the other LLC defendants, so there is no evidence in the record relevant to this factor.

[5] There is no indication in the record that any of the entities had any employees per se, though it is clear that they were all managed and operated by their sole and controlling shareholder and manager, Ruggiero.

(8) *Whether the effect of the transfer would be to allow the transferor to escape obligations via a mere change in form*. It is clear from the record that the other LLC defendants now hold a substantial portion of the assets that were once held by Second City LLC and which the State could have reached to satisfy Second City LLC's environmental cleanup liabilities. Absent imposition of successor liability on the other LLC defendants, the effect of the transfers would be to shield these assets from Second City LLC's obligations via a mere change in form. This factor favors a finding of successor liability.

In sum, the important *Gladstone* factors that are relevant to the evidence in this case favor a finding of successor liability. The court therefore concludes that the other LLC defendants are mere continuations of Second City LLC, and, as successors, are liable on the same terms as Second City LLC. As explained above, Second City LLC is liable for treble damages under 10 V.S.A. § 6615(b) for failure to comply with the 2011 Order. The other LLC defendants are also so liable.

b. Fraudulent Transfers

The State also argues that the transfers of property from Second City LLC to the other LLC defendants were fraudulent as to creditors under the Uniform Fraudulent Transfers Act, 9 V.S.A. § 2288, and should be set aside. The UFTA provides in relevant part that a transfer is fraudulent as to creditors when it is made either with "actual intent to hinder, delay, or defraud any creditor," 9 V.S.A. § 2288(a)(1), or "without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor: (A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (B) intended to incur or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due," 9 V.S.A. § 2288(a)(2). The State argues that the transfers should be deemed fraudulent under both 9 V.S.A. § 2288(a)(1) for actual fraudulent intent and under 9 V.S.A. § 2288(a)(2) for transferring without receiving equivalent value in light of impending insolvency.

With respect to actual fraudulent intent under 9 V.S.A. § 2288(a)(1), the State has provided a careful and comprehensive analysis of the badges of fraud, the factors set forth in 9 V.S.A. § 2288(b) that the court may consider. The State argues that the presence of a sufficient number of these badges of fraud compels a finding of fraudulent intent. The plain language of 9 V.S.A. § 2288(b) states that "[i]n determining actual intent under subdivision (a)(1) of this section, consideration may be given, among other factors, to" the badges of fraud. This language is permissive

rather than mandatory, and grants authority to find fraudulent intent based on badges of fraud. It is not, contrary to the State's contention, a compulsory directive to find fraudulent intent based on badges of fraud. The prefatory notes and comments cited by the State in support of its position do not contravene this natural reading, and in any event are of little weight relative to the plain language of the statute as enacted.

The underlying question in the 9 V.S.A. § 2288(a)(1) analysis is the actual intent of the transferor, and that question must be answered by reference not only the badges of fraud, but also to direct evidence. Certainly, many badges of fraud are present here. But, as the plain language of 9 V.S.A. § 2288(b) contemplates, badges of fraud may be abundant even where actual fraudulent intent is absent. The Defendants vociferously maintain that there was no fraudulent intent behind the transfers. On summary judgment, where the nonmoving party must be given the benefit of all reasonable doubts and inferences, the court cannot disregard the Defendants' assertions that the transfers were made without fraudulent intent. The weighing of this conflicting evidence is a task for the factfinder at trial, not for the court on summary judgment. The court therefore cannot at this time rule the transfers fraudulent under 9 V.S.A. § 2288(a)(1).

9 V.S.A. § 2288(a)(2), on the other hand, requires no finding of actual fraudulent intent, but instead looks only to objective facts. It is undisputed that Second City LLC received no value in exchange for the transfers in question; the Defendants concede that "[n]o consideration was required nor paid." Defendants' Response to State's Motion for Summary Judgment at 18. The Defendants concede that Second City LLC was engaged in a business for which its remaining assets were unreasonably small; "[a]s it was in 2011 there were no funds or assets that Second City LLC or Second City Properties LLC or 84 Woodstock LLC had or could use to fund the 2010 CAP other than those provided by Defendant Ruggiero and with the change in economy and loan sources dried up, monies could not be raised to fund the 2010 CAP." Defendants' Response to State's Motion for Summary Judgment at 21.

It is clear, then, from undisputed facts that Second City LLC made the transfers without receiving a reasonably equivalent value in exchange for the transfers, and was engaged in a business for which its remaining assets were unreasonably small in relation to the business. This is all that is necessary to render the transfers fraudulent as to creditors under 9 V.S.A. § 2288(a)(2).

The court therefore concludes that the transfers were fraudulent as to creditors, and sets them aside and allows the State to reach the transferred assets.

VII. Release Liability Under 10 V.S.A. § 6616

Finally, the State also requests that the Defendants be held liable as actual releasers of contaminants into groundwater under 10 V.S.A. § 6616. The State has provided no authority in support of the notion that 10 V.S.A. § 6616 provides grounds for imposing liability beyond the liability imposed by 10 V.S.A. § 6615. The court is not convinced that it does, and will not grant summary judgment in favor of the State on this question.

Summary

In sum, the court finds the Defendants liable as follows.

Defendant John M. Ruggiero is liable:

(1) As an owner of the Property, via piercing of the corporate veil, as sole shareholder of the entity 84 Woodstock LLC, which is the current titled owner of the Property; and
(2) For treble damages, via piercing of the corporate veil, as sole shareholder of the entity Second City Properties LLC, which failed to comply with the Environmental Division's Order entered July 19, 2011 mandating removal and remediation of the contamination on the Property.

Defendant Second City LLC is liable for treble damages, for its failure to comply with the Environmental Division's Order entered July 19, 2011 mandating removal and remediation of the contamination on the Property.

Defendant Second City Properties LLC is liable for treble damages, for its failure to comply with the Environmental Division's Order entered July 19, 2011 mandating removal and remediation of the contamination on the Property.

Defendants 6 Hopkins LLC, 10 Cleveland LLC, 16 Meadow LLC, 32 Merchants LLC, 35 Elm LLC, 38 Elm LLC, 48 Strongs LLC, 49 Forest LLC, 54 Cherry LLC, 61 School LLC, 65 School LLC, 70 Grove LLC, 75 Harrison LLC, 76 Grove LLC, 79 School LLC, 114 Strongs LLC, 212 Columbian LLC, and 222 Stratton LLC are liable:

(1) On the same terms as Second City LLC, as successors thereof; to wit, for treble damages, for their predecessor Second City LLC's failure to comply with the Environmental Division's Order entered July 19, 2011

mandating removal and remediation of the contamination on the Property; and

(2) As transferees of assets via transfers from Second City LLC that were fraudulent as to Second City LLC's creditors.

Defendant 84 Woodstock LLC is liable as the current titled owner of the Property.

While liability for certain Defendants has been established on the bases identified above, this ruling also denies liability as a matter of summary judgment on some of the bases asserted by the State. This raises the question of whether the State wishes an evidentiary hearing to pursue liability on the bases for which liability was denied. If the State wishes to do so, it shall submit a request for an evidentiary hearing on liability within 30 days, and such request shall specify (a) each separate grounds for liability on which a hearing is sought, (b) the specific Defendant(s) against whom liability is sought, and (c) the amount of time the State suggests will be needed for trial. Defendants shall then have the usual 15 days to respond. A pretrial conference can then be scheduled at which the hearing needs of the case can be addressed.

ORDER

For the reasons set forth above:

1. The Plaintiff's Motion for Summary Judgment on Liability (MPR 3) is *granted in part* and *denied in part*, and
2. The Plaintiff shall submit within 30 days a request for an evidentiary hearing on liability as described above; if none is filed, a pretrial conference will be scheduled to address the needs of the case with respect to damages.

Dated this _____ day of April, 2016.

_____

Mary Miles Teachout
Superior Court Judge