STATE OF MICHIGAN

COURT OF APPEALS

TRAVERSE CITY AUTO MALL,

Plaintiff-Appellant,

v

WOLVERINE AUTO SUPPLY, INC., formerly known as TOP VALUE EXHAUST SYSTEMS, INC.,

Defendant,

and

INTERNATIONAL TOP VALUE AUTOMOTIVE, LLC,

Defendant-Appellee.

UNPUBLISHED
August 2, 2002

No. 226824
Grand Traverse Circuit Court
LC No. 99-018517-CK

TRAVERSE CITY AUTO MALL,

Plaintiff-Appellant,

v

WOLVERINE AUTO SUPPLY, INC., formerly known as TOP VALUE EXHAUST SYSTEMS, INC.,

Defendant,

and

INTERNATIONAL TOP VALUE AUTOMOTIVE, LLC,

Defendant-Appellee.

No. 227554
Grand Traverse Circuit Court
LC No. 99-018517-CK

Before: Meter, P.J., and Markey and Owens, JJ.

PER CURIAM.

Plaintiff appeals by right from a grant of summary disposition and award of mediation sanctions to defendant International Top Value Automotive (ITVA). We reverse the grant of summary disposition, vacate the order awarding mediation sanctions, and remand this case for further proceedings.

Defendant Wolverine Auto Supply (Wolverine) originally leased commercial space from plaintiff, but when Wolverine encountered financial problems, it sold many of its assets to ITVA. The transaction included an apparent sublease on plaintiff's space. ITVA initially paid rent to plaintiff but vacated the premises and stopped paying rent before the end of Wolverine's lease term. Plaintiff sued Wolverine and included ITVA as a defendant on the theory that ITVA had impliedly assumed Wolverine's liabilities. Wolverine defaulted, and ITVA later moved for summary disposition, arguing that it was a subtenant of Wolverine and therefore not liable to plaintiff. The trial court agreed.

Plaintiff argues that the trial court should not have granted summary disposition to ITVA because the documentary evidence raised genuine issues of fact regarding ITVA's implied assumption of Wolverine's obligations to plaintiff. We agree.

This Court reviews de novo an order granting summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). "When reviewing a motion granted under MCR 2.116(C)(10), we must examine all relevant documentary evidence in the light most favorable to the nonmoving party and determine whether there exists a genuine issue of material fact on which reasonable minds could differ." *Progressive Timberlands, Inc v R & R Heavy Haulers, Inc*, 243 Mich App 404, 407; 622 NW2d 533 (2000). "The nonmoving party may not rest on its pleadings but must demonstrate a factual issue using documentary evidence." *Id*.

The applicable rule of successor liability depends on the nature of the transaction between the predecessor and successor corporations. *Foster v Cone-Blanchard Mach Co*, 460 Mich 696, 702; 597 NW2d 506 (1999). "If the acquisition is accomplished by merger, with shares of stock serving as consideration, the successor generally assumes all its predecessor's liabilities." *Id*. If the purchase occurs through an exchange of cash for assets (which was the case here), the successor is not liable for the predecessor's liabilities except in five narrow situations. *Id*. The 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." (19 Am Jur 2d, Corporations, § 1546, pp 922-924; *Malone v Red Top Cab Co*, 16 Cal App 2d 268, 273 [60 P2d 543 (1936)].)'" [*Foster, supra* at 702-703, quoting *Turner* [*v Bituminous Casualty Co*, 397 Mich 406,] . . . 417, n 3 [; 244 NW2d 873

(1976)], quoting *Schwartz v McGraw-Edison Co*, 14 Cal App 3d 767; 92 Cal Rptr 776 (1971) (footnote omitted).]

In the instant case, plaintiff relies on the first enumerated exception. This Court addressed this exception in *Antiphon, Inc v LEP Transport, Inc*, 183 Mich App 377, 384; 454 NW2d 222 (1990), noting that implied liability may be found "where the conduct or representations relied upon by the party asserting liability indicate an intention on the part of the buyer to pay the debts of the seller." "Whether such an intent exists must be determined from the facts and circumstances of each case." *Id*. The relevant factors to consider are the effect of the transfer on the creditors of the predecessor corporation and any admissions of liability on the part of spokespersons of the successor corporation. *Id*.

We conclude that under an *Antiphon* analysis, the trial court should not have granted summary disposition to ITVA. Indeed, documentary evidence demonstrated that (1) the seller was in dire financial straits and was likely uncollectible; (2) the seller and buyer used similar names: Top Value Exhaust Systems, LLC, and "International Top Value Automotive, LLC, respectively; (3) after the seller and buyer signed the asset purchase agreement, the chief financial officer of ITVA informed plaintiff's manager that ITVA would pay the current rents and the rental arrears; and (4) plaintiff's manager did not know of a change in tenants after the asset purchase agreement was signed. These circumstances parallel, in relevant part, the circumstances relied on by the *Antiphon* Court to find an implied assumption of liability. See *id.* at 385. Therefore, the issue of this potential assumption of liability should have been fully explored at trial, and the trial court erred in granting summary disposition to ITVA.

The trial court found that the exception to the general rule of corporate successor liability discussed in *Antiphon* could not form the basis of a cause of action but could only be used as a type of equitable estoppel defense. We disagree. Indeed, *Antiphon* can be read as stating that a court of equity should imply an assumption of liability by a successor corporation if the facts show that the predecessor is uncollectible and the successor represented that it would assume the predecessor's obligations.[1]

The order granting summary disposition is reversed, the order awarding mediation sanctions is vacated, and this matter is remanded for further proceedings consistent with this

[1] ITVA argues that because "[t]here cannot be an express and implied contract covering the same subject matter at the same time," see *Campell v City of Troy*, 42 Mich App 534, 537; 202 NW2d 547 (1972), and because the asset purchase agreement signed by ITVA specifically disavowed the assumption of any of the seller's obligations, the rule of implied liability from *Antiphon* cannot be used here. We disagree. Indeed, there was no express agreement between ITVA and *plaintiff* in this case; thus, an implied agreement under *Antiphon* may be found. ITVA is not in privity of contract with plaintiff, and concluding that the express disavowal of liability in the contract between ITVA and Wolverine superceded the rule of corporate successor liability found in *Antiphon* would render the *Antiphon* rule virtually meaningless, because successor corporations could always sign such disavowals to avoid liability.

opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Jane E. Markey
/s/ Donald S. Owens