

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

**VELIE and VELIE, P.L.L.C.,
JONATHAN VELIE**

Plaintiff,

vs.

Case No. CIV-07-514-C

**ONNAM ENTERTAINMENT, L.L.C.,
SANDRA MANNO, and TRUE
NATIVE AMERICAN GAMING, L.L.C.**

Defendants.

**PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT
TRUE NATIVE AMERICAN GAMING'S MOTION TO DISMISS**

Plaintiffs submit this response in opposition to Defendant True Native American Gaming's (TNAG) Motion to Dismiss. Defendant TNAG argues that Plaintiffs have failed to state a claim for which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons stated below, Defendant TNAG's motion to dismiss should be denied.

FACTS

On November 22, 2005, Onnam Entertainment, LLC (Onnam), formally retained Velie & Velie to perform legal services on behalf of Onnam. Velie and Velie was to perform legal work related to Onnam's core business, casino develop within Indian Country. Velie and Velie worked on numerous legal issues related to casino development on behalf of Onnam. As of August 2006, Velie and Velie had performed approximately \$75,085.83 in legal services on behalf of Onnam.

One of the tribal projects Velie and Velie worked on behalf of Onnam involved the Caddo Nation. Jon Velie negotiated contracts between Onnam Entertainment and the Caddo Nation to develop and manage a casino property for the Tribe in Anadarko, Oklahoma.

After Velie and Velie had ceased work on behalf of Onnam, the owners of Onnam formed True Native American Gaming. Upon information and belief, TNAG was incorporated in the State of Delaware on May 22, 2007 with the same owners as Onnam. Upon information and belief, TNAG assumed the benefit of the contract negotiated by Jon Velie for Onnam. Upon information and belief, TNAG has the contract to act as the developer and manager of the same casino property previously contracted between the Caddo Nation and Onnam.

Plaintiffs requested default judgment against TNAG for failure to appear and defend in the current case. This Court directed TNAG to file an answer or other responsive pleading within five days. TNAG did not answer but now seeks to have the present case dismissed for failure to state a claim.

ARGUMENT

In reviewing a motion to dismiss for failure to state a claim, courts should assume as true plaintiff's allegations. *Beedle v. Wilson*, 422 F.3d 1059, 1063 (10th Cir.2005). In addition, the allegations should be viewed in a light most favorable to the plaintiff. *Id.* The Supreme Court recently decided that the inquiry in considering a motion to dismiss should be whether the complaint contains "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, --- U.S. ---, 127 S.Ct. 1955, 1969, 1974, (2007). Under this standard, a "plaintiff must nudge [] [his] claims across the line from conceivable to plausible in order to survive a motion to dismiss." *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007)(quoting *Bell Atlantic*, 127 S.Ct. at 1974). Plausibility, however,

“does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence” to support the plaintiff’s claim. *Bell Atlantic*, 127 S.Ct. at 1965.

Under this standard, TNAG’s motion to dismiss should be denied. Taken as true and viewed in a light most favorable to Plaintiffs, the complaint clearly alleges facts that create plausible grounds for relief. Plaintiffs allege breach of contract for failure to pay legal fees. Although the contract for services was between Onnam and Plaintiff, the complaint clearly alleges and puts TNAG on notice that Plaintiff seeks to hold TNAG accountable for the Onnam contract.

Generally, a company is not liable for the debts and liabilities of a transferor company. *Pulis v. United States Elec. Tool Co.*, 1977 OK 36, ¶ 5, 561 P.2d 68, 69. An exception to this general rule has been found: “(1) Where there is an agreement to assume such debts or liabilities (2) Where the circumstances surrounding the transaction warrant a finding that there was a consolidation or merger of the corporations, or (3) that the transaction was fraudulent in fact or (4) that the purchasing corporation was a mere continuation of the selling company.” *Id.* A Colorado appellate court examined the issue of successor liability under the same criteria and determined that it was error to grant summary judgment before determining whether the company fit the exceptions to the successor liability rule. *See Ruiz v. ExCello Corp.*, 653 P.2d 415, 417 (Colo. App. 1982). (“These allegations [of successor liability] are sufficient to raise questions of material fact as to whether ExCello fits within the traditional exceptions to the general rule.”). The plaintiff in *ExCello Corp.* alleged that a B&T company manufactured a die-casting machine that malfunctioned and injured plaintiff. The plaintiff further alleged that

the B&T entity became a division of ExCello. The appellate court remanded the case to determine if ExCello was liable under the exceptions imposing successor liability. *Id.*

In the current case, Plaintiffs allege that the contract between Onnam and the Caddo Nation was transferred from Onnam to TNAG. Plaintiffs First Amended Complaint at ¶19. Plaintiffs allege that successor liability should be imposed on TNAG because the assets of Onnam, including the Caddo contract, have been transferred to TNAG. *See Pulis v. United States Elec. Tool Co.*, 1977 OK 36, 561 P.2d 68. The facts alleged in the complaint are sufficient to ñudge [the] claims across the line from conceivable to plausible.ö *Ridge at Red Hawk*, 493 F.3d at 1177. In addition to the transfer of assets, Plaintiffs allege that the owners of Onnam and True Native American Gaming are the same. Plaintiffs First Amended Complaint at ¶17. Plaintiffs further allege that True Native American Gaming is engaged in the same business as Onnam. *Id.* at ¶18. Additionally, Plaintiffs allege that True Native American Gaming has assumed the benefit of the contract Jon Velie helped negotiate between Onnam and the Caddo Nation. *Id.* at ¶19. Clearly, Plaintiffs have alleged a plausible ground for relief. Because Plaintiffs have met the threshold pleading requirements to survive a motion to dismiss, Defendant TNAG's motion to dismiss should be denied.

Based on the foregoing, Plaintiffs respectfully request that Defendant TNAG's motion to dismiss for failure to state a claim be denied.

DATED: December 19, 2007

Respectfully Submitted,

/s/ Jon Velie
Jon Velie (OBA # 15106)
VELIE & VELIE P.L.L.C.
210 East Main St. Ste 222
Norman, OK 73069
Phone: (405) 364-2525
Facsimile: (405) 364-2587
Email: jon@velielaw.com

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2007, I electronically transmitted Plaintiffs' Response in Opposition to Defendant True Native American Gaming's Motion to Dismiss to the Clerk of Court using the ECF System for filing, thereby serving the document on all ECF registrants for this case:

Jacob L. Rowe
The Law Offices of Doug Friesen
1309 N. Shartel Avenue
Oklahoma City, OK 73103
Phone: 405.239.2722
Facsimile: 405.235.2453
Attorney for Defendant
True Native American Gaming, L.L.C.

William H. Hoch, III
CROWE & DUNLEVY
A Professional Corporation
20 North Broadway
Suite 1800
Oklahoma City, OK 73102-8273

/s/ Jon Velie
Jon Velie