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

PRESENT: HON. SHERRY KLEIN HEITLER PART 30
Justice

WEXLER, ROBERT N., ET AL.

-v-

A.O. SMITH WATER PRODUCTS CO. ET AL.

INDEX NO. 190223/11

MOTION DATE

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on 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 as per the memorandum decision dated 7.2.12

FILED
JUL 10 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7.2.12

HON. SHERRY KLEIN HEITLER J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

----------X

ROBERT N. WEXLER and BETSY WEXLER,

Plaintiffs,

-against-

A.O. SMITH WATER PRODUCTS CO., et al.,

Defendants.

----------X

Index No. 190223/11
Motion Seq. 001

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.:

In this asbestos-related personal injury action, defendant Rain Bird Corporation ("Rain Bird") moves pursuant to CPLR 3211(a)(1) to dismiss the complaint against it on the ground that it has a defense founded upon documentary evidence. For the reasons set forth below, the motion is denied.

BACKGROUND

On June 14, 2011, Robert Wexler and his wife Betsy Wexler filed this action to recover for personal injuries caused by Mr. Wexler's alleged exposure to asbestos-containing products. Mr. Wexler was deposed on October 17, 2011. A copy of his deposition transcript is submitted as defendant's exhibit C. At his deposition, Mr. Wexler testified that he worked as a plumber from 1958 until 2010 at various commercial construction sites throughout New York and New Jersey and that he was regularly exposed to asbestos associated with valves sold by the Hammond Valve Corporation. ("Hammond").

On May 15, 1984, Condec Corporation ("Condec"), a Delaware corporation which owned all of Hammond's outstanding stock, sold what appears to be all or nearly all of Hammond's

assets to HVC Acquiring Inc., a California corporation created for the purposes of the transaction by the Rain Bird Sprinkler Manufacturing Corporation, itself also a California entity.[1] The Asset Purchase and Sale Agreement (defendant's exhibit A, "Contract") sets forth which categories of Hammond's assets were sold to Rain Bird. Contract § 1.a thereof refers to certain property, plant, and equipment as listed in an addendum to the contract which the plaintiffs seek to acquire through discovery. Contract §§ 1.b - 1.g thereof refer to all inventory, all trade accounts receivable as of the date of closing, all intangible assets of the company, all leases of real and personal property to which Hammond was a party, and some of Hammond's contractual obligations.

In reliance on section 5.8a of the Contract, Rain Bird claims that it did not acquire any liabilities from Hammond. Section 5.8a provides:

> 5.8 General Warranty Against Liabilities
>
> Except as specifically set forth herein, there are no liabilities, responsibilities, debts or obligations, known or unknown, liquidated or unliquidated, fixed or contingent, related to Seller or Condec or their operations (including claims based upon express or implied product warranties) to which buyer or HVC shall succeed or become subject by reason of the transactions contemplated hereby.
>
> a) In accordance with the foregoing, seller hereby specifically warrants buyer or HVC against product liability claims whether arising from products sold by seller prior to Closing or from products or parts sold hereunder as a part of inventory.

The plaintiffs, however, assert that § 5.8 is narrowed by § 7, which provides:

> 7. SURVIVAL OF REPRESENTATIONS AND WARRANTIES. All statements contained herein or in any certificate or other instrument delivered by or on behalf of any party pursuant hereto, or in connection with the transactions contemplated hereby, shall be deemed representations and warranties by that party thereunder. All representations, warranties, covenants and agreements made by a party shall

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[1] Page 1 of the Contract defines Hammond as "Seller" and Rain Bird as "Buyer."

> survive the Closing Date for a period of two years except for the warranties contained in Section 5.8b hereof which shall survive the Closing Date for a period of five years.

Rain Bird's motion is predicated on the ground that it did not contractually assume any liability for any personal injury claims stemming from a product manufactured, distributed, or sold by Hammond. In opposition, plaintiffs argue there is a predecessor/successor relationship between Rain Bird and Hammond such that Rain Bird is liable for Hammond's alleged torts. Specifically, plaintiffs assert that because all warranties in the contract were limited by § 7 to either two or five years, Rain Bird expressly, if not impliedly, assumed Hammond's liabilities after such grace period. Plaintiffs further argue that the purchase by Rain Bird of Hammond's assets was really a *de facto* merger and that they are entitled to further discovery on this issue.

DISCUSSION

CPLR 3211(a)(1) provides, in part, that "[A] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . [a] defense is founded upon documentary evidence . . ."

In determining a motion to dismiss under CPLR 3211, the court is bound to "liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" and to "accord plaintiffs the benefit of every possible inference." *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 (2002). In order to prevail on a motion to dismiss based on documentary evidence, "the documents relied upon must definitively dispose of plaintiff's claim." *Bronxville Knolls v Webster Town Ctr. Partnership*, 221 AD2d 248, 248 (1st Dept 1995). "Such a motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively

establishing a defense as a matter of law." *Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 (2002).

This case features competing and very basic theories of tort and corporate law. Under New York law, a corporation which buys the assets of another corporation is generally not liable for torts committed before the sale by the selling corporation. *Semenetz v Sherling & Walden*, Inc., 7 N.Y.3d 194, 196 (2006). On the other hand, "a successor that effectively takes over a company in its entirety should carry the predecessor's liabilities as a concomitant to the benefits it derives from the good will purchased" to "ensure that a source remains to pay for the victim's injuries." *Grant-Howard Assoc. v General Housewares Corp.*, 63 NY2d 291, 296-97 (1984); *see also See Van Nocker v A.W. Chesteron, Co.*, 15 AD3d 254, 256 (1st Dept 2005); Restatement (Third) of Torts, §12, comment b. (Public policy forbids behavior that "unfairly deprive[s] future products liability plaintiffs of the remedies that would otherwise have been available against the predecessor").

In *Schumacher v Richards Shear Co.*, 59 NY2d 239 (1983), the New York Court of Appeals struck a balance between these two competing principles and identified four situations wherein the tort liabilities of a selling corporation may be imposed upon a purchasing corporation (*Id.* at 245):

> (1) [the purchasing corporation] expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations.

In opposition to Rain Bird's motion the plaintiffs argue that Rain Bird impliedly assumed Hammond's tort liability due to a *de facto* merger between those two entities. As the First Department held in *Fitzgerald v Fahnestock & Co.*, 286 AD2d 573, 574-575 (1st Dept 2001)

(internal citations omitted:

> The hallmarks of a de facto merger include: continuity of ownership; cessation of ordinary business and dissolution of the acquired corporation as soon as possible; assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and continuity of management, personnel, physical location, assets and general business operation . . . Not all of these elements are necessary to find a de facto merger. Courts will look to whether the acquiring corporation was seeking to obtain for itself intangible assets such as good will, trademarks, patents, customer lists and the right to use the acquired corporation's name.

Although Rain Bird asserts that continuity of ownership is a necessary element of any finding that a *de facto* merger occurred, continuity of ownership for *de facto* merger purposes has been held to be dispositive only in matters arising from a breach of contract. *Cargo Partner AG v Albatrans, Inc.*, 352 F3d 41, 47 (2d Cir 2003) (applying New York law); *see also Hayden Capital USA, LLC v Northstar Agri Indus.*, 11-CV-594, 2012 U.S. Dist. LEXIS 58881 (SDNY Apr. 23, 2012).

Furthermore, the theory of successor liability is rooted in equity and "[p]ublic policy considerations dictate that, at least in the context of tort liability, courts have flexibility in determining whether a transaction constitutes a de facto merger." *Sweatland v Park Corp.*, 181 AD2d 243, 246 (4th Dept 1992). "[T]he court is to make, on a case-by-case basis, an analysis of the weight and impact of a multitude of factors that relate to the corporate creation, succession, dissolution, and successorship." *Id., citing Santa Maria v. Owens-Illinois Inc.*, 808 F2d 848, 861 (1st Cir. 1986).

The merits of the plaintiffs' *de facto* merger claim cannot be addressed in the context of this motion to dismiss without further disclosure from the defendant on this issue. It is for this reason that Rain Bird's motion is denied. In this regard, *Van Nocker, supra,* 15 AD3d 254, is instructive.

Like the case at bar, the First Department in *Van Nocker* also considered the potential for liability in the context of an asbestos personal injury claim against an alleged successor corporation.[2] The *Van Nocker* court held that a *de facto* merger was absent because the selling corporation continued to exist as a corporate entity in a meaningful way and because there was plainly no continuity in ownership.[3] Here, while there is also no continuity of ownership, at this stage of the case there is also no information upon which this court may determine whether and/or to what extent Hammond continued to operate after it had sold what may have been all of its assets and intangibles to Rain Bird. This is crucial because the "dissolution criterion for a de facto merger may be satisfied, notwithstanding the selling corporation's continued formal existence, if that entity 'is shorn of its assets and has become, in essence, a shell.'" *Van Nocker, supra*, at 257 (*quoting Fitzgerald, supra*, 286 AD2d at 575). Upon consideration of the record presented herein, without more, the defendant has not unequivocally demonstrated that plaintiffs' *de facto* merger argument is without merit.

This court thus need not consider the other *de facto* merger factors. It is significant,

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2 The plaintiff in *Van Nocker* alleged injury from asbestos-containing products manufactured by the Hardie-Tynes Manufacturing Company (Old H-T), a Delaware corporation. In 1997, Old H-T sold substantially all of its operating assets to the defendant, Hardie-Tynes Co., Inc. (New H-T), an Alabama corporation. The plaintiffs sued New H-T as the alleged successor to Old H-T's tort liabilities.

3 In relevant part, the asset purchase agreement at issue in *Van Nocker* required Old H-T to retain: "(1) all cash on hand and in all bank accounts and cash equivalents; (2) subject to certain exceptions, trade accounts receivable, employee receivables, and other current receivables; (3) certain claims and choses in action relating to the Business; (4) incomes taxes of the Business recoverable as of the Closing Date; (5) certain raw materials and supplies (6) automobiles, whether owned or leased; (7) certain real property and (8) certain purchase orders, unfilled customer orders, and agreements relating to the business."

however, that upon the present record Rain Bird appears to have assumed most if not all of Hammond's assets, including real property, intangibles, good will, and general business operations.

This court is also mindful that this is a pre-answer CPLR 3211(a)(1) motion to dismiss, not a motion for summary judgment. At the very least, there should be discovery once issue is joined as to whether there was a *de facto* merger, for the matter is relevant as to whether the defendant may be liable for Hammond's alleged torts. *See Woodson v Am. Transit Ins. Co.*, 292 AD2d 160, 161 (1st Dept 2002); *Ladenburg Thalmann & Co. v Tim's Amusements, Inc.*, 275 AD2d 243, 248 (1st Dept 2000).

Accordingly, it is hereby

ORDERED that Rain Bird Corporation's motion to dismiss is denied in its entirety.

This constitutes the decision and order of the court.

DATED: 7.2.12

SHERRY KLEIN HEITLER
J.S.C.