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

RETAIL WORKS FUNDING, LLC,
Plaintiff,

v. **Case No. 15-148461-CB**
Hon. James M. Alexander

TUBBY'S SUB SHOPS, INC and
JB DEVELOPMENT, LLC,
Defendants.
_____/

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants' motion for summary disposition.

On June 1, 2015, Plaintiff obtained a default judgment for $184,241.62 against Just Baked Shop, LLC in Macomb County Circuit Court. The next day, Defendant Tubby's Sub Shops (through Defendant JB Development) purchased Just Baked's service mark for $4,000. Because of an outstanding tax lien, JB paid the $4,000 directly to the State of Michigan.

Plaintiff then filed this action – seeking to recover from Defendants the $184,241.62 owed by Just Baked under an alter ego/successor liability theory. Plaintiff also brought a claim for unjust enrichment.

Defendants now move for summary disposition under MCR 2.116(C)(8) and (C)(10). A (C)(8) motion tests the legal sufficiency of the complaint. A motion under this subrule may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Wade v Dept of Corrections*, 439 Mich 158; 483 NW2d 26 (1992).

A motion under (C)(10) tests the factual support for a plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Under (C)(10), "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 that a genuine issue of disputed fact exists." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

As stated, Plaintiff's Complaint is based on the theory that "Defendants are merely a continuation of Just Baked and therefore should be held accountable for Just Baked's judgment."

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).

But Michigan also recognizes 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:
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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." *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).

Similarly, "a showing of fraud, wrongdoing, or misuse is required under Michigan law in order to prevail on an alter-ego theory of liability." *Dutton Partners, LLC v CMS Energy Corp*, 290 Mich App 635, 645; 802 NW2d 717 (2010).

In their motion, Defendants argue that none of the *Foster* exceptions apply, nor is there any evidence of fraud, wrongdoing, or misuse such that Plaintiff could prevail on either a successor liability or alter-ego theory.

Instead, Defendants argue that all evidence establishes that they had no relationship with Just Baked and simply purchased "only one asset of that company, the Service Mark, in an arm's length transaction where the purchase price . . . was appraised by an independent third party." Further, the $4,000 price was actually $1,000 more than the appraised value.

In support of their argument, Defendants attach (1) their pre-purchase UCC lien search records, (2) the business valuation report, (3) the Service Mark Purchase Agreement, (4) the Closing statement, (5) the Lien Release by the Michigan Department of Treasury, (6) the Assignment of the Service Mark, and (7) the Affidavit of Robert Paganes, a member of JB and shareholder of Tubby's. In his Affidavit, Mr. Paganes claims that "the only asset JB purchased from Just Baked L.L.C. was its service mark."

Initially, the Court rejects Plaintiff's argument that the transfer was without consideration because Defendants actually paid 33% more than the appraised value for the service mark. This was consideration paid for the same.

In response, Plaintiff also argues that Just Baked and Tubby's merged, and in such a case, Tubby's remains liable for Just Baked's debts. In support, Plaintiff cites T*urner v Bituminous*

Cas Co, 397 Mich 406; 244 NW2d 873 (1976) for the proposition that, in a case involving a cash sale of assets, in order to establish a de facto merger, the following requirements must be 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.
>
> . . .
>
> (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.
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> *Turner*, 397 Mich at 420, quoting *Shannon v Samuel Langston Co*, 379 F Supp 797, 801 (WD Mich, 1974).[1]

If a plaintiff can establish these three requirements, "then the transferee must accept the liability with the benefits." *Turner*, 397 Mich at 430.

In this case, Plaintiff argues that the first and third requirements have been met – while acknowledging that there is no evidence that the fourth requirement has been met. Initially, the Court notes that, other than Plaintiff's bold conclusion that the first requirement has been met, there is simply no evidence to support the same. Plaintiff does not allege (must less provide any evidence of) a continuity of management, or physical location, or general business operations.

As a result, the Court concludes that Plaintiff only presents evidence to support a finding that the third requirement is met. As a result, Plaintiff fails to present sufficient evidence to avoid summary disposition on its claim for de facto merger.

Defendants also argue that Plaintiff's unjust enrichment claim fails because their purchase of a $3,000 asset for $4,000 cannot be unjust. Indeed, the Department of Treasury

[1] The second requirement from *Shannon* does not apply in a case sale of corporate assets, such as the alleged case here. *Turner*, 397 Mich at 430 (reasoning "we adopt the rule that in the sale of corporate assets for cash, the first, third and fourth criteria set forth in the *Shannon* quotation from *McKee* shall be guidelines to establish whether there is continuity between the transferee and the transferor corporations.).

accepted this payment for the same. Further, Defendants argue that Plaintiff would not be entitled to any monies unless Just Baked's tax liens of over $850,000 were paid off – which would be "ridiculous" given the service mark's appraised value of only $3,000.

Generally, "in order to sustain a claim of quantum meruit or unjust enrichment, a plaintiff must establish (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 195; 729 NW2d 898 (2006); citing *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993).

In its response brief, Plaintiff simply concludes that the elements "are easily applied." The Court disagrees. Plaintiff paid over the appraised value for the service mark. And there is no inequity resulting to Plaintiff by Defendants purchase of the minimally valued service mark. These circumstances do not support an unjust enrichment claim.

Finally, the Court will note that Plaintiff filed a "Supplemental Brief" in support of its response to Defendants' summary motion. But the Court Rules do not such a brief, and Plaintiff did not seek leave of the Court to file the same. As a result, the same will not be considered.[2]

(Remainder of page intentionally left blank.)

[2] Assuming arguendo that the Court would consider the same, Plaintiff's supplemental brief presents no evidence that would alter the outcome on this motion. Plaintiff simply cherry picks and quotes out-of-context to Todd Turkin's deposition, who testified that Tubby's does not operate Just Baked. (Turkin Dep. at 11). Mr. Turkin testified that Tubby's purchased "the name pretty much," but also the recipes, distribution rights, and franchise rights. (Id.) And Tubby's bought this all for the $4,000 payment to "the IRS." (Id. at 11-12).
While Mr. Turkin also references a "consulting agreement," he makes clear that said agreement was with his wife, and was for her **services**, not for any Just Baked assets. (Id. at 12-13

For all of the foregoing reasons and viewing all evidence in the light most favorable to Plaintiff, the Court finds that there are no material facts in dispute, whereby Defendants are entitled to judgment as a matter of law under (C)(10). As a result, the Court GRANTS Defendants' motion for summary disposition and DISMISSES Plaintiff's Complaint in its entirety.

Defendants may file an appropriate motion for sanctions.

This Order is a Final Order that resolves the last pending claim and closes the case.

IT IS SO ORDERED.

February 24, 2016 /s/ James M. Alexander
Date Hon. James M. Alexander, Circuit Court Judge