STATE OF MICHIGAN

COURT OF APPEALS

LOUIS MERAM,

Plaintiff-Appellant,

V

CLARK REFINING & MARKETING, INC.,

Defendant-Appellee,

and

APEX OIL COMPANY,

Defendant.

UNPUBLISHED
December 14, 2001

No. 221342
Wayne Circuit Court
LC No. 98-803970-CE

Before: White, P.J., and Sawyer and Saad, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court orders granting defendant summary disposition pursuant to MCR 2.116(C)(10), and denying plaintiff's motion for partial summary disposition and declaratory judgment, in this action to recover response activity costs and damages under NREPA, MCL 324.20101 *et seq*. We affirm.

I

From July 15, 1958 through December 31, 1979, Clark Oil & Refining Corporation owned the property at issue, 16136 Telegraph Road in Detroit, and operated a Clark retail gasoline station there. The gas station had four underground storage tanks (USTs), two of which were removed when the station was closed around late 1978 or 1979. Church's Fried Chicken, Inc., bought the property in 1979 and plaintiff bought the property from Church's on April 29, 1994. Plaintiff alleged that around January 1997, contamination of the soil and groundwater due to releases of petroleum hydrocarbon products from the UST system was discovered, and that he incurred response activity costs and would incur future costs in remediating the site. Plaintiff alleged that defendant Clark Refining & Marketing Inc. ("New Clark") was the successor to the retail operations of Clark Oil and Refining Corporation ("Old Clark"), and was thus liable for response activity costs at the site or to contribute towards them under NREPA.

The record indicates that in 1981, Old Clark, a Wisconsin corporation, was acquired by Apex Oil Company, a Missouri general partnership and not a party to this appeal. [1] In December 1987, Apex, Old Clark and a number of other Apex subsidiaries filed voluntary petitions under Chapter 11 of the United States Bankruptcy Code.[2] In 1988, the Horsham Corporation, through its apparently newly formed subsidiary, Apex Oil Company Acquisition Corporation (AOC Acquisition Corp.), agreed to purchase certain assets of Apex and its subsidiaries, including nearly all of the assets of Clark,[3] subject to the bankruptcy court's approval. The Asset Purchase Agreement between AOC Acquisition Corp. and Apex Oil Company contained an exclusion of liability for environmental claims. The Bankruptcy Court approved the purchase agreement, its order to that effect specifying that "the transfer and conveyances of the Purchase Assets to AOC shall be free and clear of all liens, claims, taxes, encumbrances, obligations, contractual commitments and interest except for those Permitted Encumbrances under the terms of the Asset Purchase Agreement, as amended."

AOC Acquisition Corp. changed its name to Clark USA. The bankruptcy court approved Apex's reorganization plan with respect to the remaining Apex assets and debtor entities on August 16, 1990. Clark USA eventually became Clark Refining and Marketing, Inc. (New Clark).

Plaintiff's motion for partial summary disposition and declaratory judgment argued that New Clark was, as a matter of law, the successor of Old Clark. Defendant's motion for summary disposition argued that Apex was the successor corporation of Old Clark, not New Clark. The circuit court concluded that there was insufficient evidence to indicate that New Clark was a successor of Old Clark and granted defendant summary disposition. This appeal ensued.

A

We review the circuit court's summary disposition determination under MCR 2.116(C)(10) de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In reviewing a motion the circuit court considers affidavits, pleadings, depositions, admissions and documentary evidence filed or submitted by the parties in the light most favorable to the nonmoving party. *Id.*

> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish

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[1] Plaintiff's first amended complaint also alleged that former defendant Apex Oil Company, Inc., was the successor of Old Clark. Apex was granted summary disposition pursuant to MCR 2.116(c)(7), after it argued that plaintiff's claim was discharged in bankruptcy. The court determined that plaintiff should raise the issue whether his claim was a pre- or post-judgment claim in the bankruptcy court.

[2] *In re Apex Oil Co*, 92 BR 847 (Bankr ED Mo, 1988).

[3] The property at issue was not part of the sale, as it had already been sold to Church's in 1979.

that a genuine issue of disputed fact exists. [*Id.* at 455, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996).]

The general rule is that "if one corporation purchases the assets of another and pays a fair consideration therefor, no liability for the debts of the selling corporation exists in the absence of fraud or agreement to assume the debts." *Turner v Bituminous Casualty Co*, 397 Mich 406; 244 NW2d 873 (1976).[4]

> [W]here 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. The five exceptions are as follows:
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> > '(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)]." *Schwartz v McGraw-Edison Co*, 14 Cal App 3d 767; 92 Cal Rptr 776; 66 ALR3d 808, 820-821 (1971). [*Foster v Cone-Blanchard Machine Co*, 460 Mich 696, 702-703; 597 NW2d 506 (1999), quoting *Turner, supra* at 417 n 3.]

The fifth ("mere continuation") exception, is at issue in the instant case. Under the traditional "mere continuation" exception, there must be a continuity of shareholders, along with three other

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[4] Under *Turner*:

> . . . . a prima facie case of continuity of enterprise exists where the plaintiff establishes the following facts: (1) there is continuation of the seller corporation, so that there is a continuity of management, personnel, physical location, assets, and general business operations of the predecessor corporation; (2) the predecessor corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible; and (3) the purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the selling corporation. *Turner* identified as an additional principle relevant to determining successor liability, whether the purchasing corporation holds itself out to the world as the effective continuation of the seller corporation. [*Foster v Cone-Blanchard Machine Co*, 460 Mich 696, 702-703, 706; 597 NW2d 506 (1999).]

requirements, set forth below. However, in *Turner, supra,* a products liability case, the Supreme Court expanded the mere continuation exception to situations where there was no common identity of ownership. *Turner, supra* at 429-430; see also discussion of *Turner* in *City Mgmt Corp v US Chemical Co, Inc,* 43 F3d 244, 251-252 (CA 6, 1994).

During the pendency of this appeal, the Supreme Court stated in *Foster, supra,* that *Turner*'s holding indicates that the "continuity of enterprise" doctrine [i.e., the mere continuation exception] applies only when the transferor is no longer viable and capable of being sued. *Foster,* 460 Mich at 705. Plaintiff has not shown that Apex did not emerge as a viable entity capable of being sued.

Under *Foster, supra,* we must affirm the grant of summary disposition to defendant.

Affirmed.

/s/ Helene N. White
/s/ David H. Sawyer
/s/ Henry William Saad