STATE OF MICHIGAN

COURT OF APPEALS

RICHARD OLIVER,

Plaintiff-Appellant/Cross-Appellee,

v

MICHAEL G. PERRY, LINDA PERRY, RIVERTOWN CONSTRUCTION MANAGEMENT, L.L.C., and MPC LAND, L.L.C.,

Defendants-Appellees/Cross-Appellants,

and

SPACE PLACE, INC., d/b/a ISLAND STOW-A-WAY, INC.,

Defendant-Appellee.

UNPUBLISHED
June 7, 2011

No. 296871
Wayne Circuit Court
LC No. 08-126798-CZ

Before: SERVITTO, P.J., and HOEKSTRA and OWENS, JJ.

PER CURIAM.

Plaintiff Richard Oliver brought this action against individual defendants Michael Perry and Linda Perry, and corporate defendants Rivertown Construction Management, L.L.C., ("Rivertown") and Space Place, Inc.("Space Place"), alleging that defendants were liable for a default judgment in the amount of $768,257 that plaintiff previously obtained against M. G. Perry Construction Company ("Perry Construction"). The trial court granted Michael and Linda Perry's motion for summary disposition pursuant to MCR 2.116(C)(10). Thereafter, following a bench trial, the court directed a verdict for defendant Space Place and awarded plaintiff a judgment against defendant Rivertown on plaintiff's theories of successor liability and de facto merger. Plaintiff appeals as of right, challenging the trial court's summary disposition and directed verdict decisions, and defendants cross appeal, challenging the judgment against Rivertown. We reverse the trial court's summary disposition decision and affirm its directed verdict decisions and the judgment against Rivertown.

In a prior case, plaintiff obtained a default judgment against Perry Construction in the amount of $768,257. This Court affirmed that judgment on appeal. *MG Perry Constr Co v Oliver*, unpublished opinion per curiam of the Court of Appeals, issued May 23, 2006 (Docket No. 265791). While that case was pending, Michael Perry formed Rivertown, using his builder's license to obtain a license for Rivertown. In early 2006, Linda Perry obtained her own builder's license and became president and sole owner of Rivertown. Relevant to the instant matter, Rivertown and a building materials supplier, N.A. Manns Lumber, worked out an arrangement whereby N.A. Manns would extend credit to Rivertown, but instead of granting Rivertown the usual ten percent discount for contractors, ten percent of Rivertown's payments were to be applied toward Perry Construction's outstanding debt to N.A. Manns. Michael Perry transferred 95 percent of his ownership interest in another corporation, Space Place, to Linda Perry. Space Place executed a mortgage to secure Perry Construction's debt to N.A. Manns. Plaintiff alleges that these transactions were made to allow Perry Construction to avoid its judgment debt to plaintiff.

In this action, plaintiff sought to enforce the prior default judgment against Rivertown under theories of successor liability and de facto merger. Plaintiff asserted a claim against Space Place under the Uniform Fraudulent Transfer Act ("UFTA"), MCL 566.31 *et seq*. Plaintiff also asserted a claim against Michael and Linda Perry, alleging that they should be personally liable for the debt because they disregarded corporate formalities in their scheme to prevent plaintiff from collecting his judgment against Perry Construction.

The trial court granted summary disposition in favor of Michael and Linda Perry with respect to plaintiff's attempt to pierce the corporate veil. At the conclusion of a bench trial, the court granted Space Place's motion for a directed verdict, finding that the evidence did not support a valid claim under the UFTA. However, the court awarded plaintiff a judgment against Rivertown based on theories of successor liability and de facto merger.

I. PLAINTIFF'S APPEAL

Plaintiff argues that the trial court erroneously granted Michael and Linda Perry's motion for summary disposition, thereby dismissing his claim to pierce the corporate veil.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Teel v Meredith*, 284 Mich App 660, 662; 774 NW2d 527 (2009). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint, and is granted when the proffered evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Ward v Titan Ins Co*, 287 Mich App 552, 554; 791 NW2d 488 (2010), lv pending. On review of a motion under MCR 2.116(C)(10), a court must examine the documentary evidence presented and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Dextrom v Wexford Co*, 287 Mich App 406, 415-416; 789 NW2d 211 (2010). "A question of fact exists when reasonable minds could differ as to the conclusions to be drawn from the evidence." *Id.* at 416.

In the context of plaintiff's claims against Michael and Linda Perry, there is little substantive distinction between a claim for fraudulent conveyance and a claim to pierce the

corporate veil to reach the Perrys' individual assets. Corporations are generally regarded as legally distinct from their shareholders, even if a single shareholder owns all the stock. *Dep't of Consumer Indus Servs v Shah*, 236 Mich App 381, 393; 600 NW2d 406 (1999). However, equitable principles enable a court to look beyond the legal entity of corporate existence and pierce the corporate veil when necessary to correct fraud, illegality, or injustice. *Id.* Each case involving disregard of the corporate entity must be decided according to its own particular facts. *Id.* "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." *Foodland Distrib v Al-Naimi*, 220 Mich App 453, 456; 559 NW2d 379 (1996). In *Foodland Distrib*, *id.* at 457, this Court quoted *SCD Chem Distrib, Inc v Medley*, 203 Mich App 374, 381; 512 N.W.2d 86 (1994), as requiring the following elements be established to pierce the corporate veil:

> First, the corporate entity must be a mere instrumentality of another entity or individual. Second, the corporate entity must be used to commit a fraud or wrong. Third, there must have been an unjust loss or injury to the plaintiff.

The UFTA defines fraudulent transfers as follows:

> (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation in either of the following:
>
> (a) With actual intent to hinder, delay, or defraud any creditor of the debtor.
>
> (b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor did either of the following:
>
> (*i*) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.
>
> (*ii*) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due. [MCL 566.34(1).]

Here, the substance of plaintiff's claim is based on piercing the corporate veil. Plaintiff never alleged that either Michael or Linda Perry incurred a debt. Rather, he alleged that they transferred or incurred debts through their corporate entities for fraudulent and unlawful purposes. Accordingly, the only means for plaintiff to establish individual liability on Michael and Linda Perry is to pierce the corporate veil. Plaintiff adequately pleaded a claim for piercing the corporate veil by alleging that the Perrys ignored and disregarded corporate formalities in their transactions to continue Perry Construction's business as Rivertown. Moreover, plaintiff introduced evidence that Rivertown loaned $23,000 to Perry Construction, and that there is no documentation or explanation for this loan. The evidence established a question of fact with

respect to the Perrys' personal liability under a theory of piercing the corporate veil. Accordingly, the trial court erred in granting summary disposition of plaintiff's claim against Michael and Linda Perry.

Plaintiff also argues that the trial court erred in granting Space Place's motion for a directed verdict. We review a trial court's decision regarding a motion for a directed verdict de novo. *Genna v Jackson*, 286 Mich App 413, 416; 781 NW2d 124 (2009). This Court must view the evidence in the light most favorable to the nonmoving party and affirm the directed verdict if there is no factual question upon which reasonable minds could differ. *Id.* at 416-417.

Plaintiff contends that Space Place's execution of a mortgage to secure Perry Construction's debt qualifies as fraudulent under MCL 566.34(1) because it was made by a debtor, i.e., Perry Construction, with the intent to defraud plaintiff, a judgment creditor. MCL 566.34(2) provides:

> In determining actual intent under subsection (1)(a), consideration may be given, among other factors, to whether 1 or more of the following occurred:
>
> (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.

The trial court granted a directed verdict for Space Place on the ground that no benefit transferred to Space Place. The trial court also noted that a debt was *taken away from* Perry Construction. The court concluded that the transaction was not a fraudulent transfer to prevent plaintiff from collecting his judgment, but rather a negotiation with N. A. Manns to protect its interest and continue to do business with Rivertown.

We agree that Space Place's granting of a mortgage to secure Perry Construction's debt does not constitute a fraudulent conveyance under MCL 566.34. It is not an obligation incurred by a debtor. Assuming, arguendo, that Space Place's exposure to foreclosure in the event of Perry Construction's default constitutes a "transfer made . . . by a debtor" within the meaning of MCL 566.34(1), there was no evidence that the transfer was made with an actual intent to hinder, delay, or defraud plaintiff. Space Place's exposure to mortgage liability did not put plaintiff in a worse position with respect to collecting the judgment from Perry Construction. Indeed, given plaintiff's theory that Rivertown was formed to continue Perry Construction's business, plaintiff could actually be in a better position to collect his judgment, because the mortgage enabled Rivertown to remain in business. Plaintiff's attempt to collect the judgment debt from Rivertown pursuant to a fraudulent conveyance theory (or to collect from Michael and Linda Perry under a piercing of the corporate veil theory) would be futile if Rivertown could not purchase the supplies it needed to function.

This Court's decision in *Foodland Distrib*, 220 Mich App 453, does not compel a different result. That case involved a complex series of transactions in which an individual, Amir Al-Naimi, restructured his debt and his businesses' debts to avoid foreclosure on a mortgage interest loan to Michigan National Bank. The restructuring included an arrangement in which New Metro, a business nominally owned by Al-Naimi's relatives, but owned and operated de facto by Al-Naimi, increased its secured debt from $233,000 to $625,000 without receiving consideration. Al-Naimi and his wife's personal indebtedness were reduced without consideration as part of this restructuring. *Id.* at 467-469. The plaintiff, Foodland Distributors, was a wholesale grocery distributor that sold groceries to Al-Naimi and his entities to be sold in party stores and supermarkets that they owned and operated. *Id.* at 466-467. Foodland brought an action against New Metro, Al-Naimi, and other entities and individuals associated with Al-Naimi, to collect the debts that New Metro had incurred for grocery shipments. *Id.* at 469-470. Foodland Distributor's action against New Metro was dismissed, and the case proceeded to trial against the three individual defendants under theories of piercing New Metro's corporate veil. *Id.* at 470.

One issue in Foodland's action was whether the transfer of debt to New Metro constituted a fraudulent conveyance. The trial court concluded that it was not, because Foodland Distributors failed to show that it was adversely affected by the restructuring agreement, inasmuch as the transaction did not result in any preferential or fraudulent payments to Michigan National Bank at Foodland's expense. *Id.* at 476. On appeal, this Court observed:

> In a "typical" fraudulent conveyance, the debtor conveys certain property (i.e., an item of positive value) to another party and receives in exchange therefor insufficient consideration. See, e.g., MCL 566.14 *et seq*. In this case, rather than conveying property with a positive value, Amir conveyed a *debt* to New Metro, without any attendant benefit to New Metro. The question whether conveyance

> of a *debt* could be a fraudulent conveyance raises interesting questions of first impression in our state. [*Id.* at 477.]

The Court considered the UFTA's predecessor, the Uniform Fraudulent Conveyance Act, MCL 566.11 *et seq*. The Court noted that former MCL 566.14 provided:

> Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

The Court stated:

> Central to the analysis here is whether New Metro's assumption of debt, for no consideration, can be a fraudulent conveyance, even though no "asset" was transferred from New Metro to any entity. MCL 566.11 states that a "'[c]onveyance]' includes every payment of money, assignment, release . . . and also the *creation of any lien or incumbrance*." (Emphasis added.) Thus, while saddling a corporation with a debt for no consideration is not a "traditional" conveyance, it appears that the definitions in the statute are broad enough to encompass such a "reverse" conveyance.
>
> There is also some support for this interpretation in *SCD Chemical Distributors, Inc v Medley*, 203 Mich App 374, 378-379; 512 NW2d 86 (1994), where this Court was attempting to determine whether inventory, customers, and goodwill were "assets" within the meaning of the UFCA. The Court looked to two non-Michigan cases: one case held that the UFCA applied to any property that has value; the other held that the act does not cover property that has no value. Following this logic in the instant case, a debt has *negative* value, but value nonetheless. I thus conclude that incurring a debt for no consideration could constitute a fraudulent conveyance. [*Foodland Distrib*, 220 Mich App at 480-481.]

The Court concluded that the increase of New Metro's debt from $233,000 to $625,000 as a result of the restructure agreement, which was incurred without any consideration, constituted a fraudulent conveyance because New Metro was insolvent before, or as a result of, incurring the obligation. *Id.* at 482.

The instant case is distinguishable from *Foodland Distrib*. In *Foodland Distrib*, New Metro was the debtor owing an obligation to the plaintiff-creditor, Foodland Distributors. The basis of Foodland Distributor's action against New Metro and its principals was that New Metro's incurrence of the debt from Al-Naimi was a fraudulent conveyance *to itself* (or incurrence of an obligation), without consideration, that left New Metro insolvent. If Space Place's granting of a mortgage is considered a conveyance from Perry Construction, it is not a conveyance that caused the debtor, Perry Construction, to incur debts beyond its ability to pay as they became due. MCL 566.34(1)(b)(*ii*). Accordingly, the trial court did not err in directing a verdict for Space Place.

II. DEFENDANTS' CROSS APPEAL

Defendants argue that the trial court erred as a matter of law in entering a judgment against Rivertown because successor liability is not available to a judgment creditor. We review a trial court's conclusions of law de novo. *Chelsea Investment Group, LLC v City of Chelsea*, 288 Mich App 239, 250-251; 792 NW2d 781 (2010).

"[A] corporate successor may be liable for its predecessor's defective products if the totality of the acquisition demonstrates a basic continuity of the enterprise between the predecessor and successor corporations." *Foster v Cone-Blanchard Machine Co*, 460 Mich 696, 702; 597 NW2d 506 (1999), citing *Turner v Bituminous Cas Co*, 397 Mich 406, 417 n 3; 244 NW2d 873 (1976). The Court in *Foster* noted that the traditional rule of successor liability focused on the nature of the transaction between the predecessor and successor corporation, and imposed successor liability where the acquisition was accomplished by merger, with shares of stock serving as consideration. *Foster*, 460 Mich at 702. The traditional rule did not impose liability where the purchase was accomplished by an exchange of cash for assets, unless one of five narrow exceptions applied. *Id*. The five 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." [*Id.* at 702, quoting *Turner*, 397 Mich at 417 n 3 (citation and internal quotations omitted).]

The Court in *Turner* expanded the traditional rule to force a successor to accept the predecessor's liability with the benefits of continuity where there is a continuity of enterprise between the successor and the predecessor. *Foster*, 460 Mich at 703, citing *Turner*, 397 Mich at 430. Under the expanded rule,

> 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*, 460 Mich at 703-704, citing *Turner*, 397 Mich at 430.

Defendants argue that the successor liability doctrine has not been recognized outside the context of product liability cases. Both *Foster* and *Turner* were product liability cases. However, this Court has tacitly recognized the doctrine of successor liability in cases involving

commercial matters. See *Lakeview Commons Ltd Partnership v Empower Yourself, LLC*, ___ Mich App ___; ___ NW2d ___ (Docket No. 291728, issued September 16, 2010, approved for pub November 9, 2010), and *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 717-719; 762 NW2d 529 (2008) (successor liability applies to corporations in purely commercial contexts, such as breach of a lease agreement); see also *Antiphon, Inc v LEP Transp, Inc*, 183 Mich App 377; 454 NW2d 222 (1990).

Nonetheless, in *Starks v Mich Welding Specialists, Inc*, 477 Mich 922; 722 NW2d 888 (2006), our Supreme Court affirmed a judgment in favor of a successor corporation in a case in which a judgment creditor sought to enforce a judgment against the judgment debtor's alleged successor. The Supreme Court stated:

> In lieu of granting leave to appeal, we AFFIRM the judgment of the Court of Appeals. Where, as here, a successor corporation acquires the assets of a predecessor corporation and does not explicitly assume the liabilities of the predecessor, the traditional rule of corporate successor non-liability applies. See *Foster*, [460 Mich 696]. Because an exception designed to protect injured victims of defective products rests upon policy reasons not applicable to a judgment creditor, the Court declines to expand the exception to the traditional rule set forth in *Turner* [397 Mich 406] to cases in which the plaintiff is a judgment creditor.

Thus, a judgment creditor is precluded from enforcing a judgment against a successor corporation under the doctrine of successor liability.

The trial court determined that *Starks* was distinguishable because plaintiff proved that Rivertown implicitly assumed Perry Construction's liabilities. The trial court's finding of an implicit assumption of liabilities was based on its analysis of what it labeled the "five elements" set forth in *Craig v Oakwood Hosp*, 471 Mich 67, 93-94; 684 NW2d 296 (2004). The trial court's approach misapprehends the decision in *Starks* and the holding in *Craig*. In *Starks*, the Supreme Court specifically stated that the assumption of liability must be *explicit*, a condition that is not satisfied in this case. Further, the *Craig* Court did not set forth five "elements" to be satisfied as proof of an implicit assumption of liabilities, but rather recited the five alternate means of proving successor liability as discussed in *Turner* and *Foster*. Consistent with the *Starks* Court's limited recognition of successor liability, the *Craig* Court concluded that successor liability is not available in a medical malpractice action. *Id.* at 96-99.

The trial court erred in concluding that plaintiff could prevail on a successor liability theory if it proved five "elements" of implicit assumption of Perry Construction's liabilities. While we agree that Rivertown was a successor of Perry Construction, the decision in *Starks* clearly and plainly provides that a judgment creditor cannot enforce a judgment against a successor corporation unless there has been an explicit assumption of the predecessor's debts, which does not exist in this case.

With respect to de facto merger, in *Craig*, 471 Mich at 97-98, the Supreme Court stated that "[a] de facto merger exists when *each* of the following requirements is met":

> (1) There is a continuation of the enterprise of the seller corporation, so that there is a continuity of management, personnel, physical location, assets, and general business operations.
>
> (2) There is a continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock, this stock ultimately coming to be held by the shareholders of the seller corporation so that they become a constituent part of the purchasing corporation.
>
> (3) The seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible.
>
> (4) The purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation. [Quoting *Turner*, 397 Mich at 420.]

The evidence in this case established the employees of Perry Construction and Rivertown were the same and that the businesses were run from the same address. It is clear that Perry Construction ceased its ordinary business operations when Rivertown was formed, and there was evidence suggesting that Rivertown paid some of Perry Construction's debts and that Rivertown continued projects originally begun by Perry Construction. It was established that Michael Perry signed a check on behalf of Rivertown, drawn out of Rivertown's bank account, to Perry Construction. It is also clear that Rivertown was initially formed with the use of Michael Perry's builder's license, that his wife was the owner of Rivertown, that both Michael and Linda Perry relied on the monies earned by Perry Construction to support their household, and that Rivertown was formed to provide the income to support the household that was now missing with the closure of Perry Construction. Thus, the trial court did not err to the extent that it granted plaintiff a judgment against Rivertown based on a de facto merger theory.

Judgment against Rivertown is affirmed. The trial court's grant of summary disposition for the Perry's is reversed, and its directed verdict for Space Place is affirmed. We remand to the trial court for proceedings consistent with this opinion. We do not retain jutisdiction.

/s/ Deborah A. Servitto
/s/ Joel P. Hoekstra
/s/ Donald S. Owens