[* 1]

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

----------X

THOMAS HOUSTON and ELLEN HOUSTON,

Plaintiffs,

-against-

BEAZER EAST, Inc., individually and as successor-in interest to THIEM CORP. and UNIVERSAL REFRACTORIES, et. al.,

Defendants.

----------X

Index No. 190119/12
Motion Seq. No. 007

DECISION & ORDER

SHERRY KLEIN HEITLER, J.:

In this asbestos personal injury action, defendant Glenwood Mason Supply Co., Inc. ("Glenwood Inc.") moves pursuant to CPLR 3212 for summary judgment dismissing all claims and cross-claims asserted against it on the ground that it bears no responsibility for any of the products which allegedly contributed to plaintiff Thomas Houston's injuries. In opposition plaintiffs assert that Glenwood Inc. is the successor-in-interest to Glenwood Mason Supply Co. ("Glenwood Co."), a building material supplier which sold Mr. Houston asbestos-containing products during the 1950's and 1960's.

Plaintiffs' March 7, 2012 complaint alleges that Mr. Houston's mesothelioma is a direct result of his occupational exposure to asbestos. At his deposition Mr. Houston discussed his career as a mason and the asbestos-containing products he believed contributed to his injuries, including fire clay which he purchased from Glenwood Co., a partnership established in 1949 by Joseph Cincotta, now deceased. Defendant Glenwood Inc., also a building material supplier, was incorporated in 1992 under the name Brooklyn Mason Supply Co., Inc. by Mr. Cincotta's daughter, Constance Cincotta. The corporation's name was changed to Glenwood Mason Supply

Co., Inc. in June 2000[1], four years after Glenwood Co. had been dissolved by reason of Mr. Cincotta's death. At all times Ms. Cincotta has been Glenwood Inc.'s sole shareholder, officer, and director. Both entities operated out of an office building located at 4100 Glenwood Road in Brooklyn, New York (the "Building"). While it is undisputed that Glenwood, Inc. did not sell Mr. Houston any of the products which he alleges contributed to his asbestos exposure, plaintiffs contend that it is nevertheless liable for Mr. Houston's injuries as Glenwood Co.'s successor-in-interest.

DISCUSSION

CPLR 3212(b) provides that a motion for summary judgment shall be granted if "the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." Should the movant establish its *prima facie* entitlement to summary judgment, the opponent "must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." *Zuckerman v New York*, 49 NY2d 557, 562 (1980).

A prerequisite to successor liability is a finding that the alleged successor acquired all or substantially all of the alleged predecessor's assets. *See Schumacher v Richards Shear Co.*, 59 NY2d 239, 245 (1983); *Lippe v Bairnco Corp.*, 99 Fed. Appx. 274, 284 (2d Cir. 2004) ("the theory of successor liability is appropriate where a defendant succeeds to substantially all of its

[1] See Amended Certificate of Incorporation, dated June 6, 2000, submitted as defendant's exhibit 1.

predecessor's assets . . . ."); *see also C.P. Sys. v Recovery Corp. of Am.*, 1998 US Dist. LEXIS 12797, at * 3 (SDNY Aug. 18, 1998) ("a theory of successor liability requires an allegation that defendants purchased all or substantially all of the assets of the predecessor entity, not merely a controlling interest.").

Ms. Cincotta claims that she never owned an interest in Glenwood Co. and that she started Glenwood Inc. with her own funds because she wanted to run her own business. She further claims that Glenwood Co. and Glenwood Inc. always functioned as separate businesses with separate customers, separate inventories, separate employees, separate payrolls, separate bank accounts, and separate office spaces. According to Ms. Cincotta, Glenwood Co. was dissolved in 1996 not to avoid its obligations but because her father suffered a debilitating stroke in 1995 which made it impossible for him to work and which ultimately caused his death, and that Glenwood Inc. never acquired any of the Glenwood Co. assets, either before or after its dissolution.[2]

In rebuttal, plaintiffs have presented no evidence to demonstrate that Glenwood Inc. acquired any of Glenwood, Co.'s assets. Instead, plaintiffs speculate that Ms. Cincotta acquired her father's business interest in Glenwood Co. when she purchased the Building in her individual name for $275,000 in 1992, during the time in which both businesses were operating under different names as separate entities. Plaintiffs claim the purchase price was $100,000 more than the Building's fair market value.[3] However, the sole support for plaintiffs position is its own conclusory calculation of the Building's value based on what they purport to be the 1992-1993

---

2 Cincotta Affidavit, sworn to January 14, 2014, ¶¶ 3-5.

3 Plaintiffs allege that the Building's value at the time of sale was only $176,103.

Brooklyn equalization rate of 15.10% applied to the Building's tax assessed value of $153,000. Notably, the Building was not owned by either entity, but by Mr. Cincotta individually, and it was transferred directly from father to daughter, not as a business asset, but simply as a piece of real property. There is no competent allegation by plaintiffs that this transaction included the transfer of bank accounts, inventory, or employees from one company to another, and thus no evidence to even suggest that Ms. Cincotta obtained an ownership interest in Glenwood Co. as a result of the transfer. Accordingly plaintiffs have not met their burden on this threshold issue and for this reason alone the defendant's motion is granted. *Zuckerman, supra.*

Even assuming, *arguendo*, plaintiffs had demonstrated a transfer of Glenwood Co.'s assets to Glenwood Inc., summary judgment still would be appropriate. In New York, a corporation which acquires the assets of another corporation is not liable for the torts of its predecessor unless it (1) 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 was entered into fraudulently to escape such obligations. *Schumacher v Richards Shear Co.*, 59 NY2d 239, 245 (1983).

Relevant to this motion are the *de facto* merger and mere continuation exceptions.[4] In tort cases "courts have flexibility in determining whether a transaction constitutes a de facto merger [and] the 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." *Sweatland v Park Corp.*, 181 AD2d 243, 246 (4th Dept 1992) (*citing Santa*

[4] The parties acknowledge that the "mere-continuation and de-facto-merger doctrines are so similar that they may be considered a single exception." *Cargo Partner AG v Albatrans, Inc.*, 352 F.3d 41, 45 n.3 (2d Cir. 2003).

Maria v. Owens-Illinois Inc., 808 F2d 848, 861 [1st Cir. 1986]). These factors 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." *Fitzgerald v Fahnestock & Co.*, 286 AD2d 573, 574-575 (1st Dept 2001). Courts will also "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." *Id.*

In this case, similar to the First Department's finding in *Van Nocker v A.W. Chesteron, Co.*, 15 AD3d 254, 256 (1st Dept 2005)[5], there is no evidence either that Ms. Cincotta possessed an interest in Glenwood Co. or that her father possessed an interest in Glenwood Inc. Conversely, Glenwood Co. continued to operate following Glenwood Inc.'s formation under a different name in 1992. Glenwood Co.'s General Ledger portrays active sales of approximately $9 million and $8 million in 1993 and 1994, respectively, and show that it maintained several active bank accounts, kept significant inventory, and paid substantial professional and advertising fees.[6] This does not fit into the requirement of the mere continuation exception that "only one corporation survive[] the transaction; the predecessor corporation must be extinguished . . . ." *Schumacher*, *supra*, at 245. While the two companies at issue share similar names, that was not

---

5 In *Van Nocker*, the First Department considered the potential for liability in the context of an asbestos personal injury claim against an alleged successor corporation. The 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 no continuity in ownership. *Id.* at 256.

6 Exhibit 1 to Cincotta Affidavit, sworn to March 17, 2014.

always the case. The defendant's legal name from its inception through June of 2000 was Brooklyn Mason Supply Co., Inc. During the years in which both entities existed, and for several years after Glenwood Co. dissolved, Ms. Cincotta's company's name bore no resemblance to her father's company's name.

The court is mindful that there are some connections between the defendant and its alleged predecessor. Both sold building material supplies, both had offices at 4100 Glenwood Road in Brooklyn, and for many years Ms. Cincotta worked for Glenwood Co. as its office manager. Also, as plaintiffs point out, Ms. Cincotta uses her "80-year family heritage" as a major point of advertising.[7] While there can be no question that Ms. Cincotta and her business have greatly benefitted from Joseph Cincotta's institutional knowledge and industry contacts, such connections do not denote a *de facto* merger that would require Ms. Cincotta's business to defend against her father's company's alleged torts.

In this case plaintiffs have failed to show that Glenwood Inc. purchased or otherwise acquired any of Glenwood Co.'s assets, that Ms. Cincotta and her father possessed interests in each other's companies, or that Glenwood Co. became a shell upon Glenwood Inc.'s formation. The successor liability question is thus not a genuine triable issue.

Accordingly, it is hereby

ORDERED that Glenwood Mason Supply Co., Inc.'s motion for summary judgment is granted, and further

ORDERED that this action and any cross-claims against this defendant are severed and dismissed; and it is further

---

[7] See plaintiffs' exhibits L, p. 33, plaintiffs' exhibit N.

ORDERED that the remainder of the action shall continue as against the remaining defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: 6.16.14

SHERRY KLEIN HEITLER, J.S.C.