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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB Justice PART ____

Index Number : 110847/2006

ASSOCIATED MUTUAL INSURANCE

VS.

M.H. RHODES

SEQUENCE NUMBER : 003

RENEWAL

INDEX NO. ____

MOTION DATE ____

MOTION SEQ. NO. ____

MOTION CAL. NO. ____

this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

MAR 03 2008

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 2/26/08

WALTER B. TOLUB

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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ASSOCIATED MUTUAL INSURANCE COOPERATIVE a/s/o Ramon Perez d/b/a R.P. Super Deli

Plaintiff,

Index No. 110847/06
Mtn Seq. 003

-against-

M.H. RHODES Co. and ADVANCE TECHNICAL COMPONENTS, INC.,

Defendants.

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WALTER B. TOLUB, J.:

By this motion Defendant Capewell, LLC d/b/a M.H. Rhodes s/h/a M.H. Rhodes Co., moves to renew its prior motion for summary judgment pursuant to CPLR 3212 and upon renewal, an order granting summary judgment dismissing the complaint and cross-claims.

Facts

This property damage action arises from a fire that occurred on December 6, 2003 at a premises known as R.P. Super Deli. Plaintiff claims that the timer in an oven at the Deli did not work properly and caused the oven to overheat and caused a fire.

Plaintiff's subrogor, Ramon Perez d/b/a R.P. Super Deli (the Deli), owned an operated the Deli. Plaintiff claims that the moving Defendant manufactured, installed and supplied the "defective" timer, known as "Marketime Part # DKJ-Y", and that the timer was installed in a Biaggia Professional Pizza Oven (the

"Oven") which was used at the Deli. The timer however, was actually supplied by M.H Rhodes, Inc., a non-party to this action.

The Oven had been installed prior to Mr. Perez's acquisition of the Deli. The Oven was not changed or serviced in the five years prior to the fire.

Plaintiff has asserted a separate cause of action against the co-defendant, Advance Technical Components, as the supplier of a thermostat that was installed in the Oven.

Background

The moving Defendant acquired the assets of M.H. Rhodes, Inc., in December 1, 2000. Pursuant to the Purchase Asset Agreement (Agreement), Capewell acquired the assets, property, rights and business relating to the timer and switch product line of M.H. Rhodes, Inc. The Agreement provided for the assumption of certain liabilities by Capewell. The "assumed liabilities" are outlined in Schedule 1A of the Agreement (Defendant's Ex. C) and include warranty obligations but not claims for negligence arising from the use of products sold prior to the closing date. Capewell did not purchase the factory or its machinery. Shortly after the sale, Capewell began to manufacture the product line in its own facility, utilizing purchased tools and marketing the products under the name M.H. Rhodes.

Motions for Summary Judgment

The moving Defendant filed a motion for summary judgment and this court held that the motion was premature. (Decision dated August 14, 2007.) Since further discovery has been conducted, the moving Defendant now moves to renew the prior motion for summary judgment and upon renewal, summary judgment dismissing the Complaint and cross-claims.

Discussion

As with any motion for summary judgment, success is wholly dependent on whether the proponent of either of the respective motions has made a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" (Wolff v New York City Trans. Auth., 21 AD3d 956 [2d Dept 2005], quoting Winegrad v New York University Med. Ctr., 64 NY2d 851, 853 [1985] [internal quotes omitted]. A party is entitled to summary judgment if the sum total of the undisputed facts establish the elements of a claim or a defense as a matter of law. This means that none of the material elements of the claim or defense are in dispute (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §37:180).

Plaintiff argues that Capewell, LLC, the successor of M.H. Rhodes and current manufacturer and designer of the oven timer, impliedly assumed liability when it acquired the assets of M.H.

Rhodes. Plaintiff emphasizes that Capewell, Inc., assumed the obligation to repair and replace any damaged or defective units previously sold by its predecessor, as evidence of an assumption of liability.

The general rule is that the party acquiring the assets of another company is not liable for the torts of its predecessors. (Schumacher v. Richards Shear Co., Inc., 59 NY2d 239, 244 [1983]). As Judge Lasker stated in Ladjevardian v. Laidlaw-Coggeshall, Inc., 431 F. Supp 834 [S.D.N.Y. 1977], a corporation impliedly assumes the liabilities of its predecessor following an asset purchase when: (1) the successor corporation attested to its intention to assume liability for the contracts of its predecessor; (2) all accounts of the predecessor were to be serviced by the successor; (3) customer accounts of the predecessor were automatically transferred to the successor; (4) all credit balances owed to customers of the predecessor were assumed by the successor; and (5) all debit balances were to be an obligation of the successor. (Ladjevardian v. Laidlaw-Coggeshall, Inc., 431 F. Supp 834 [S.D.N.Y. 1977]).

Here, there can be no implied assumption of liability to the moving Defendant. The assumed liabilities were specifically listed and expressly declared in the Agreement (Schedule 1A, Defendant's Ex. C). Plaintiff's argument of an implied assumption of liability stemming from the obligation to repair or

replace damaged or defective units fails. Capewell assumed certain product-support obligations relative to assuming the seller's warranty policies, which was not the case here.

Additionally, the Agreement was not a *de facto* merger as Plaintiff contends. The requirements of a *de facto* merger are: (1) the continuity of ownership, (2) cessation of ordinary business operations and the dissolution of the selling corporation as soon as possible after the transaction; (3) the buyer's assumption of the liabilities ordinarily necessary for the uninterrupted continuation of the seller's business; and (4) continuity of management, personnel, physical location, assets and general business operation. (Van Nocker v. A.W. Chesterton Co., 15 AD3d 254, 256 [1st Dept 2005]).

While it is true that certain employees of M.H. Rhodes became employees of Capewell, this fact alone is not sufficient to satisfy the standard relative to establishing continuity of ownership. (Kretzmer v. Firesafe Products Corp., 24 AD3d 158 [1st dept 2005]). There is no evidence that R.H. Rhodes was dissolved after the asset sale or that it became a mere shell. Rather, the Agreement suggests that it retained assets as listed in the Agreement. Lastly, the seller's tools, but not the heavy machinery, was removed from its factory in Avon and taken to Capewell's facility in South Windsor, indicating that the seller's business did not continue uninterrupted.

It follows that Capewell, LLC did not assume tort liability for defective products manufactured by non-party M.H. Rhodes prior to the effective date of the Agreement. Although there are exceptions to this general rule, no such exception applies under the facts presented here.

Accordingly it is

ORDERED that Capewell, LLC d/b/a M.H. Rhodes s/h/a M.H. Rhodes Co., motion to renew its prior motion for summary judgment pursuant to CPLR 3212 is granted and upon renewal summary judgment dismissing the Complaint and cross-claims is granted.

Counsel for the remaining parties are directed to appear as scheduled on February 29, 2008 at 11:00am in room 335 at 60 Centre Street for a compliance conference.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 2/26/08

HON. WALTER B. TOLUB, J.S.C.