STATE OF MICHIGAN

COURT OF APPEALS

CHARLES STARKS, JR., Plaintiff-Appellant, v MICHIGAN WELDING SPECIALISTS, INC., and AUGUST F. PITONYAK, Defendants-Appellees.	UNPUBLISHED November 29, 2005 No. 257127 Macomb Circuit Court LC No. 01-005581-CZ

Before: Talbot, P.J., and White and Wilder, JJ.

PER CURIAM.

This case arises out of plaintiff's unsuccessful attempt to collect a judgment from defendants based on theories of successor liability, conversion, fraud, and piercing the corporate veil. Plaintiff appeals as of right the trial court's order dismissing all claims against defendants, Michigan Welding Specialists, Inc. (MWS), and August F. Pitonyak (Pitonyak). We affirm.

I. Defendants' Motion for Reconsideration

Plaintiff first argues that trial court improperly considered defendants' motion for reconsideration because it was not filed within the time limits imposed by court rule. We disagree.

This Court reviews a trial court's decision concerning a motion for reconsideration for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). "The movant must show that the trial court made a palpable error and that a different disposition would result from correction of the error." *Herald Co, Inc v Tax Tribunal*, 258 Mich App 78, 82; 669 NW2d 862 (2003); MCR 2.119(F)(3).

Plaintiff cites MCR 2.119(F)(1), which provides: "Unless another rule provides a different procedure for reconsideration of a decision . . . a motion for rehearing or reconsideration of the decision on a motion must be served and filed not later than 14 days after entry of an order disposing of the motion." The interpretation and application of court rules are questions of law, which this Court reviews de novo. *Staff v Johnson*, 242 Mich App 521, 527; 619 NW2d 57 (2000). Plaintiff argues that defendants' motion was not for reconsideration of the trial court's order denying defendant's motion for clarification, which had been issued only

seven days earlier, but a motion for reconsideration of the trial court's order partially denying summary disposition, which had been issued over eight months earlier.

Even if defendants' motion is properly viewed as a motion for reconsideration of the order partially denying summary disposition, MCR 2.108(E) provides that a trial court may extend the time for filing a motion where another rule does not otherwise limit a court's authority to do so. See *Arrington v Detroit Osteopathic Hosp Corp (On Remand)*, 196 Mich App 544, 549-550; 493 NW2d 492 (1992). Additionally, MCR 2.116(E)(3) permits a party to file more than one motion under MCR 2.116, subject to the provisions of MCR 2.115(F), which authorizes sanctions if filed in bad faith. This Court has applied MCR 2.116(E)(3) to hold that a trial court's denial of one motion for summary disposition does not bar a second motion for summary disposition. *Limbach v Oakland Bd of Co Rd Comm'rs*, 226 Mich App 389, 395; 573 NW2d 336 (1997). As this Court has explained:

> A court's decision to grant a motion for reconsideration is an exercise of discretion. MCR 2.119(F)(3); *Michigan Nat'l Bank v Mudgett*, 178 Mich App 677, 681; 444 NW2d 534 (1989). Thus, "[i]f a trial court wants to give a 'second chance' to a motion it has previously denied, it has every right to do so, and this court rule [MCR 2.119(F)(3)] does nothing to prevent this exercise of discretion." *Smith v Sinai Hosp of Detroit*, 152 Mich App 716, 723; 394 NW2d 82 (1986). The rule allows the court considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties. See *Bers v Bers*, 161 Mich App 457, 462; 411 NW2d 732 (1987). [*Kokx v Bylenga*, 241 Mich App 655, 658-659; 617 NW2d 368 (2000).]

Accordingly, the trial court did not abuse its discretion in reconsidering its earlier ruling.

Assuming defendant's motion is more properly characterized as a motion for summary disposition, we review the trial court's ruling de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the claim. *Id.* A trial court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, in the light most favorable to the party opposing the motion. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Where the burden of proof on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in the pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *Id.* Where the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 363. Our review is limited to the evidence that had been presented to the trial court at the time the motion was decided. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

II. Statutory Conversion

Next, we address plaintiff's claim of statutory conversion. Questions regarding statutory interpretation and application are issues of law determined de novo on appeal. *Yaldo v North Pointe Ins Co*, 457 Mich 341, 344; 578 NW2d 274 (1998). Statutory conversion consists of knowingly buying, receiving, or aiding in the concealment of any stolen, embezzled, or

converted property. *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111; 593 NW2d 595 (1999); MCL 600.2919a. To support an action for conversion, the defendant "must have obtained the [property] without the owner's consent to the creation of a debtor-creditor relationship" and "must have had an obligation to return the specific [property] entrusted to his care." *Lawsuit Financial, LLC v Curry*, 261 Mich App 579, 591; 683 NW2d 233 (2004), quoting *Head, supra* at 111-112. The plaintiff bears the burden of proving he had right or title to the property at the time of an alleged conversion. *Wessels v Beeman*, 87 Mich 481, 488; 49 NW 483 (1891).

In this case, Dualtech consented to a debtor-creditor relationship with National City Bank (National City), giving it a security interest in all of its "inventory, chattel paper, accounts, equipment and *general intangibles* . . . whether now owned or hereafter acquired, whether now existing or hereafter arising, and wherever located." The evidence shows that National City foreclosed on all of Dualtech's assets, and plaintiff's only offering to refute this is his "gut feeling." Plaintiff admitted that National City and Lakeside Community Bank were secured creditors with priority over him, and that he had no right or title to Dualtech's assets at the time National City transferred them to MWS. Because plaintiff failed to offer any evidence that Dualtech did not consent to National City's security interest or that he had any right to the assets at the time that National City sold them to MWS, the trial court did not err in dismissing plaintiff's claims for statutory conversion. *Quinto, supra* at 363.

III. Constructive Trust

Next, we address plaintiff's claim that the trial court should have imposed a constructive trust on MWS's assets. A constructive trust is an equitable remedy that arises independently of any actual or presumed intention of the parties to create a trust. *Potter v Lindsay*, 337 Mich 404, 411; 60 NW2d 133 (1953). We review a lower court's decisions in equity de novo and all underlying findings of fact for clear error. *46th Circuit Trial Court v Crawford Co*, 266 Mich App 150, 170; 702 NW2d 588 (2005). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

"Constructive trusts do not arise by agreement or from intention, but by operation of law; and fraud, active or constructive, is their essential element." *Hewelt v Hewelt*, 245 Mich 108, 110; 222 NW 119 (1928). The party seeking to have a constructive trust imposed bears the burden of establishing fraud, misrepresentation, concealment, undue influence, duress, or some other circumstance that would make it inequitable for the holder of legal title to retain the property. *Kammer Asphalt v East China Twp*, 443 Mich 176, 188; 504 NW2d 635 (1993). A constructive trust is imposed when "'property has been acquired in such circumstances that the holder of legal title may not, in good conscience, retain the beneficial interest.'" *Kent v Klein*, 352 Mich 652, 656; 91 NW2d 11 (1958) (citation omitted).

As we previously stated in our discussion of plaintiff's claims for statutory conversion, National City had a valid, prior security interest in all of Dualtech's assets, including its goodwill. When National City foreclosed on Dualtech's assets, it extinguished any interest plaintiff had in them. Plaintiff was aware of the sale of Dualtech's assets to MWS and had the opportunity to bid on them, but he refused. Plaintiff presented no evidence to establish fraud,

either in the foreclosure or sale of Dualtech's assets. With no evidence of fraud, the trial court did not err in dismissing plaintiff's claim for imposition of a constructive trust.

IV. Successor Liability

Next, we address plaintiff's claim that the trial court erred in refusing to impose successor liability on MWS. "The doctrine of successor liability is derived from equitable principles." *Craig v Oakwood Hosp*, 471 Mich 67, 77; 684 NW2d 296 (2004) (citations and internal quotations omitted). "Its application is therefore subject to review de novo." *Id.*

The imposition of successor liability requires an examination of "the nature of the transaction between predecessor and successor corporations." *Foster v Cone-Blanchard Machine Co*, 460 Mich 696, 702; 597 NW2d 506 (1999). "[T]here may be a cause of action where the totality of the transaction demonstrates a basic continuity of the enterprise. *Turner v Bituminous Cas Co*, 397 Mich 406, 411; 244 NW2d 873 (1976). In a merger in which stock is exchanged as consideration, the successor corporation "generally assumes all its predecessor's liabilities." *Foster*, *supra* at 702. When the successor purchases assets for cash, however, the successor corporation assumes its predecessor's liabilities *only* "(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.* (citations omitted).[1]

Although plaintiff has alleged that the sale of Dualtech's assets—specifically Dualtech's goodwill—was fraudulent, in bad faith, or lacking in consideration, he has presented no evidence to support these allegations. All of the evidence presented to the lower court supports the finding that National City validly foreclosed on all of Dualtech's assets, including goodwill, and validly sold those assets to MWS. Likewise, plaintiff presented no evidence to the lower court that MWS expressly or impliedly assumed Dualtech's liabilities. This Court's inquiry, therefore, must focus on whether (1) the transaction was a consolidation or merger (either de jure or de facto), and (2) whether MWS is a "mere continuation" of Dualtech. *Id*.

Our Supreme Court listed four factors as supporting the imposition of successor liability:

> (1) There was basic continuity of the enterprise of the seller corporation, including, apparently, a retention of key personnel, assets, general business operations, and even the [corporate] name.

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[1] We note that although the *Turner/Foster* factors were applied where the successor corporation purchased the assets directly from the predecessor corporation, not from a lienor that had foreclosed on the assets, as is the case here, the imposition of successor liability is equitable in nature and applies to the "totality of the transaction." We, therefore, see no reason why they should not be applied to the present case.

(2) The seller corporation ceased ordinary business operations, liquidated, and dissolved soon after distribution of consideration received from the buying corporation.

(3) The purchasing corporation assumed those liabilities and obligations of the seller ordinarily necessary for the continuation of the normal business operations of the seller corporation.

(4) The purchasing corporation held itself out to the world as the effective continuation of the seller corporation. [*Turner, supra* at 430.]

Here, these factors do not support the imposition of successor liability. First, although there was a basic continuity of operation and MWS hired many of Dualtech's key personnel, including the Ulrys, Dualtech was not the seller corporation, National City was. Next, even though Dualtech was not the seller corporation, it ceased doing ordinary business and dissolved *before* MWS purchased the assets. Lastly, although MWS may have assumed payment of some of Dualtech's liabilities necessary to continue normal business operations, MWS sent a letter to its customers and suppliers expressly stating that Dualtech went out of business and that MWS is a new corporation with different ownership. MWS, therefore, did not hold itself out to the world as an effective continuation of Dualtech. In reviewing the "totality of the transaction" from Dualtech to National City to MWS, we find that there is insufficient continuity of enterprise to justify the imposition of successor liability.

V. Fraudulent Transfer

Next, we address plaintiff's claim that MWS's purchase of Dualtech's former assets amounts to a fraudulent transfer. Questions regarding statutory interpretation and application are issues of law determined de novo on appeal. *Yaldo, supra* at 344. Pursuant to the Uniform Fraudulent Transfers Act (UFTA), MCL 566.31 *et seq.*, a transfer is fraudulent if made "[w]ith the actual intent to hinder, delay, or defraud any creditor of the debtor." MCL 566.34(1)(a); see also *Coleman-Nichols v Tixon Corp,* 203 Mich App 645, 659; 513 NW2d 441 (1994). The UFTA lists several factors that a court may consider in determining whether a debtor had an actual intent to hinder, delay, or defraud:

(a) The transfer or obligation was to an insider.

(b) The debtor retained possession or control of the property transferred after the transfer.

(c) The transfer or obligation was disclosed or concealed.

(d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.

(e) The transfer was of substantially all of the debtor's assets.

(f) The debtor absconded.

(g) The debtor removed or concealed assets.

(h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.

(i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.

(j) The transfer occurred shortly before or shortly after a substantial debt was incurred.

(k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor. [MCL 566.34(2).]

Applying these factors to the present case, plaintiff has not shown an intent to defraud. Plaintiff confounds the issue by failing to recognize that there are two distinct transfers that occurred here. First, Dualtech transferred a security interest in all of its assets to National City. This security interest was recorded at least two years before plaintiff obtained a judgment against Dualtech, and plaintiff acknowledged that National City's interest in Dualtech's assets was valid and prior to his own. Second, National City transferred the assets to MWS through a valid sale, of which plaintiff had notice. Plaintiff simply misapplies the factors listed in MCL 566.34(2) because his argument presupposes a direct transfer from Dualtech to MWS.

Plaintiff only acknowledges that there were actually two transfers made in his argument with respect to factor (k): The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor. Neither MWS nor National City, however, were "insiders" of Dualtech as defined by MCL 566.31(g), which only includes directors, officers, persons in control, and general partners of the debtor corporation, and relatives of any of those individuals. Additionally, Pitonyak does not fall within the statutory definition of an "insider" because he had no interest in Dualtech.

Plaintiff claims that a document from Citizens Bank (Citizens), MWS's lender, which lists Deborah Ulry as an officer of MWS, creates a genuine issue of material fact whether National City transferred the assets to an "insider." Deborah Ulry, however, was not listed as an officer in MWS's articles of incorporation, and Citizens wrote a letter explaining that it had mistakenly listed her as an officer because of a shortcoming in its own software. Plaintiff presented no evidence to rebut Citizens' letter, but rather, argues that a jury could infer that Citizens colluded with MWS from the evidence. Although fraudulent or wrongful conduct may be inferred from circumstantial evidence, fraud must still be established by clear and convincing evidence and must never be presumed. *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 457-458; 559 NW2d 379 (1996). Without any evidence of wrongful conduct by Citizens in writing the letter of explanation, plaintiff failed to create a genuine issue of material fact with regard to whether Deborah Ulry is an officer of MWS. Factor (k) is, therefore, inapplicable and the trial court did not err in dismissing plaintiff's UFTA claim.

VI. Piercing the Corporate Veil

Next, we address plaintiff's claim that the trial court erred in refusing to pierce the corporate veil to impose liability on Pitonyak, individually. This Court's review of a decision

not to pierce the corporate veil is de novo because of the equitable nature of the remedy. *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 43; 436 NW2d 70 (1989). However, the trial court's decision "will not be reversed unless the factual findings are clearly erroneous or the reviewing court is convinced that it would have reached a different result had it occupied the trial court's position." *Id.* at 43-44.

"Piercing the corporate veil" is not in and of itself a cause of action, but rather a doctrine that fastens liability on the individual who uses a corporation merely as an instrumentality to conduct his or her own personal business, and liability arises from fraud or injustice perpetrated not on the corporation but on third parties dealing with the corporation. See *In re RCS Engineered Products Co, Inc*, 102 F3d 223, 226 (CA 6, 1996); *Aioi Seiki, Inc v JIT Automation, Inc*, 11 F Supp 2d 950, 953-954 (ED Mich, 1998). The law treats a corporation as an entirely separate entity from its stockholders, even where one person owns all of the corporation's stock. *Kline v Kline*, 104 Mich App 700, 702; 305 NW2d 297 (1981). This fiction is a convenience, "introduced in the law to serve the ends of justice." *Allstate Ins Co v Citizens Ins Co of America*, 118 Mich App 594, 600; 325 NW2d 505 (1982). However, when this fiction is invoked to subvert justice, the courts may ignore it. *Id.;* see also *Paul v Univ Motor Sales Co*, 283 Mich 587, 602; 278 NW 714 (1938). The traditional basis for piercing the corporate veil has been to protect a corporation's creditors where there is a unity of interest of the stockholders and the corporation and where the stockholders have used the corporate structure in an attempt to avoid legal obligations. *Allstate, supra* at 600.

There is no single rule for when the corporate entity may be disregarded. *Papo v Aglo Restaurants of San Jose, Inc*, 149 Mich App 285, 301; 386 NW2d 177 (1986). Instead, courts must consider all relevant facts in light of the corporation's economic justification to determine if the corporate form has been abused. *Klager v Robert Meyer Co*, 415 Mich 402, 411-412; 329 NW2d 721 (1982). This Court has used the following standard for piercing the corporate veil: (1) the corporate entity is merely an agent or instrumentality of its shareholders or another entity; (2) the corporate entity was used to commit a fraud or wrong; and (3) the plaintiff suffered an unjust loss or injury. *SCD Chemical Distributors, Inc v Medley*, 203 Mich App 374, 381; 512 NW2d 86 (1994).

As we stated repeatedly in our discussion of the previous issues, plaintiff has presented no evidence of fraud. Additionally, Pitonyak could not have used Dualtech as his own instrumentality because he was not an officer or shareholder of Dualtech; he is an owner of MWS, which had no direct dealings with Dualtech, but rather purchased Dualtech's former assets from National City in a valid sale. Furthermore, although plaintiff suffered the loss of being able to collect his judgment from Dualtech, this loss was not unjust because, as even plaintiff admitted, National City's security interest in Dualtech's assets was prior to his own. The trial court, therefore, did not err in refusing to pierce the corporate veil to hold Pitonyak personally liable.

Affirmed.

/s/ Michael J. Talbot
/s/ Helene N. White
/s/ Kurtis T. Wilder