

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**EMA-US, INC,
Plaintiff,**

v.

**Case No. 13-137047-CK
Hon. James M. Alexander**

**CHANG HWAN PRECISION TERMINAL CO, LTD, ET AL,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendant GETI America Corporation's second motion for summary disposition. The Court dispenses with oral argument pursuant to MCR 2.119(E)(3).

In January 2005, Plaintiff and Defendant Chang Hwan contracted for Plaintiff to act as an independent contractor that would earn commissions for sales that it procured for Chang Hwan's products. The contract was reportedly terminated in December 2012, and the present suit involves claims that Chang Hwan owes Plaintiff over \$400,000 in pre-termination commissions. Plaintiff also claims that the Agreement provided that Chang Hwan is liable for paying post-termination commissions for up to seven years on certain sales procured by Plaintiff.

Coincidentally, the month after Plaintiff's and Chang Hwan's commission agreement was terminated, Defendant GETI America was organized as a Michigan corporation. Relevant to the current motion, Plaintiff's Complaint names GETI America Corporation, GETI America, and GETI as d/b/a's of Chang Hwan. In its first responsive pleading to the original Complaint, GETI

filed a motion for summary disposition – seeking dismissal of the GETI Defendants because Plaintiff’s contract was solely with Chang Hwan. Plaintiff responded that the GETI Defendants were acting as mere instrumentalities of Chang Hwan. This Court held, however, that Plaintiff had not adequately pled a claim for piercing the corporate veil and ultimately gave Plaintiff ten days to amend its Complaint to sufficiently do so. Plaintiff filed its Amended Complaint on May 9, 2014.

The GETI Defendants now bring the present motion as their first responsive pleading to Plaintiff’s Amended Complaint. Like in the prior motion, the GETI Defendants argue that they are entitled to dismissal because “Plaintiff has failed to establish sufficient basis to pierce the corporate veil.”

Defendants seek summary disposition under MCR 2.116(C)(7), and (C)(10). A motion under (C)(7) determines whether a claim is barred, among other grounds, by immunity. And a (C)(10) motion tests the factual support for Plaintiff’s claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In its Response, Plaintiff asks for summary disposition as to liability under (C)(10).

Generally, “[i]t is a well-recognized principle that separate corporate entities will be respected.” *Seasword v Hilti, Inc*, 449 Mich 542, 547; 537 NW2d 221 (1995), citing *Wells v Firestone*, 421 Mich 641, 650; 364 NW2d 670 (1984). Further, “Michigan law presumes that, absent some abuse of corporate form, parent and subsidiary corporations are separate and distinct entities.” *Seasword*, 449 Mich at 547.

This presumption, often referred to as a “corporate veil,” may be pierced only where an otherwise separate corporate existence has been used to “subvert justice or cause a result that [is] contrary to some other clearly overriding public policy.” More specifically, Michigan courts have generally required that a subsidiary must “become ‘a mere instrumentality’ of the parent” before its separate corporate existence will be disregarded.

This law makes it clear that in order to state a claim for tort liability based on an alleged parent-subsidary relationship, a plaintiff would have to allege: (1) the existence of a parent-subsidary relationship, and (2) facts that justify piercing the corporate veil. *Seasword*, 449 Mich at 547-548 (internal citations omitted).

Plaintiff also argues that the GETI Defendants could be liable under a successor liability theory. Our Supreme Court has explained this theory in *Foster v Cone-Blanchard Machine Co*, 460 Mich 696; 597 NW2d 506 (1999):

The traditional rule of successor liability examines the nature of the transaction between predecessor and successor corporations. If the acquisition is accomplished by merger, with shares of stock serving as consideration, the successor generally assumes all its predecessor's liabilities. However, where 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:

“(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.**” *Foster*, 460 Mich at 702-703 (emphasis added), quoting 19 Am Jur 2d, Corporations, § 1546, pp 922-924; *Malone v Red Top Cab Co*, 16 Cal App 2d 268, 273; 60 P.2d 543 (1936). *Turner v Bituminous Casualty Co*, 397 Mich 406, 417; 244 NW2d 873 (1976); and *Schwartz v McGraw-Edison Co*, 14 Cal App 3d 767; 92 Cal Rptr 776 (1971).

Our Court of Appeals has recognized the close relationship between a piercing the corporate veil theory and one for successor liability. *RDM Holdings, Ltd v Cont'l Plastics Co*, 281 Mich App 678, 718; 762 NW2d 529 (2008) (reasoning “Much of the evidence . . . in relation to the corporate veil claim is equally relevant to the successor liability claim.”).

The *RDM* Court noted that:

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. *RDM Holdings*, 281 Mich App at 718, citing *Turner*, 397 Mich at 430.

As stated in this Court’s prior ruling, it is apparent that Plaintiff believes that Chang Hwan is attempting to avoid paying pre- and post-termination commissions by creating the GETI Defendants and running all of its former business through the GETI name. In other words, Plaintiff appears to argue that GETI is a “mere instrumentality” of Chang Hwan or is “a mere continuation or reincarnation of the old corporation.”¹

In its response, Plaintiff cites to volumes of compelling evidence that supports its theory. This evidence comes in the form of affidavits and Defendants’ own documents that appear to show that the GETI Defendants, in part: (1) retained several key Chang Hwan employees, (2) used the same manufacturing plant, (3) used Chang Hwan’s tooling, (4) picked up Chang Hwan’s North and Central America business portfolio, and (5) used many of the same vendor and part numbers used by Chang Hwan.

For their part, Defendants claim that “Plaintiff has made absolutely no argument that either GETI America, Chang Hwan, or the non-party, GET Korea have in some way abused their corporate form.” The Court disagrees. Plaintiff makes exactly that argument.

Additionally, in their motion and reply, Defendants repeatedly question the credibility of Plaintiff’s affiants (and ironically, just as they did in the past, using competing affidavit as the

¹ The Court will note that this appears to be an accurate summary of Plaintiff’s Count 6. Michigan law has long provided that courts “look beyond a plaintiff’s choice of labels to the true nature of the plaintiff’s claim.” *Manning v Amerman*, 229 Mich App 608, 613; 582 NW2d 539 (1998). Indeed, “[i]t is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim.” *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007).

basis). It is well settled, however, that credibility is an issue which must be submitted to the trier of fact. *White v Taylor Distributing Company, Inc*, 275 Mich App 615; 739 NW2d 132 (2007).²

Simply put, Defendants' motion is frivolous. Defendants knew (at the very least) that there were competing affidavits when they filed this motion. They knew so because the Court referenced these affidavits in its April 30, 2014 Opinion. The competing affidavits alone preclude summary disposition.

For the foregoing reasons, the Court finds that Defendants failed to establish their right to summary disposition of Plaintiff's claim for piercing the corporate veil. As a result, Defendants' motion summary disposition is DENIED in its entirety.³

Additionally, MCR 2.114(D) provides that:

The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that . . . the document is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and . . . the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Defendants violated MCR 2.114(D) by filing a motion without any basis in fact and with the purpose to harass, cause unnecessary delay, or needlessly increase the cost of litigation.

Under MCR 2.114(E):

If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.

² Additionally, in *Vanguard Ins Co v Bolt*, 204 Mich. App. 271; 514 N.W.2d 525 (1994), the Court of Appeals held: The granting of a motion for summary disposition is especially suspect where motive and intent are at issue or where a witness or deponent's credibility is crucial. Accordingly, where the truth of a material factual assertion of a moving party depends upon a deponent's credibility, there exists a genuine issue for the trier of fact and a motion for summary disposition should not be granted. *Vanguard Ins, supra* at 276 (internal citations omitted).

³ Because Plaintiff failed to adequately establish its entitlement to summary disposition on liability, its counter-motion for the same is also denied.

Under MCR 2.114(F): “In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages.”

MCR 2.625(A)(2) provides, “if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591.”

The cited statute, MCL § 600.2591 states:

(1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court . . . shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.

(2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.

Plaintiff may bring an appropriate motion for actual costs and actual attorney fees against Defendants based on this Opinion.

IT IS SO ORDERED.

August 5, 2014
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge