

STATE OF MICHIGAN
COURT OF APPEALS

STATE FARM FIRE & CASUALTY
INSURANCE COMPANY as subrogee of
CLARENCE BELLANTE,

UNPUBLISHED
April 2, 1999

Plaintiff-Appellant,

v

No. 205164
Wayne County Circuit Court
LC No. 96-621394 NP

PITNEY BOWES MANAGEMENT SERVICES,
INC.,

Defendant,

and

MIDI MUSIC CENTER INC., d/b/a LOWERY
ORGAN COMPANY,

Defendant-Appellee.

Before: McDonald, P.J., and Hood and Doctoroff, JJ.

MEMORANDUM.

Plaintiff appeals by right from a final order in this products liability action, challenging the trial court's interlocutory order granting summary disposition in favor of defendant Midi Music Center Incorporated (hereinafter "Midi"). We reverse and remand for reinstatement of plaintiff's claims against Midi. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff alleges that a fire in the home of its insured was caused by a defect in an electric organ manufactured in 1975 by "Lowrey Organs" of La Grange Park, Illinois. Midi does business under the "Lowrey Organ Company" name, having acquired the Lowrey trademark and numerous other Lowrey assets, such as inventories and patents, from a secured creditor foreclosing its security interest in the business assets of Lowrey Industries Inc.

In granting summary disposition for Midi, the trial court concluded that Article Nine of the Uniform Commercial Code precludes Midi from being held responsible for Lowrey's debts and liabilities as Lowrey's successor because Midi purchased its Lowrey assets from Lowrey's secured creditor. We disagree. Section 9-317 of the Uniform Commercial Code simply provides that "mere existence of a security interest," in and of itself, is insufficient to impose contract or tort liability upon the secured party (and presumably also third parties purchasing the secured party's interest) for the debtor's acts or omissions. The UCC does not immunize secured creditors and third party purchasers from otherwise assuming liability pursuant to the ordinary principles of successor liability.

In *Turner v Bituminous Casualty Co*, 397 Mich 406; 244 NW2d 873 (1976), our Supreme Court adopted the "continuity of enterprise" theory of successor liability in products liability actions. Instead of focusing upon the corporate forms of the parties participating in asset transaction or how the assets are acquired (e.g., stock transfer vs. cash purchase), the "continuity of enterprise" theory focuses upon the activities of the corporate entities after the asset transaction occurs, and principally, upon the post-transfer activities of the asset-acquiring entity. See generally, 63 Am Jur 2d, Products Liability, § 131.

The following guidelines have been established for determining whether there is a continuity of enterprise:

- (1) Whether there is a continuity of management, personnel, physical location, assets, and general business operations of the selling corporation;
- (2) Whether the selling corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible;
- (3) Whether the purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations to the selling corporation; and
- (4) Whether the purchasing corporation holds itself out to the world as the effective continuation of the seller corporation. [*Turner, supra*, 397 Mich at 420; *Foster v Cone-Blanchard Mach Co*, 221 Mich App 43, 50; 560 NW2d 664 (1997), lv gtd 457 Mich 865 (1998).]

On the limited evidentiary record presented in this case, we are unable to conclude that there are no genuine issues of material fact as to whether the requisite continuity of enterprise exists between Lowrey Industries Inc. and Midi to establish liability under principles established in *Turner*, notwithstanding the fact that Midi purchased its Lowrey assets from Lowrey's secured creditor.

The trial court's order granting Midi's motion for summary disposition is reversed, and this case is remanded for reinstatement of plaintiff's claims against Midi and further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Gary R. McDonald

/s/ Harold Hood

/s/ Martin M. Doctoroff