[Cite as *Bond Safeguard Ins. Co. v. Dixon Builders I, L.L.C.*, 2012-Ohio-3313.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

BOND SAFEGUARD INSURANCE COMPANY, et al.	:	
	:	CASE NO. CA2011-02-027
Plaintiffs-Appellees,	:	O P I N I O N
	:	7/23/2012
- vs -	:	
	:	
DIXON BUILDERS I, LLC, et al.,	:	
Defendants-Appellants.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2010-10-4223

Ulmer & Berne, James D. Houston, Frederic X. Shadley, 600 Vine Street, Suite 2800, Cincinnati, Ohio 45202, for plaintiffs-appellees, Bond Safeguard Ins. and Lexon Ins. Co.

Dixon Builders II, LLC, 8050 Beckett Center Drive, Suite 213, West Chester, Ohio 45069, defendant-appellant, pro se

Brian T. Byington and Dawn M. Byington, 6134 LeSourdsville West Chester Road, Hamilton, Ohio 45011, defendants-appellants, pro se

Mark D. Schraffenberger, c/o Dixon Builders II, LLC, 8050 Beckett Center Drive, Suite 213, West Chester, Ohio 45069, defendant-appellant, pro se

RINGLAND, J.

{¶ 1} Defendants-appellants, Dixon Builders I, LLC, Dixon Builders II, LLC, Brian T.

Byington, Dawn M. Byington, Mark D. Schraffenberger, et al., appeal an order of the Butler County Court of Common Pleas requiring them to post $600,000 in collateral with the clerk of court as security against any actual or potential loss or expense incurred by plaintiffs-appellees, Bond Safeguard Insurance Company and Lexon Insurance Company, as a result of 32 surety bonds that appellees issued to appellants from 2004 to 2008.[1] For the reasons that follow, we affirm the trial court's order.

{¶ 2} Dixon Builders I was a residential builder that operated in Butler County from 2002 until 2010. Brian Byington was the president and managing member of Dixon Builders I. He also owned, managed and operated numerous development companies that were affiliated with Dixon Builders I. The development companies were formed to develop large parcels of real estate into subdivisions. Once a subdivision development was created, Dixon Builders I would market its home construction services in that subdivision and build houses for its customers on lots within the subdivision.

{¶ 3} In 2004, Dixon Builders I and its affiliated development companies entered into multiple "performance agreements" with the Butler County Board of Commissioners and the cities of Hamilton, Trenton and Middletown (the "Butler County Entities") regarding various subdivisions that Dixon Builders I and its affiliated development companies intended to build. Under the terms of the performance agreements, Dixon Builders I and its affiliates were required to complete construction of the various phases of the subdivisions in a workmanlike manner, by specified dates. They were also required to obtain "performance bonds" to secure performance of their obligations under the agreements, including their obligation to construct certain infrastructure improvements in each of the subdivisions, such as curbs, gutters, sidewalks and streets.

1. The other defendants-appellants in this case are the 30 companies listed in the case caption, which are subsidiaries or affiliates of Dixon Builders I and/or Dixon Builders II.

{¶ 4} To fulfill this latter requirement, the development companies, from 2004 to 2008, obtained 32 surety bonds in the aggregate sum of $1.8 million dollars from Bond Safeguard and Lexon. To induce Bond Safeguard and Lexon to issue the surety bonds to its affiliates, Dixon Builders I entered into a General Indemnity Agreement with Bond Safeguard and Lexon on January 16, 2004. Listed as "Principal[s]" and "Indemnitors" under the indemnity agreement were "Dixon Builders [I], LLC and all subsidiaries and affiliates now owned and/or hereafter created, controlled, managed or acquired." In addition to signing the indemnity agreement as president of Dixon Builders I, Brian Byington also signed the agreement in his individual capacity, as did his wife, Dawn Byington, making both of them additional "Indemnitors" under the agreement.

{¶ 5} On February 1, 2007, the parties executed a second general indemnity agreement, which was the same as their 2004 agreement, except that (1) Dawn Byington did not sign the second indemnity agreement; (2) Mark Schraffenberger, who was vice president and director of development of Dixon Builders I, signed the second indemnity agreement in his individual capacity; and (3) Brian Byington, who signed the second indemnity agreement as he had the first, i.e., as both president of Dixon Builders I and in his individual capacity, also signed the second indemnity agreement on behalf of Maher Road, LLC, which was an affiliate of Dixon Builders I.

{¶ 6} The 2004 and 2007 general indemnity agreements contained a "collateralization" provision that stated in relevant part:

> If the Company [Bond Safeguard and/or Lexon] shall set up a reserve to cover any claim, suit or judgment under any * * * bond [issued by Bond Safeguard and/or Lexon to an affiliated development company of Dixon Builders I], the Indemnitors will, immediately upon demand, deposit with the Company a sum of money equal to such reserve, such sum to be held by the Company as collateral security on such bond * * *."

{¶ 7} In 2009, Dixon Builders I, Brian Byington, individually, Schraffenberger,

individually, and others had judgments of $6,561,391.82 and $2,248,506.60 entered against them in favor of Union Savings Bank and Huntington National Bank, respectively. In early 2010, Dixon Builders I lost its lines of credit with Huntington National Bank and Fifth Third Bank. In May 2010, Brian Byington asked Schraffenberger to form Dixon Builders II, which was to be a residential construction business like Dixon Builders I. Schraffenberger drafted an operating agreement for Dixon Builders II that placed ownership of the company with three trusts that had been established in 2000 for the benefit of Brian Byington's three children: the Brooke Byington Trust, the Jessica Byington Trust and the Chase Byington Trust.

{¶ 8} Under the agreements establishing the trusts, Brian Byington was given the power to invest trust assets at his "sole discretion" and "to sell, contract to sell * * * or otherwise dispose of, for any purpose and at any time prior to making final distribution, any or all assets of the Trust[.]" In the operating agreement for Dixon Builders II, each of the three trusts was designated as a "member" of Dixon Builders II and given a 33⅓ percent "ownership interest" in the company. Brian and Dawn Byington were designated as the "Manager[s]" of Dixon Builders II and given "full and complete authority, power and discretion to manage and control the business, affairs and properties of [Dixon Builders II], to make all decisions regarding those matters and to perform any and all other acts or activities customary or incidental to the management of [Dixon Builders II's] business."

{¶ 9} On June 20, 2010, the Butler County Entities began making claims against the surety bonds the affiliates of Dixon Builders I had obtained from Bond Safeguard and Lexon, with the assistance of Dixon Builders I. The Butler County Entities alleged that Dixon Builders I and its affiliates were in default of their contractual obligations related to the subdivisions, including their obligations to complete construction of the subdivisions' infrastructure. On September 28, 2010, Schraffenberger told Bond Safeguard and Lexon

that Dixon Builders I and its affiliates did not have sufficient funds to cover completion of the subdivisions or their other obligations secured by the bonds. On October 1, 2010, Dixon Builders I had a $714,043.88 judgment entered against it in favor of its landlord. In mid-October 2010, Dixon Builders I ceased operations, at which time all of its employees became employees of Dixon Builders II.

{¶ 10} On October 12, 2010, Bond Safeguard and Lexon filed a complaint for a temporary restraining order, preliminary injunction, permanent injunction, monetary damages and *quia timet* relief against Dixon Builders I, Dixon Builders II, 30 of their affiliated development companies, Brian Byington, Dawn Byington and Schraffenberger, who had executed the parties' 2004 and 2007 general indemnity agreements as indemnitors. In count two of their complaint, Bond Safeguard and Lexon, citing the doctrine of *quia timet*, requested a preliminary injunction against the defendants/indemnitors, ordering them to post a bond or other suitable collateral to secure Bond Safeguard and Lexon against any claims asserted by the Butler County Entities in relation to the surety bonds they had issued to the development companies affiliated with Dixon Builders I.[2]

{¶ 11} A bench trial was held on November 18-19, 2010. The evidence presented revealed that from the time the Butler County Entities began making claims against the surety bonds to the time Bond Safeguard and Lexon filed their complaint, Dixon Builders I and its affiliates sold or transferred at least 61 lots within the subdivisions they were developing, knowing that claims were being made against the bonds. However, none of the proceeds from the sales or transfers of the lots was paid to Bond Safeguard or Lexon, or placed in

2. As will be discussed further in our response to appellants' first assignment of error, in those jurisdictions that recognize it, the doctrine of "*quia timet*" provides a surety with the right "to demand that the principal place the surety 'in funds' when there are reasonable grounds to believe that the surety will suffer a loss in the future because the principal is likely to default on its primary obligation to the creditor." *Borey v. Nat'l Union Fire Ins. Co. v. Pittsburgh, Pennsylvania*, 934 F.2d 30, 32 (2nd Cir.1991).

reserve to fund any of the obligations of Dixon Builders I under the parties' general indemnity agreements.

{¶ 12} On March 7, 2011, the trial court, relying on the doctrine of *quia timet*, issued an amended order finding that Dixon Builders I, Brian Byington and Dawn Byington were obligated "to place" Bond Safeguard and Lexon "in funds," because this "is what these Defendants bargained for and promised to do." The trial court also found that Dixon Builders II, Maher Road, Schraffenberger, the Brook Byington Trust, the Jessica Byington Trust and the Chase Byington Trust are "affiliates" of Dixon Builders I, and thus were also obligated to place Bond Safeguard and Lexon in funds, because Dixon Builders II "is the same company with a different name" as Dixon Builders I.

{¶ 13} The trial court ordered Dixon Builders II, "Brian Byington as president and individually," Maher Road, Schraffenberger, the Brooke Byington Trust, the Jessica Byington Trust and the Chase Byington Trust, within 10 days of its order, to post collateral of $600,000 with the clerk of courts as security against any actual or potential loss or expense incurred by Bond Safeguard and Lexon in connection with their issuance of the surety bonds in question. The trial court further ordered the defendants to produce, for Bond Safeguard and Lexon's "inspection and copying[,]" "any and all books, records, credit reports, and accounts of the Defendants, jointly and severally owned."

{¶ 14} Dixon Builders I, Dixon Builders II, their 30 affiliates (including Maher Road), Brian Byington, Dawn Byington, and Schraffenberger ("appellants") now appeal from the trial court's March 7, 2011 order, assigning the following as error:

{¶ 15} Assignment of Error No. 1:

{¶ 16} "THE TRIAL [sic] ERRED IN GRANTING APPELLEES INJUNCTIVE RELIEF AS THE APPELLEES HAVE NOT PLEAD [sic], AND DID NOT ESTABLISH, THE ELEMENTS NECESSARY FOR INJUNCTIVE RELIEF."

{¶ 17} Assignment of Error No. 2:

{¶ 18} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN HOLDING THAT APPELLANT DIXON BUILDERS II, LLC ('DIXON BUILDERS II') WAS AN AFFILIATE UNDER THE GENERAL AGREEMENT OF INDEMNITY."

{¶ 19} In their first assignment of error, appellants argue the trial court erred in granting injunctive relief to Bond Safeguard and Lexon ("appellees"), because appellees failed to establish the elements necessary to show that they were entitled to such relief.[3] We disagree with this argument.

{¶ 20} The purpose of a preliminary injunction is to preserve the status quo of the parties pending a final adjudication of the case on the merits. *Battelle Mem. Inst. v. Big Darby Creek Shooting Range*, 192 Ohio App.3d 287, 2011-Ohio-793, ¶ 21. In ruling on a motion for a preliminary injunction, a court must consider whether (1) the movant has shown a substantial likelihood that it will prevail on the merits of its underlying substantive claim, (2) the movant will suffer irreparable harm if the injunction is not granted, (3) the preliminary injunction would harm third parties, and (4) the public interest will be served by the injunction. *Id*. The movant must establish each of these elements "by clear and convincing evidence." *Id*. The decision whether to grant or deny a preliminary injunction rests in the sound discretion of the trial court, and the trial court's decision on the matter will not be overturned

3. Appellees have not raised the issue of whether the order appellants are appealing is a final, appealable order. However, because this issue is jurisdictional, this court is obligated to consider it, sua sponte, and dismiss the appeal if it is not taken from a final order. *Barber v. Ryan*, 12th Dist. No. CA2010-01-006, 2010-Ohio-3471, ¶ 6. Appellants would likely argue the order they are appealing is a final, appealable order under R.C. 2505.02(B)(4), because (1) it is an order that grants a preliminary injunction and thus is an order that grants a "provisional remedy," (2) the order both determines the action with respect to the provisional remedy and prevents a judgment in their favor with respect to the provisional remedy, and (3) they will not be afforded a meaningful or effective remedy by an appeal following final judgment in the case. While the question of whether appellants will be denied an effective remedy by an appeal following final judgment in the case is problematic, we conclude that under the facts and circumstances of this case, the order appellants are appealing is a final, appealable order for purposes of R.C. 2505.02(B)(4).

unless it constitutes an "abuse of discretion," *i.e.*, the decision is arbitrary, unconscionable or unreasonable. *Id*. at ¶ 22.

{¶ 21} Applying the foregoing to this case, we first note that appellees have shown by clear and convincing evidence that there is a substantial likelihood they will prevail on the merits of their underlying substantive claim, *i.e.*, under the parties' general indemnity agreements, appellants are obligated to indemnify appellees for any loss or expense they incur as a result of issuing the surety bonds in question. Moreover, appellants have not presented any argument to the contrary on this element.

{¶ 22} Appellees also presented clear and convincing evidence regarding the last two elements necessary to obtain a preliminary injunction, i.e., granting the preliminary injunction would not cause undue hardship to third parties and the public interest will be served by the injunction. There is little doubt that third parties, including lenders, homebuyers and appellants' employees, have been and/or may be harmed as a result of appellants' actions and the circumstances that have befallen them. However, appellees' attempt to enforce their general indemnity agreements with appellants and the trial court's decision to grant injunctive relief to appellees is not what has, or will, cause harm to those third parties. Moreover, the public interest undoubtedly will be served by allowing sureties like appellees to enforce their indemnity agreements against parties like appellants.

{¶ 23} Unlike the foregoing, the question of whether appellees presented clear and convincing evidence that they will suffer "irreparable harm" unless the preliminary injunction is granted, presents a more difficult question.

{¶ 24} This court has held that "[i]rreparable harm exists where there is no plain, adequate, and complete remedy at law, and for which money damages would be impossible, difficult, or incomplete." *1st Natl. Bank v. Mountain Agency, LLC*, 12th Dist. No. CA2009-05-056, 2009-Ohio-2202, ¶ 47. "[A]dequate remedy at law 'means that the legal remedy must

be as efficient as the indicated equitable remedy would be; that such legal remedy must be presently available in a single action; and that such remedy must be certain and complete.'" *Mid-America Tire, Inc. v. PTZ Trading Ltd.*, 95 Ohio St.3d 367, 380, 2002-Ohio-2427, ¶ 81, quoting *Fuchs v. United Motor Stage Co., Inc.*, 135 Ohio St. 509 (1939), paragraph four of the syllabus.. However, it is not necessary for a party to show that he or she has suffered actual harm, since "a threat of harm is a sufficient basis on which to grant injunctive relief." *Convergys Corp. v. Tackman*, 169 Ohio App.3d 665, 666-667, 2006-Ohio-6616, ¶ 9 (1st Dist.).

{¶ 25} Appellants argue appellees failed to show that they would be irreparably harmed by not being granted injunctive relief because they have adequate remedies at law, namely, an action for breach of contract, an action for indemnity from appellants under R.C. 1341.20, and an action for "attachment" of appellants' property under R.C. 1341.21. Appellants contend that many courts have found the doctrine of *quia timet* inapplicable where the surety fails to establish any irreparable harm "flowing solely from the loss" of its rights to "*quia timet* relief" or "exoneration." Appellants also contend that appellees failed to show that they were "secreting" or fraudulently conveying assets, or that they would be in a worse situation if the trial court failed to grant them injunctive relief.

{¶ 26} *Quia timet* is "the right of a surety to demand that the principal place the surety 'in funds' when there are reasonable grounds to believe that the surety will suffer a loss in the future because the principal is likely to default on its primary obligation to the creditor." *Borey*, 934 F.2d at 32. The closely related, yet distinct, principle of "exoneration" is "the surety's right, after the principal's debt has matured, to compel the principal to honor its obligation to the creditor." *Id*. Thus, "[*q*]u*ia timet* is the applicable remedy available to the surety *before* the principal's debt is mature when it becomes likely that the principal will default on his obligation[,]" while "exoneration is the proper remedy *once liability has matured*

and the principal has defaulted on his debt to the creditor." (Emphasis added.) *Id*. at 32-33.

{¶ 27} There are very few cases in Ohio that discuss *quia timet* as it relates to the rights of sureties. This apparently stems from the fact that *quia timet* and the closely related principle of exoneration have been codified in this state in R.C. 1341.19, 1341.20 and 1341.21. R.C. 1341.19 codifies the principal of exoneration, and states that "[a] surety may maintain an action against his principal to compel him to discharge the debt or liability for which the surety is bound, *after it becomes due*." (Emphasis added.) *See, e.g., Borey* at 32-33. R.C. 1341.20 codifies the doctrine of *quia timet*, and states that "a surety may maintain an action against his principal to obtain indemnity against the debt or liability for which he is bound, *before it is due*, whenever any of the grounds exist upon which an order may be made for arrest of a debtor, or for an attachment." (Emphasis added.) R.C. 1341.21 states, in pertinent part, that in an action under R.C. 1341.20, "the surety may obtain any provisional remed[y] mentioned in [R.C.] Chapter[ ] * * * 2715 * * *, upon the grounds and in the manner provided by law."

{¶ 28} Appellees did not, and could not, bring an action against appellants for exoneration under R.C. 1341.19 because the debt or liability for which appellees were bound had not yet become due at the time appellees brought their action against appellants in October 2010. *See Borey*, 934 F.2d at 32-33. Appellees did not bring an action for *quia timet* relief under R.C. 1341.20, or an action for attachment under that section and R.C. 2715.01, either. Their failure to do so likely may have been caused by concern that they would have had difficulty establishing the existence of "any of the grounds * * * upon which an order may be made for arrest of a debtor, or for an attachment."

{¶ 29} As a result, appellees brought their action for injunctive relief against appellants under the equitable doctrine of *quia timet*. However, the only Ohio case that appellees have been able to cite in support of their claim that *quia timet* is still recognized in this state outside

of R.C. 1341.20 and 1341.21 is *Northwestern Nat'l. Ins. Co. of Milwaukee, Wisconsin v. Barney,* N.D.Ohio No. C86-3936, 1988 WL 215411 (Nov. 23, 1988). The trial court found *Barney* applicable and cited it in support of its decision, along with *Wise v. Miller*, 45 Ohio St. 388 (1887), which the *Barney* court cited in fn. 1 of its decision. However, appellees and the trial court's reliance on these cases is misplaced.

{¶ 30} *Barney* largely dealt with the principle of exoneration under R.C. 1341.19, which applies to a situation in which a surety is seeking indemnity from a debtor or indemnitor *after* the debt for which the surety is bound had become due. *See id.* at *1, *4-*5, and *Borey*, 934 F.2d at 32-33. By contrast, in this case, appellees sought indemnity from appellants *before* the debt for which appellees are bound had become due.

{¶ 31} Similarly, in *Wise*, the Ohio Supreme Court stated, "We see no reason why the plaintiff, *after the notes indorsed by him became due and before he paid them*, could not have maintained an action against the stockholders who signed the agreement to compel them to pay the debt, and protect him therefrom according to the terms of their covenant." (Emphasis added.) *Id*. at 400. The *Wise* court, citing English precedent, further stated that "'a surety may file a bill to compel the debtor on a Bond in which he joined, to pay the debt *when due*, whether the surety has been actually sued for it or not[.]'" (Emphasis added.) *Id*., quoting *Wooldridge v. Norris*, L. R. 6 Eq. 410. By contrast, in this case, appellees are seeking indemnity from appellants on a debt for which appellees are bound as sureties *before* that debt has become due.

{¶ 32} Notwithstanding the foregoing, we conclude that the trial court did not err in ordering appellants to post $600,000 in collateral with the clerk of courts as security for any debts appellees may incur as a result of the surety bonds they issued to appellants' affiliates for which appellants agreed to act as indemnitors. The $600,000 in collateral that appellants were ordered to post with the clerk of courts is equal to the amount of money appellees

placed in reserve to pay for their estimated surety bond obligations to the Butler County Entities. Appellants were obligated to pay that amount to appellees under the collateralization provision in the parties' general indemnity agreements.

{¶ 33} In *United Bonding Ins. Co. v. Stein*, 273 F.Supp. 929, 930 (E.D.Pa.1967), the court granted specific performance to a surety with respect to a provision in the parties' indemnity agreement that required the indemnitors, on the surety's demand, to provide the surety with funds equal to any reserve the surety deemed necessary to establish. To obtain specific performance, a party is required to show that he or she has no adequate remedy at law. *Gleason v. Gleason*, 64 Ohio App.3d 667, 672 (4th Dist.1991). While the court in *United Bonding Ins. Co. v. Stein* did not expressly address this issue, the court did state that when an indemnitor refuses to voluntarily comply with a surety's demand for collateral, a legal remedy for subsequent damages would not suffice. *Id*. at 930.[4] *See generally, Milwaukee Constr. Co. v. Glens Fall Ins.*, 367 F.2d 964, 965 (9th Cir.1966) (court specifically enforced provision of indemnity agreement requiring indemnitors to post adequate security upon establishment of a liability reserve).

{¶ 34} By ordering appellants to post $600,000 in collateral, the trial court was essentially ordering "specific performance" of the collateralization provision in the parties' general indemnity agreements, with the only difference being that rather than ordering appellants to deposit the money with appellees, the trial court ordered appellants to post collateral in that amount with the clerk of courts. By doing so, the trial court was attempting to prevent the further dissipation of appellants' assets that may be needed to pay off appellants' debts to appellees arising from the parties' general indemnity agreements. Thus,

4. *See also* Mann and Jennings, *Quia Timet: A Remedy for the Fearful Surety*, 20 Forum, 685, 695-696 (Summer, 1985) (discussing the above-quoted language in *United Bonding Ins. Co. v. Stein*, and opining that "inadequacy of remedy should be presumed upon the indemnitor's failure to voluntarily post collateral").

the trial court's decision to grant appellees' request for injunctive relief preserved the status quo pending final adjudication of the case on the merits, which is consistent with the purpose of a preliminary injunction. *Battelle Mem. Inst.*, 2011-Ohio-793 at ¶ 21.

{¶ 35} Furthermore, it was not necessary for appellees to show that they suffered actual harm to obtain injunctive relief, since a threat of harm is a sufficient basis on which to grant such relief. *Convergys Corp. v. Tackman*, 2006-Ohio-6616 at ¶ 9. Appellees had ample reason to fear that appellants would not honor their obligations under the parties' general indemnity agreements, as Schraffenberger told them in September 2010 that Dixon Builders I and its affiliated development companies did not have sufficient funds to cover completion of the subdivisions or their other obligations secured by the bonds. There was also ample evidence presented to allow the trial court to infer that appellants had already taken steps to remove their assets from Dixon Builders I and Dixon Builders II in an apparent attempt to avoid paying their creditors such as appellees.

{¶ 36} In light of the foregoing, we conclude that appellees have established by clear and convincing evidence that they had no adequate remedy at law, though we do so on grounds different from those cited by the trial court. *See United Bonding Ins. Co. v. Stein*, 273 F.Supp. at 930. Therefore, appellants' first assignment of error is overruled.

{¶ 37} In their second assignment of error, appellants argue the trial court erred in finding that Dixon Builders II is an "affiliate" of Dixon Builders I, for purposes of the parties' general indemnity agreements, and therefore, that Dixon Builders II, like Dixon Builders I, was also obligated to place appellees in funds. Appellants contend that since appellees drafted the general indemnity agreements without defining the term "affiliate," the agreements contain an "ambiguity" that must be construed against appellees and in their favor, and therefore the trial court erred in finding that Dixon Builders II is an "affiliate" of Dixon Builders I for purposes of the parties' general indemnity agreements. We find this

argument unpersuasive.

{¶ 38} The parties' general indemnity agreements do not define the term "affiliate." However, "'[c]ommon words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the document.'" *In re All Kelley & Ferraro Asbestos Cases*, 104 Ohio St.3d 605, 614, 2004-Ohio-7104, quoting *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241 (1978), paragraph two of the syllabus. The term "affiliate" is commonly defined to include "a company effectively controlled by another or *associated with others under common ownership or control*." (Emphasis added.) *Webster's Third New International Dictionary* (1993) 35. *See also, Black's Law Dictionary* 63 (8th Ed.2004) (defining "affiliate" to include a "corporation that is related to another corporation by shareholdings or other means of control; a subsidiary, parent, or sibling corporation").

{¶ 39} In support of their assertion that Dixon Builders II is *not* an affiliate of Dixon Builders I for purposes of the parties' general indemnity agreements, appellants point out that under Dixon Builders I's operating agreement, Brian Byington and Dawn Byington had "ultimate control" of that company. Appellants assert that by contrast, Dixon Builders II is owned by three separate trusts formed ten years prior to the formation of Dixon Builders II, that Brian Byington and Dawn Byington have no "beneficial interest" in the three trusts, and that the three separate trusts have "ultimate control" of Dixon Builders II under that company's operating agreement. However, the evidence presented in this case overwhelming supports the trial court's determination that Dixon Builders II is an "affiliate" of Dixon Builders I for purposes of the parties' general indemnity agreements.

{¶ 40} The evidence shows that Dixon Builders II was formed in an effort to allow Brian Byington to avoid liability for the serious financial problems that had enveloped Dixon Builders I by early 2010. At the time of the formation of Dixon Builders II, Dixon Builders I

had had several million dollars in judgments awarded against it in 2009, including a $2,248,506.60 judgment awarded in favor of Huntington National Bank and a $6,561,391.82 judgment awarded in favor of Union Savings Bank. Moreover, Fifth Third Bank and Huntington National Bank had frozen the lines of credit used by Dixon Builders I to fund the purchase of lots and the construction of new homes.

{¶ 41} One month after it was formed in May 2010, Dixon Builders II reported gross profits of $158,692—even though the company did not yet have any employees and had not yet built a single home. From June 18, 2010, through October 15, 2010, Dixon Builders II received $1,355,251 from the closings of nine homes built by Dixon Builders I, even though Dixon Builders II had no employees at the time the closing funds for the nine homes were disbursed to it. Schraffenberger testified that Dixon Builders I built these homes for Dixon Builders II under an unwritten "construction management agreement." However, this claim was undermined by the fact that contracts for each of the homes were executed before Dixon Builders II was formed.

{¶ 42} The fact that the funds of Dixon Builders I and Dixon Builders II were often commingled was established by evidence showing that from June through October 2010, Dixon Builders II paid $760,360 to Dixon Builders I. At the time of the hearing held in this case, Dixon Builders II was conducting business from the same location as had Dixon Builders I. Dixon Builders I had executed the lease for this property, and there is no evidence that the lease was ever assigned to Dixon Builders II. On the day Dixon Builders I ceased operations in mid-October 2010, all Dixon Builders I employees became Dixon Builders II employees.

{¶ 43} As stated earlier, Dixon Builders II is owned by three trusts that were established for the benefit of Brian Byington's children, i.e., the Brooke Byington Trust, the Jessica Byington Trust and the Chase Byington Trust. Brian Byington is the trustee for each

of those trusts and has the power to invest, sell or otherwise dispose of the trusts' assets. Under Dixon Builders II's operating agreement, Brian Byington and Dawn Byington have "full and complete authority, power and discretion to manage and control the business, affairs and properties of [Dixon Builders II], to make all decisions regarding those matters and to perform any and all other acts or activities customary to the management of [Dixon Builders II's] business." Additionally, Dixon Builders II finances its new home construction activities through an entity called MPM Family, LLC, which is owned by the same three trusts that own Dixon Builders II.

{¶ 44} Given the foregoing, the evidence overwhelmingly established that Dixon Builders II is an "affiliate" of Dixon Builders I for purposes of the parties' general indemnity agreements, because the evidence shows that Dixon Builders II was a company that was effectively controlled by, associated with, related to, and/or under the common ownership or control of another, namely, Dixon Builders I. *See Webster's Third New International Dictionary* at 35 and *Black's Law Dictionary* at 63.

{¶ 45} Accordingly, appellants' second assignment of error is overruled.

{¶ 46} Judgment affirmed.

HENDRICKSON, P.J., and PIPER, J., concur.