STATE OF MICHIGAN

COURT OF APPEALS

DUTTON PARTNERS LLC, Plaintiff-Appellee,	UNPUBLISHED September 21, 2010 APPROVED FOR PUBLICATION November 16, 2010 9:10 a.m.
V CMS ENERGY CORPORATION, Defendant-Appellant.	No. 292094 Oakland Circuit Court LC No. 2008-091210-NO

Before: GLEICHER, P.J., and ZAHRA and K. F. KELLY, JJ.

PER CURIAM.

CMS Energy Corporation, defendant, appeals by leave granted the trial court's opinion and order denying its motion for summary disposition.[1] We reverse and remand.

I. BASIC FACTS & PROCEDURE

Plaintiff owns a 177-acre development, known as "Stonegate Ravines," located in Orion Township, Michigan. An easement across the property contains an underground pipeline, which is used for the transportation and distribution of natural gas. On May 1, 2005, part of the pipeline ruptured and allegedly exploded, or at least caused natural gas to be released into the atmosphere. At the time, plaintiff was still working on the development of Stonegate Ravines and, as a result of the pipe's rupture, plaintiff had to temporarily cease its construction on the project.

On April 30, 2008, plaintiff filed a two-count complaint alleging that defendant was negligent and that its conduct, which allegedly caused the pipe to explode, had created a nuisance and trespass on plaintiff's property. Plaintiff's complaint was filed one day before the

[1] *Dutton Partners LLC v CMS Energy Corp*, unpublished order of the Court of Appeals, issued August 24, 2009 (Docket No. 292094).

statute of limitations expired. See MCL 600.5805(10) (setting the limitations period for ordinary negligence actions at three years). In its answer to the complaint, defendant asserted that plaintiff had sued the wrong party.

A. DEFENDANT'S CORPORATE STRUCTURE

Defendant is a corporation organized under Michigan's laws and is a utility holding company. Defendant does not have any daily operations and has no employees; instead, it derives income from the holdings of its subsidiaries in the form of dividends received on securities. Its subsidiaries are involved in various sectors of the power and energy industries. A majority of defendant's income derives from only one of its subsidiaries, Consumers Energy Company (Consumers).

Consumers owns, operates, and maintains the pipeline involved in the underlying incident. However, defendant and Consumers are separate Michigan corporations, allegedly each with its own officers and board of directors. And, although defendant owns 100 percent of Consumers, defendant does not own or operate any of Consumers' gas pipelines or related infrastructure. Consumers controls its own day-to-day operations, while defendant only concerns itself with regard to major policy issues affecting Consumers. Further, the two companies allegedly keep separate books and records, their financial results are reported separately, and each entities' board of directors has their own meetings and separate minutes are kept.

Other attributes of the two corporations, however, are not so distinct. Consumers and defendant share the same physical address; Consumers' universal resource locator (URL), or its website domain, is registered to defendant; the two share the same in-house counsel; all of Consumers' and defendant's filings with the Securities and Exchange Commission (SEC) are filed jointly; the two entities share the same code of conduct, ethics manual, and set of governing principles; and, defendant includes all of Consumers' assets, including its pipelines, on its balance sheets and depreciates such assets for its accounting purposes.

B. MOTION FOR SUMMARY DISPOSITION

On September 24, 2008, defendant moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff had sued the incorrect party. In its brief in support, defendant argued that it is a utility holding company separate from Consumers. Defendant relied on the affidavits of Catherine Reynolds and David Montague, who testified that defendant's corporate structure is separate from Consumers' structure and to Consumers' role in pre- and post-investigation of the ruptured pipeline, respectively.

Plaintiff countered that its suit against defendant was appropriate because defendant allegedly is the alter ego of Consumers. Plaintiff supported its position that Consumers and defendant are the same entity by relying on publicly available information showing, among other things, that the two share the same corporate address and had made joint filings to the SEC. Further, contrary to Reynold's affidavit, plaintiff asserted that Consumers and defendant shared the same board of directors and corporate executives, relying on information from defendant's 2007 annual report and defendant's website. It asserted that summary disposition should be denied because a question of fact remained regarding whether defendant is the alter ego of

Consumers. It also contended that that it should be allowed further discovery because defendant's liability was not limited to "ownership" of the pipeline, but included maintenance, repair, and inspection of the pipeline.

Before the trial court could rule on defendant's motion for summary disposition, plaintiff filed a motion to amend the pleadings to add Consumers as a party. Defendant countered that such leave to amend should be denied because the statute of limitations had expired on plaintiff's claims.

The trial court, Judge Fred M. Mester presiding, denied defendant's motion for summary disposition and also denied plaintiff's motion to amend the complaint. In denying plaintiff's motion to amend, the court found that Consumers did not have notice of the lawsuit within the limitations period and, thus, granting the motion to amend would be futile. With regard to defendant's motion for summary disposition, the court explained:

> [T]his Court finds that because the allegation of the Complaint [sic] are not limited to liability based on ownership of the line but also as to the maintenance, repair and inspection of the pipeline, defendant may be liable to the Plaintiff in other capacities than as the owner.

The trial court made no explicit ruling regarding plaintiff's alter ego theory.

C. RENEWED MOTION FOR SUMMARY DISPOSITION

After further discovery, defendant renewed its motion for summary disposition. In its renewed motion, defendant argued that there is no question of fact that defendant does not own and is not responsible for maintenance of the pipeline at issue. In its view, the only question left to pursue was whether defendant had any of those responsibilities; it interpreted Judge Mester's order as precluding plaintiff's alter ego theory of liability. Defendant relied on a second affidavit prepared by Montague, which indicated that defendant has no responsibilities for maintenance and repair of the pipeline.

Plaintiff responded, arguing that Judge Mester's ruling had not precluded its alter ego theory. It re-affirmed its original position that defendant was an appropriate party because it is the alter ego of Consumers. Plaintiff did not provide any evidence that defendant was responsible for the pipeline's maintenance, repair, or inspection.

In the interim, a new trial judge, Judge Lisa Gorcyca, was assigned to the case. After oral argument, the trial court issued a written opinion and order denying defendant's renewed motion for summary disposition, finding that defendant misinterpreted Judge Mester's ruling. It stated:

> [T]he undisputed evidence presents material factual questions regarding whether the two entities are alter egos of one another: (1) The CMS Energy 2007 Annual Report identifies "gas pipelines" of Consumers Energy as an asset of CMS Energy; (2) Both companies have the same physical address and phone number; (3) In the Internet Universal Resource Locator, www.consumersengergy.com has been registered to "CMS Energy," not to Consumers Energy; (4) Both entities share the same in-house counsel; (5) Consumers Energy's letterhead describes

> Consumers Energy as "A CMS Energy Company;" (6) CMS enjoys the accounting benefit of depreciating the gas pipelines which are supposedly owned by its subsidiary.
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> In sum, this Court finds that Judge Mester's previous ruling were appropriate. Defendant has not presented any basis to set aside that ruling.

Defendant now appeals this order to this Court.

II. STANDARD OF REVIEW

We review the trial court's decision on defendant's renewed motion for summary disposition de novo.[2] *Fries v Mavrick Metal Stamping, Inc*, 285 Mich App 706, 712; 777 NW2d 205 (2009). A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Woodman v Kera, LLC*, 280 Mich App 125, 134; 760 NW2d 641 (2008). We must review all the evidence in a light most favorable to the non-moving party. *Houdek v Centerville Twp*, 276 Mich App 568, 572-573; 741 NW2d 587 (2007). Summary disposition is appropriate where there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. *Woodman*, 280 Mich App at 134. A genuine issue of material fact exists where the record leaves open an issue upon which reasonable minds could differ. *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 443; 761 NW2d 846 (2008).

III. ANALYSIS

Defendant argues that the trial court, Judge Gorcyca presiding, erred by finding that factual questions remained with respect to plaintiff's alter ego theory of liability. We agree with defendant. At the outset, we note that the proprietary of the trial court's ruling is questionable in the first instance. Plaintiff never pled facts supporting its alter ego theory in its complaint and never moved to amend to add such facts; thus, plaintiff's complaint likely could have been dismissed for failure to state a claim.[3] However, because the trial court treated the alter-ego theory of liability as if it had been properly pled and raised, and ultimately denied defendant's renewed motion on the basis of plaintiff's alter ego theory, we will treat the matter as if it had been properly presented and preserved.

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[2] We note that a successor judge has the authority to enter whatever orders his or her predecessor could have entered. MCR 2.613(B).

[3] Despite this deficiency, defendant never moved to dismiss on this basis under MCR 2.116(C)(8); rather, both of its motions were based solely on MCR 2.116(C)(10). Defendant does argue on appeal, however, that plaintiff failed to plead specific facts seeking to have the trial court disregard defendant's corporate form and suggests that plaintiff's alter ego argument is therefore waived and should have been dismissed for failure to state a claim. Defendant could have raised this basis for dismissal in its renewed motion for summary disposition, but failed to do so. Rather, it continued to defend itself against plaintiff's alter ego theory, in effect forfeiting its own waiver argument. Thus, we consider defendant's argument under MCR 2.116(C)(8) to be unpreserved and we will not dispose of this appeal on (C)(8) grounds.

Plaintiff's suit seeks to pierce the corporate veil and hold defendant liable for the acts of its subsidiary, Consumers.[4] "In order to state a claim for tort liability based on an alleged parent-subsidiary relationship, a plaintiff would have to allege: (1) the existence of a parent-subsidiary relationship, and (2) facts that justify piercing the corporate veil." *Seasword v Hilti, Inc*, 449 Mich 542, 548; 537 NW2d 221 (1995).

It is undisputed in this case that Consumers is defendant's subsidiary. Thus, the pertinent question is whether plaintiff has alleged sufficient facts to justify piercing the corporate veil. It is well settled under Michigan law that "absent some abuse of corporate form, parent and subsidiary corporations are separate and distinct entities . . . ." *Id*. at 547. However, the courts may ignore this presumption, and the corporate veil may be pierced, if, under the circumstances, an otherwise separate corporate existence has been used to "subvert justice or cause a result that would be contrary to some other clearly overriding public policy." *Wells v Firestone Tire & Rubber Co*, 421 Mich 641, 650; 364 NW2d 670 (1985). For the corporate veil to be pierced, the plaintiff must aver facts that show (1) the corporate entity is a mere instrumentality of another entity or individual; (2) the corporate entity must have been used to commit fraud or a wrong; and, (3) as a result, the plaintiff must have suffered an unjust injury or loss. *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 715; 762 NW2d 529 (2008). "At least in the context of tort liability, relevant factors in showing that a subsidiary is a 'mere instrumentality' of its parent might be that the parent and subsidiary shared principal offices, or had interlocking boards of directors or frequent interchanges of employees, that the subsidiary is the parent's exclusive distributing arm, or the parent's revenues are entirely derived from sales by the subsidiary." *Seasword*, 449 Mich at 548 n 10.

Here, the trial court denied defendant's renewed motion for summary disposition, finding material questions of fact exist regarding "whether the two entities are alter egos of one another[,]" including:

> (1) The CMS Energy 2007 Annual Report identifies "gas pipelines" of Consumers Energy as an asset of CMS Energy; (2) Both companies have the same physical address and phone number; (3) In the Internet Universal Resource Locator, www.consumersengergy.com has been registered to "CMS Energy," not to Consumers Energy; (4) Both entities share the same in-house counsel; (5) Consumers Energy's letterhead describes Consumers Energy as "A CMS Energy Company;" (6) CMS enjoys the accounting benefit of depreciating the gas pipelines which are supposedly owned by its subsidiary.

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[4] Plaintiff's case differs from the traditional lawsuit where a party seeks to pierce the corporate veil because plaintiff is not attempting to hold liable defendant's individual corporate executives or shareholders. See *Rymal v Baergen*, 262 Mich App 274, 293; 686 NW2d 241 (2004) ("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.").

We do not disagree with the trial court's ruling in this regard—legitimate questions exist regarding whether Consumers is a mere instrumentality of defendant's, given the conflicting evidence presented below. However, the trial court erred by denying summary disposition because plaintiff failed to demonstrate any evidence of fraud, wrongdoing, or misuse of the corporate form. And, after our review of the record, we cannot find any factual evidence showing that defendant merely used Consumers to commit fraudulent or otherwise wrongful acts. Nothing in the record demonstrates that Consumers was so controlled or manipulated by defendant in relation to Consumers' maintenance, ownership, and repair of the pipeline, that defendant was somehow abusing its corporate shield for its own purposes. Thus, given the absence of any evidence of fraud or misuse, summary disposition for defendant should have been granted.

Significantly, plaintiff does not point to any evidence of fraud, wrongdoing, or misuse in its brief on appeal. Rather, it simply argues that Michigan law does not require such a showing in order for a parent corporation to be held liable for the acts of its subsidiary. We disagree. Plaintiff has cited no binding authority for its proposition, but instead relies on lower federal court cases and Michigan cases pre-dating 1990. Neither lower federal court decisions nor Michigan cases pre-dating November 1, 1990, are binding on this Court. *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 59; 760 NW2d 811 (2008); MCR 7.215(J)(1).

Further, defendant's reliance on *CMS Energy Corp v Attorney General*, 190 Mich App 220; 475 NW2d 451 (1991), for the same proposition is unavailing. In *CMS Energy Corp*, this Court affirmed the decision of the Michigan Public Service Commission (PSC), which disregarded the separate corporate identities of Consumers and CMS Energy in a ruling that subjected certain of Consumers' proceeds received from its own assets to the PSC's regulations. *Id*. at 223-226, 231-233. Consumers had transferred the proceeds at issue to its nonregulated subsidies for purposes of insulating those funds from regulation and those subsidiaries were subsequently transferred to CMS Energy's control. *Id*. at 223-226. Although the panel cited the proposition that fraud need not be shown to consider the entities as one, it did not rely on that proposition for its conclusion that the PSC appropriately "pierce[d] the corporate veil of the nonregulated corporate entities." *Id*. at 232. Thus, the Court's statement that fraud need not be shown is dicta and is not binding on this Court. See *Auto-Owners Ins Co v Budkis*, 227 Mich App 45, 52; 575 NW2d 79 (1997). Moreover, the Court explicitly cited some misuse of the corporate form that did occur under the circumstances; specifically, the subsidiaries held by Consumers were transferred to CMS Energy for the sole purpose of merely "avoid[ing] regulation of the proceeds to be generated by those assets." *CMS Energy Corp*, 190 Mich App at 232. Thus, *CMS Energy Corp*, does not support plaintiff's position, but rather refutes it.[5]

Because a showing of fraud, wrongdoing, or misuse is required under Michigan law in order to prevail on an alter-ego theory of liability and because plaintiff proffered no such evidence, the trial court erred by denying defendant's renewed motion for summary disposition.

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[5] We were unable to locate any binding Michigan case that has held that the corporate veil may be disregarded absent a showing of fraud, wrongdoing, or some misuse of the corporate form.

Plaintiff has not presented sufficient facts in support of its alter-ego theory of liability and the case cannot go forward on this basis. The matter also cannot proceed against defendant in its individual capacity. Plaintiff concedes in its brief on appeal that "ownership as well as responsibility for repair, maintenance, and inspections of [the pipeline] rests with Consumers . . . and not [defendant]." Thus, there is no genuine question of material fact that defendant was not negligent and did not otherwise trespass on plaintiff's property. On remand, the trial court shall enter an order in defendant's favor dismissing the case with prejudice.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

Elizabeth L. Gleicher
Brian K. Zahra
Kirsten Frank Kelly