STATE OF MICHIGAN

COURT OF APPEALS

SAFECO INSURANCE COMPANY,

Plaintiff-Appellee,

v

PONTIAC PLASTICS & SUPPLY COMPANY,

Defendant,

and

TOTAL PLASTICS, INC.,

Defendant-Appellant.

UNPUBLISHED
January 21, 2000

No. 214079
Oakland Circuit Court
LC No. 97-545534 CK

Before: White, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Defendant Total Plastics, Inc.[1] appeals as of right from an order granting summary disposition in favor of plaintiff pursuant to MCR 2.116(I)(2). We reverse and remand for further proceedings.

This is a breach of contract and successor liability action in which plaintiff is seeking to recover unpaid worker's compensation insurance premiums incurred by Pontiac Plastics, plaintiff's insured, between January 1, 1995, and March 11, 1996. Defendant had purchased most of Pontiac Plastics' assets on March 11, 1996, pursuant to a purchase agreement. Under the purchase agreement, Total Plastics assumed certain liabilities of Pontiac Plastics; however, it is undisputed that Pontiac Plastics' debt to plaintiff was not one of the liabilities expressed in the purchase agreement. Plaintiff filed suit in June 1997, naming both Pontiac Plastics and Total Plastics as defendants. On October 24, 1997, the trial court entered a default judgment against Pontiac Plastics in the amount of $35,976, although plaintiff is apparently not pursuing collection on that judgment.

The issue in this case is whether Total Plastics, as the successor to Pontiac Plastics, is liable to plaintiff for the unpaid worker's compensation insurance premiums. The trial court ruled that defendant

impliedly agreed to assume Pontiac Plastics' worker's compensation liability, citing section 2.4.D of the purchase agreement.

Defendant first contends that the trial court erred in granting summary disposition in favor of plaintiff pursuant to MCR 2.116(I)(2) because plaintiff failed to demonstrate that it was a third-party beneficiary to the purchase agreement executed between it and Pontiac Plastics. Defendant asserts that the purchase agreement expressly provided that there were no third-party beneficiary rights, therefore, summary disposition should have been granted in its favor pursuant to MCR 2.116(C)(10).

As a general matter, intended third-party beneficiaries may enforce a contract to which they are not a party pursuant to the dictates of MCL 600.1405; MSA 27A.1405. See also *Koenig v South Haven*, 460 Mich 667, 679-680; 597 NW2d 99 (1999) (Taylor, J.). Review of sections 2.13 and 4.3 of the purchase agreement reveals that Pontiac Plastics was to continue all existing insurance policies for the benefit of defendant. Further, plaintiff is not seeking to enforce a contract to which it is not a party. Rather, plaintiff is seeking to enforce existing contractual rights (liabilities) which were allegedly assumed by defendant. Thus, plaintiff's claim against defendant does not a involve a breach of contract claim, but involves a successor liability claim which does not implicate third-party beneficiary rules. Accordingly, the trial court did not err in failing to rule on this issue in defendant's favor.

Defendant also contends that there was no express or implied assumption of liability pursuant to the purchase agreement, and the trial court erred in granting summary disposition on this issue.

The scope of successor liability was recently set forth by our Supreme Court in *Foster v Cone-Blanchard Machine Co*, 460 Mich 696, 702; 597 NW2d 506 (1999):

> The traditional rule of successor liability examines the nature of the transaction between predecessor and successor corporations. If the acquisition is accomplished by merger, with shares of stock serving as consideration, the successor generally assumes all its predecessor's liabilities. However, where the purchase is accomplished by an exchange of cash for assets, the successor is not liable for its predecessor's liabilities unless one of five narrow exceptions applies.

Those five exceptions are: (1) where there is an express or implied assumption of liability; (2) where the transaction amounts to a consolidation or merger, (3) where the transaction was fraudulent, (4) where some of the elements of a purchase in good faith were lacking, or where the transfer was without consideration and the creditors of the transferor were not provided for, or (5) where the transferee corporation was a mere continuation or reincarnation of the old corporation. *Id.*

In the present case, the purchase was accomplished by an exchange of cash for assets and the parties only raised the issue whether there was an express or implied assumption of the liability by defendant. The trial court, in granting summary disposition in favor of plaintiff, ruled that defendant impliedly agreed to assume the liability. The purchase agreement provides:

> **1.2. Sale of Assets by Sellers.** On the terms and subject to the conditions contained in this Agreement, Buyer [Total Plastics] shall purchase from Sellers [Pontiac Plastics], and Sellers shall sell to Buyer, the Net Tangible Assets and name "Pontiac Plastic & Supply Co., Inc." and Liabilities of Pontiac. Net Tangible Assets to be purchased are set forth Schedule 1.2.A and Liabilities are set forth on Schedule 1.2.B. Sellers will pay any Taxes payable with respect to the transfer of the Assets and Liabilities.
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> **2.4 Financial Statements.**
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> D. No Other Liabilities or Contingencies. To the best of Seller's knowledge, Company has no liabilities of any nature, whether accrued, absolute, contingent or otherwise, and whether due or to become due, probably of assertion or not, except liabilities that (i) are reflected or disclosed in the most recent of the financial statements referred to in Section 2.4 above; (ii) were incurred after the date of such financial statements in the ordinary course of business and in the aggregate do not exceed Fifty Thousand Dollars ($50,000); or (iii) are set forth in Schedule 2.4.D. hereto.[2]

The trial court ruled that section 2.4.D provided an implied assumption of liability by defendant to pay the worker's compensation premiums. The trial court reasoned that the worker's compensation liability was incurred in the ordinary course of business which in the aggregate did not exceed $50,000 (here, the claimed amount was $35,107.64).

We find that the trial court's ruling in this regard was error because section 2.4.D does not on its face provide either an express or implied agreement by defendant to assume liability for plaintiff's earned worker's compensation premium. Rather, this section is a representation by Pontiac Plastics that, to the best of its knowledge, there were no other liabilities except those reflected or disclosed in the financial statements, set forth in schedule 2.4.D[3], or incurred after the date of the financial statements in the ordinary course of business, not exceeding $50,000. There is no language in this section purporting to constitute an assumption of liability; this section speaks to the issue of disclosure. The trial court thus erred in finding an implied assumption of liability based solely on section 2.4.D. However, the inclusion and terms of this provision, when viewed in light of the entire agreement, may be reflective of an understanding or intent that defendant would assume liabilities incurred after the date of the financial statements and in the ordinary course of business, although not listed on the schedule of assumed liabilities. Schedule 1.2.B appears to be a printout of accounts payable as of a particular date. It does not appear that any known contractual liabilities incurred in the ordinary course of business were intentionally excluded from the schedule of liabilities assumed. The present liability was not liquidated in amount, and would not have appeared on a list of accounts payable.

A review of the entire purchase agreement, as well as deposition testimony from Thomas Garrett, defendant's vice-president, indicates that defendant may have impliedly assumed the worker's compensation liability. Section 1.2 specifically states that defendant was purchasing the net tangible assets, name, and liabilities of Pontiac Plastics. Section 2.13 further concerns insurance and states that schedule 3.13 "lists all insurance policies and bonds related to the Business and a history of the claims made by or on behalf of [Pontiac Plastics] under such policies during the three (3) years prior to the date of this Agreement." Section 2.13 additionally provides that all insurance policies maintained by Pontiac Plastics were to remain in full force and effect and "may reasonably be expected to be renewed on comparable terms following consummation of the transactions contemplated by this Agreement." Section 4.3.C also states that for the benefit of defendant, Pontiac Plastics would not, without the prior consent in writing of defendant, conduct business in a manner other than in the ordinary course of business and consistent with past practices, and would not terminate, amend, or fail to renew any existing insurance coverage.

Unfortunately, if schedule 3.13 was compiled, listing all insurance policies and bonds maintained by Pontiac Plastics, it is not a part of the record on appeal. While defendant and Pontiac Plastics did not expressly state that the insurance policies were to transfer to or be assumed by defendant, the net effect of the purchase agreement was for defendant to assume Pontiac Plastics' business operation. Indeed, section 1.2 does state that Total Plastics was purchasing the liabilities of Pontiac Plastics. Further, pursuant to MCL 418.611; MSA 17.237(611), defendant would have been required to secure a method of payment under the Worker's Disability Compensation Act.

Moreover, as acknowledged by Garrett, worker's compensation liability cannot be determined until an audit occurs at the end of the policy period. This is the situation in this case where the policy was canceled on the date of the close of the sale, March 11, 1996, and an audit was subsequently performed revealing that plaintiff was owed over $35,000 for the worker's compensation insurance.

Accordingly, the facts and circumstances presented indicate that a fact finder could conclude that defendant impliedly agreed to assume the worker's compensation liability at issue in this case. However, there is also evidence that defendant did not assume the worker's compensation liability because that liability was not set forth in schedule 1.2.B where all assumed liabilities were to be listed. Additional evidence, specifically schedule 3.13 and testimony of the parties involved in the negotiation of the sale, would probably shed light on this question. At this stage, we believe that summary disposition in favor of either party is premature. The record before us indicates that there is a factual dispute as to whether defendant impliedly agreed to assume any worker's compensation liability. Accordingly, the trial court erred in granting summary disposition in favor of plaintiff as neither party is entitled to judgment as a matter of law.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Harold Hood
/s/ Kathleen Jansen

[1] In this opinion, "defendant" will refer solely to defendant Total Plastics, Inc. because it is the only defendant involved in this appeal.

[2] The record contains no document purporting to be schedule 2.4.D. It is possible that the intended reference was schedule 1.2.B., the schedule of liabilities.

[3] See note 2.