

STATE OF MICHIGAN
COURT OF APPEALS

GOUGEON BROTHERS, INC.,

Plaintiff-Appellee,

v

PHOENIX RESINS, INC.,

Defendant-Appellant.

UNPUBLISHED

February 8, 2000

No. 211738

Bay Circuit Court

LC No. 97-003492-CK

Before: Doctoroff, P.J., and O'Connell and Wilder, JJ.

PER CURIAM.

Defendant appeals by leave granted from the trial court's order denying its motion for summary disposition pursuant to MCR 2.116(C)(1) (lack of personal jurisdiction). The trial court determined that, because defendant was the successor corporation of Matrix Adhesive Systems, Inc. (Matrix), the contacts supporting personal jurisdiction over Matrix were imputed to defendant. We affirm.

I. Facts

In 1996, plaintiff brought an action against Matrix, a New Jersey corporation, alleging that one of Matrix' brochures violated the Michigan Consumer Protection Act, MCL 445.901 *et seq.*; MSA 19.418(1) *et seq.*, and the Michigan pricing and advertising act, MCL 445.351 *et seq.*; MSA 19.853(11) *et seq.* Matrix filed an answer in propria persona; however, a corporation may appear only by an attorney. *Peters Production, Inc v Desnick Broadcasting Co*, 171 Mich App 283, 287; 429 NW2d 654 (1988). Therefore, Matrix retained counsel, who filed an appearance on behalf of Matrix. Matrix, through counsel, participated in the action, although no further answer nor any motions were filed. Matrix also participated in mediation. A default judgment of liability was eventually entered against Matrix for failing to comply with a discovery order. Matrix filed for bankruptcy shortly after the judgment was entered.

Defendant was incorporated in New Jersey in June 1996, before the judgment was entered against Matrix and before Matrix filed for bankruptcy. The two shareholders of Matrix were also the two shareholders of defendant. Defendant bought the assets of Matrix for \$3,000 and assumed liability for any outstanding invoices. Defendant expressly refused to assume liability for any judgments owed

by Matrix. Matrix had produced epoxy under the trademark “MAS,”¹ and defendant continued to produce epoxy under that trademark.

Plaintiff then brought the instant action against defendant, claiming that defendant was the successor corporation of Matrix and was therefore liable for damages to plaintiff under the default judgment obtained against Matrix. Plaintiff also sought to establish damages, since the default judgment only established liability. Defendant moved for summary disposition pursuant to MCR 2.116(C)(1), arguing that the court lacked personal jurisdiction over defendant because it did not have sufficient contact with the state of Michigan. The trial court denied the motion, concluding that the contacts of Matrix were imputed to defendant because defendant was the successor corporation of Matrix. This Court granted defendant’s application for leave to appeal.

II. Standard of Review

A trial court’s decision regarding a motion for summary disposition is reviewed de novo to determine whether the moving party was entitled to judgment as a matter of law. *Republic Bank v Modular One LLC*, 232 Mich App 444, 447; 591 NW2d 335 (1998). We also review jurisdictional rulings de novo. *Jeffrey v Rapid American Corp*, 448 Mich 178, 184; 529 NW2d 644 (1995). “The plaintiff bears the burden of establishing jurisdiction over the defendant, but need only make a prima facie showing of jurisdiction to defeat a motion for summary disposition.” *Id.* (internal citations omitted.) We must resolve all factual disputes in the plaintiff’s favor. *Id.* The trial court’s factual findings, however, are reviewed for clear error. MCR 2.613(C); *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 8; 596 NW2d 620 (1999).

III. Imputed Contacts to Successor Corporation

Defendant argues that the trial court erred in holding that the jurisdictional contacts of Matrix with the state of Michigan could be imputed to defendant as the successor corporation of Matrix. The actions of a corporation may be imputed to a successor corporation for purposes of establishing personal jurisdiction over the successor corporation, in some circumstances. *Jeffrey, supra* at 198. In *Jeffrey*, our Supreme Court held that one appropriate circumstance is where two corporations merge, and the surviving corporation expressly assumes the liabilities of the predecessor corporation. *Id.* However, the Court also held that “theories of liability are useful in determining whether the jurisdictional contacts of a predecessor may be imputed to a successor.” *Id.* The Court recognized that imputing contacts typically occurs where the successor is “the present corporate embodiment of the predecessor” *Id.*

This case is factually different from *Jeffrey* because defendant and Matrix did not merge, and defendant did not expressly assume all the liabilities of Matrix. However, defendant appears to be the present corporate embodiment of Matrix, and thus we examine theories of successor liability to determine whether the jurisdictional contacts of Matrix may be imputed to defendant.

Generally, a corporation that purchases the assets of another corporation is not responsible for the liabilities of the selling corporation. *Id.* at 189. This general rule of nonliability is subject to the following exceptions:

(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. [*Foster v Cone-Blanchard Machine Co*, 460 Mich 696, 702; 597 NW2d 506 (1999), quoting *Turner v Bituminous Casualty Co*, 397 Mich 406, 417 n 3; 244 NW2d 873 (1976).]

The trial court held that plaintiff demonstrated that defendant was subject to successor liability because the sale of Matrix' assets was a fraudulent transfer designed to defraud Matrix' creditors and because defendant was a mere continuation of Matrix. To support this holding, the court made the following findings of fact: defendant bought Matrix' assets for \$3,000, while Matrix' sales had exceeded \$115,000; the same two persons were equal shareholders of both Matrix and defendant; defendant conducts business at same address as did Matrix; and defendant notified Matrix' distributors that MAS epoxy was now one of defendant's products, that defendant would pay any currently owed invoices, and that the distributors should continue to use Matrix literature until the new literature was available. The notice stated, "While the ownership has changed, the company mission to provide our customers with the newest and best Epoxy systems available has not. We all feel these changes are for the better and will allow us to spend our time improving our services and product." Resolving all factual conflicts in favor of plaintiff, we conclude that the trial court's factual findings are not clearly erroneous. These findings demonstrate, at least, that defendant is a mere continuation of Matrix. Therefore, we hold that the actions of Matrix were properly imputed to defendant for purposes of determining personal jurisdiction over defendant.

IV. Matrix' Jurisdictional Actions

Because Matrix' jurisdictional actions are imputed to defendant, the trial court properly exercised personal jurisdiction over defendant if the court had personal jurisdiction over Matrix. We conclude that the court did have personal jurisdiction over Matrix because Matrix submitted itself to the jurisdiction of the court. The trial court concluded that, because Matrix participated in the original action and did not contest jurisdiction, it waived any jurisdictional challenge under MCR 2.116(D)(1). That court rule provides that a challenge to personal jurisdiction is waived if it is not raised in a party's first motion for summary disposition or in that party's responsive pleading. However, Matrix did not file a motion for summary disposition in that action, and the only answer filed was a nullity because Matrix was acting in propria persona when it was filed. Therefore, Matrix did not waive the right to bring a jurisdictional challenge under MCR 2.116(D)(1).

This does not end the inquiry, however. Although the right to bring a challenge to personal jurisdiction had not been waived, Matrix had nonetheless submitted to the court's jurisdiction by its

participation in the action and defending on the merits. In other words, although Matrix could have still challenged personal jurisdiction, any challenge would have failed. A party submits itself to the jurisdiction of the court by entering a general appearance and defending the action on the merits. *Smilgus v Smilgus*, 328 Mich 19, 22; 42 NW2d 898 (1950); *In re Gordon Estate*, 222 Mich App 148, 158; 564 NW2d 497 (1997); *Penny v Pharmaceutical Co (On Remand)*, 203 Mich App 178, 181; 511 NW2d 896 (1993).² In this case, Matrix participated in the action and filed a mediation summary, thus defending on the merits. Matrix never challenged the court's jurisdiction. It would be unreasonable to hold that Matrix did not submit to the court's jurisdiction merely because it had not filed a motion for summary disposition or an answer. The filing of an answer or motion is relevant to determining whether a party has waived the right to challenge personal jurisdiction. Whether a party has *submitted* to the court's jurisdiction depends on whether the party has defended the action on the merits. Matrix submitted to the court's jurisdiction, and its actions are imputed to defendant. Therefore, defendant has submitted itself to the court's jurisdiction.

Defendant contends that any waiver of jurisdiction in the first action does not apply to the instant action because two separate actions are involved. However, the instant action is, in essence, a continuation of the first action. Moreover, the instant action was necessitated by defendant's organizational changes. Therefore, personal jurisdiction over defendant in the instant action is proper. The trial court properly denied defendant's motion for summary disposition.³

Affirmed.

/s/ Martin M. Doctoroff

/s/ Peter D. O'Connell

/s/ Kurtis T. Wilder

¹ "MAS" stands for Matrix Adhesive Systems.

² Although an appearance is not a filing and does not waive a jurisdictional challenge under the court rules, *Maxman v Goldsmith*, 55 Mich App 656, 658; 223 NW2d 113 (1974), by defending on the merits, a party submits to the court's jurisdiction.

³ Because we conclude that Matrix submitted to the court's jurisdiction and that this submission is properly imputed to defendant, we need not address defendant's argument that personal jurisdiction was improper because its "minimum contacts" with Michigan were insufficient to meet the requirements of due process. We need not address issues not necessary to the resolution of the case at hand. *Kosmyna v Botsford Community Hospital*, ___ Mich App ___; ___ NW2d ___ (Docket No. 212137, issued 12/03/1999), slip op at 4-5.