[Cite as *Howell v. Atlantic-Meeco, Inc.*, 2002-Ohio-2058.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

PAMELA HOWELL, ET AL. :

Plaintiffs-Appellants : C.A. CASE NO. 01 CA 0084

vs. : T.C. CASE NO. 00 CV 0548

ATLANTIC-MEECO, INC., ET AL. :

Defendants-Appellees:

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O P I N I O N

Rendered on the 26th day of April, 2002.

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GRADY, J.

{¶1} Plaintiffs, Pamela Howell et al., appeal from the summary judgment granted by the trial court in favor of Defendant Atlantic-MEECO, Inc.

{¶2} On June 16, 1997, a catwalk collapsed at Buck Creek State Park, which caused the plaintiffs to be plunged into the water and allegedly sustain injuries. The catwalk was manufactured by MEECO Marinas, Inc., and installed prior

to the park's opening in 1981.

{¶3} On April 11, 1991, six years before the accident, MEECO International, Inc. had purchased the assets and liabilities of MEECO Marinas, Inc. Then, on January 15, 1993, Atlantic-MEECO, Inc. ("AMI") bought the assets and certain specific liabilities of MEECO International, Inc.

{¶4} On June 14, 2000, Plaintiffs filed a complaint in the court of common pleas against AMI alleging tortious conduct related to the collapse of the catwalk. On July 5, 2001, AMI filed a motion for summary judgment, arguing that it was not the successor in liability of the manufacturer of the Buck Creek catwalk. The trial court granted AMI's motion.

{¶5} Plaintiffs filed timely notice of appeal. They present one assignment of error.

ASSIGNMENT OF ERROR

{¶6} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT SINCE THERE EXIST MATERIAL FACTUAL DISPUTES REGARDING DEFENDANT'S LIABILITY AS A SUCCESSOR CORPORATION AND DEFENDANT'S OWN LIABILITY AND DUTY TO WARN."

{¶7} Summary judgment may not be granted unless the entire record demonstrates that there is no genuine issue of material fact and that the moving party is, on that record, entitled to judgment as a matter of law. Civ.R. 56. The burden of showing that no genuine issue of material fact exists is on the moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64.

{¶8} The moving party cannot discharge this burden by making a conclusory statement that the non-moving party has no evidence to prove its case, but must point to some evidence which, if true, requires a judgment for the moving party on one or more issues of fact determinative of the non-moving party's claim for relief or affirmative defense. *Dresher v. Burt* (1996), 75 Ohio St.3d 280. The non-moving party must then preserve the factual dispute concerning that issue by setting forth specific facts which, if true, keep it in dispute. *Id.*

{¶9} When a motion for summary judgment is made, the non-moving party is required to rebut any evidence presented by the movant in support of its motion by production of evidence on that same issue, if he will bear the burden of production at trial. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 322-323; *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, paragraph three of the Syllabus.

{¶10} All evidence submitted in connection with a motion for summary judgment must be construed most strongly in favor of the party against whom the motion is made. *Morris v. First National Bank & Trust Co.* (1970), 21 Ohio St.2d 25.

{¶11} "Because a trial court's determination of summary judgment concerns a question of law, we apply the same standard as the trial court in our review of its disposition of the motion; in other words, our review is *de novo*." *Am. States Ins. Co. v. Guillermin* (1996), 108 Ohio App.3d 547, 552.

{¶12} Plaintiffs argue that AMI is liable for the injuries they suffered when the catwalk collapsed because AMI is a successor of the manufacturer of the catwalk. However, a corporation that purchases the assets of another corporation is not liable for injuries resulting from the manufacture of a defective product by a predecessor corporation unless: "(1) the buyer expressly or impliedly agrees to assume such liability; (2) the transaction amounts to a de facto consolidation or merger; (3) the buyer corporation is merely a continuation of the seller corporation; or (4) the transaction is entered into fraudulently for the purpose of escaping liability." *Flaugher v. Cone Automatic Mach. Co.* (1987), 30 Ohio St.3d 60, 62. *See also Welco Indust., Inc. v. Applied Companies* (1993), 67 Ohio St.3d 344.

{¶13} AMI argues that Oklahoma law governs the controversy because the merger transactions took place there. We find it unnecessary to answer the choice of law question, because the successor liability test in Oklahoma is substantially the same as Ohio's *Flaugher/Welco* test. *See Goucher v. Parmac, Inc.* (Okla.App. 1984), 694 P.2d 953, 954 (citing *Pulis v. United States Electrical Tool Company* (Okla.1977), 561 P.2d 68, 69). Therefore, we will proceed to analyze the controversy on the rule common to both jurisdictions.

{¶14} The plaintiffs do not point to a specific exception to the general rule against successor liability,

but instead present evidence from which, they argue, one must glean that one of the *Flaugher/Welco* exceptions was met for purposes of surviving summary judgment. However, we find, for the reasons stated below, that the plaintiffs failed to meet their burden, pursuant to Civ.R. 56(E), to come forward with specific facts showing that there remains a genuine issue for trial.

{¶15} AMI supported its motion for summary judgment with the affidavit of H. Gene Walker, the CEO of the company, which states:

> {¶16} "1. I, as CEO of Atlantic-MEECO, Inc., have personal knowledge of the facts hereinafter stated or the facts that are a matter of public record as indicated by the documents attached hereto.
>
> {¶17} "2. MEECO Marinas, Inc. is the company which built the catwalk in question in 1980-81.
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> {¶18} "3. Atlantic-MEECO, Inc. was incorporated on January 14, 1993, years after the catwalk in question was constructed by MEECO-Marinas, Inc.
>
> {¶19} "4. On January 15, 1993, Atlantic-MEECO, Inc. bought the assets of but only specifically identified liabilities of MEECO International.
>
> {¶20} "5. At some point in 1991, MEECO International bought the assets and liabilities of MEECO Marinas, Inc.
>
> {¶21} "6. The sale of MEECO International to Atlantic-MEECO, Inc. was in no manner fraudulent.
>
> {¶22} "7. The sale by MEECO International to Atlantic-MEECO, Inc. was not a merger or consolidation of the two corporate entities.
>
> {¶23} "8. The board of directors and shareholders of the MEECO Marinas, Inc. are not the board of directors and shareholders of

Atlantic-MEECO, Inc.

{¶24} "9. Atlantic-MEECO, Inc. is not a continuation of the corporation MEECO Marinas, Inc.

{¶25} "10. Atlantic-MEECO, Inc. did not expressly or impliedly assume the liability of MEECO Marinas, Inc. for any possible defect in the catwalk at Buck Creek State Park in Clark County, Ohio."

{¶26} AMI also supported their motion with the AMI certificate of incorporation and the MEECO International-AMI Asset Purchase Agreement.

{¶27} In response to AMI's motion, plaintiffs argued that the Walker affidavit was insufficient because Walker was not the CEO of AMI at the time of the transaction. Also, the plaintiffs argued that the Asset Purchase Agreement showed that AMI had acquired MEECO International as "a going concern" at the same address, phone and fax numbers, rather than a mere collection of assets. The plaintiffs further argued that AMI "holds itself out" as a successor to the expertise and reputation of its predecessor companies, pointing to the AMI website as evidence. Finally, the plaintiffs offered evidence gathered during the discovery stage of the plaintiff's separate cause of action against the State of Ohio, including the deposition testimony of Officer Michael Yates. The plaintiffs argued that the discovery materials from the plaintiff's case against the state demonstrates that the park operators believed that MEECO Marinas, Inc., the manufacturers of the catwalk, and AMI, were the same company.

{¶28} Regarding the first *Flaugher/Welco* exception, whether the buyer corporation expressly or impliedly agreed to assume liability, the AMI-MEECO International purchase agreement specifically lists the liabilities that AMI assumed through the deal. The agreement says nothing of AMI's liability for defects in MEECO Marina's products.

{¶29} Regarding the second exception, whether the transaction amounted to a de facto consolidation or merger, the *Welco* court listed the hallmarks of a de facto merger: "(1) the continuation of the previous business activity and corporate personnel, (2) a continuity of shareholders resulting from a sale of assets in exchange for stock, (3) the immediate or rapid dissolution of the predecessor corporation, and (4) the assumption by the purchasing corporation of all liabilities and obligations ordinarily necessary to continue the predecessor's business operations." *Welco, supra,* at 349 (quoting *Turner v. Bituminous Cas. Co.* (Mich.1976), 244 N.W.2d 873, 879). Although AMI arguably meets the first of those hallmarks of a de facto merger, because it is engaged in the same business, as its predecessors, the manufacture and sale of marine dock systems, that alone cannot subject AMI to liability as a successor to the manufacturer of the Buck Creek catwalk. The others must be shown, as well, and they are not.

{¶30} Likewise, the plaintiffs have not presented any evidence that AMI is liable under the fourth *Flaugher/Welco*

exception, that the transaction was entered into fraudulently for the purpose of escaping liability. Indicia of fraud include lack of consideration and good faith. *Welco, supra,* at 349. We find nothing in the record that demonstrates that the AMI-MEECO International deal was entered into fraudulently.

{¶31} The plaintiffs' evidence appears most strongly focused on the third exception to the *Flaugher/Welco* rule, whether the buyer corporation is a "mere-continuation" of the seller. Declining to adopt an expanded version of the mere-continuation theory, the *Welco* court noted that "the basis of this theory is the continuation of the corporate entity, not the business operation, after the transaction." *Welco, supra,* at 350 (citing *Flaugher, supra*).

{¶32} A corporation might be held liable under the mere-continuation theory where "one corporation sells its assets to another corporation with the same people owning both corporations." *Id.* (quoting *Turner, supra,* at 892). "Thus, the acquiring corporation is just a new hat for, or reincarnation of, the acquired corporation." *Id.* Because a mere-continuation transaction is executed to escape liability, a hallmark of such transactions is inadequacy of consideration. *Id.*

{¶33} The *Welco* court found that although the buyer corporation in issue had the same physical plant, officers, employees, and product line as the seller corporation, the buyer corporation was not a mere-continuation of the seller

and no successor liability followed because the owners of the buyer and seller corporations were not the same people, and were strangers. *Id.* The similarities between the buyer and seller corporations were merely an indication of liability under the expanded view of successor liability, not the traditional rule that the *Welco* court preserved. *Id.*

{¶34} Applying the law to the facts at bar, we follow the reasoning of the *Welco* court and decline to adopt an expanded view of "mere-continuation" successor liability under the product line or continuity of enterprise theories. *See id.,* at 347-48; 350. Further, under the traditional mere-continuation analysis, we find that the plaintiffs failed to present evidence that meets the strict requirements of *Welco.* There is no evidence that the buyers and sellers in the AMI-MEECO International deal are the same parties and/or not strangers, and there is no evidence that the buyers and sellers in the prior deal, MEECO International-MEECO Marinas, are related in any way. As noted above, there is also no evidence presented regarding a lack of consideration, or an effort to fraudulently escape liability. In other words, there is nothing that would raise an issue of fact regarding whether AMI is a mere continuation of MEECO Marinas, the manufacturers of the catwalk.

{¶35} Therefore, we find that the plaintiffs did not carry their burden under Civ.R. 56(E) to set forth specific

facts showing that there is a genuine issue for trial. *See Dresher, supra.* The Walker affidavit affirmatively demonstrated that the AMI-MEECO International transaction did not expose AMI to liability under any of the *Flaugher/Welco* exceptions. Even when viewing the evidence in a light most favorable to the plaintiffs, we find that the plaintiffs have failed to come forward with specific facts which keep the successor liability issue in dispute. The plaintiffs have failed to present evidence that the mere-continuation exception, or any other exception to the *Flaugher/Welco* rule, applies in this case. Therefore, the trial court did not err when it granted AMI's motion for summary judgment.

{¶36} Finally, plaintiffs argue that the relationship between AMI and the manufacturers of the catwalk imposed a duty on AMI to warn the customers of the prior corporation of any product defects. The following factors must be considered to determine whether a successor corporation has the legal duty to warn a predecessor's customers: "(1) succession to a predecessor's service contracts; (2) whether the particular machine involved was under a service contract; (3) whether the successor had ever serviced the subject machine; (4) the successor corporation's knowledge of the present or prior ownership of such machines." *Gentile v. City of Cleveland* (May 2, 1985), Cuyahoga App. No. 48962, unreported, at *9. *See Leannis v. Cincinnati, Inc.* (C.A.6, 1977), 565 F.2d 437.

{¶37} The *Gentile* court held that the continuation of name and acquisition of goodwill cannot create a duty to warn when there is no accompanying assumption of service responsibility. *Gentile, supra,* at *10. The plaintiffs failed to present any evidence of the existence of a service agreement between AMI or its predecessors and their customers. Therefore, we cannot find that AMI had a legal duty to warn their predecessor's customers of product defects.

{¶38} Accordingly, the plaintiff-appellants' assignment of error is overruled.

Conclusion

{¶39} Having overruled the sole assignment of error presented, we will affirm the judgment from which the appeal was taken.

WOLFF, P.J. and FAIN, J., concur.

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