

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

BLUE CROSS BLUE
SHIELD OF MICHIGAN,

Plaintiff,

vs.

Case No. 2015-2327-CB

OXIMETRY COMPANY, LLC
and NIGHT HAWK SLEEP
SYSTEMS, INC.,

Defendants.

OPINION AND ORDER

Plaintiff has filed a motion for summary disposition as to Defendant Night Hawk Sleep Systems, Inc. ("Defendant Hawk") pursuant to MCR 2.116(C)(10), and to amend its complaint. Defendant Hawk has filed a response and requests that the motion be denied.

In addition, Defendant Hawk has filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff has filed a response and requests that the motion be denied.

I. Background

On July 2, 2015, Plaintiff filed its complaint in this matter ("Complaint"). In the Complaint, Plaintiff brings a claim for breach of contract against Defendant Oximetry Company, LLC ("Defendant Oximetry"), and against Defendant Hawk under successor liability (Count I), as well as a claim for unjust enrichment against Defendants (Count II).

In its complaint, Plaintiff alleges that Defendant Oximetry was founded in 2002 by

Dr. Robert Rudowski, Ph.D. and three other individuals. The members other than Dr. Rudowski subsequently exited Defendant Oximetry. Defendant Oximetry operated out of a headquarters located at 15760 19 Mile Rd, Suite F, Clinton Twp., MI ("Subject Property"). Defendant Oximetry was in the business of performing home-based type-I sleep testing.

Plaintiff further alleges that on January 1, 2007, Plaintiff and Defendant Oximetry Company, LLC ("Defendant Oximetry") entered into a Physician and Professional Provider Agreement under which Defendant Oximetry would provide sleep diagnostic testing to Plaintiff's insureds ("Agreement"). In October 2010, Plaintiff audited the claims it paid to Defendant Oximetry in the prior year. Based on the audit, Plaintiff calculated that it overpaid Defendant Oximetry \$354,248.37. In January 2011, Plaintiff requested that Defendant Oximetry repay the alleged overpayment amount. Defendant Oximetry challenged Plaintiff's findings. An administrative proceedings was subsequently conducted, which ultimately resulted in an administrative law judge finding in favor of Plaintiff and entering a judgment to that effect. Defendant Oximetry has not challenged the enforceability of that judgment. In June or July 2010, Defendant Oximetry ceased its operations.

In April 2010, Dr. Rudowski formed Defendant Hawk. It is alleged that Defendant Hawk initially operated out of Dr. Rudowski's home, but later relocated to the Subject Property after Defendant Oximetry's operations ended. Defendant Hawk is in the business of conducting type-III sleep testing.

Plaintiff and Defendant Hawk filed cross motions for summary disposition as to Plaintiff's claims against Defendant Hawk. On February 16, 2016, the Court held a

hearing in connection with the motion and took the matters under advisement.

II. Standard of Review

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Graves v Warner Bros*, 253 Mich App 486, 491; 656 NW2d 195 (2002). Under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Id.* However, the nonmoving party must produce evidence showing a material dispute of fact left for trial in order to survive a motion for summary disposition under this rule. MCR 2.116(G)(4); *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Wayne County Bd of Com'rs v Wayne County Airport Authority*, 253 Mich App 144, 161; 658 NW2d 804 (2002).

III. Arguments and Analysis

The parties' dispute in the instant motion is whether Defendant Hawk is liable for Defendant Oximetry's debt to Plaintiff under the doctrine of successor liability. Specifically, Plaintiff relies on the mere continuation theory of successor liability. The mere continuation theory provides that a successor entity will be liable for the predecessor's liabilities if the successor is a mere continuation or reincarnation of the old corporation. Specifically, courts are to look at the following four factors when determining whether the successor entity is a mere continuation of the predecessor: (1) whether 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) whether the predecessor corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible; (3) whether 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; and (4) whether the successor entity holds itself out to the world as the effective continuation of the predecessor. *Lakeview Commons LP v Empower Yourself, LLC*, 290 Mich App 504, 507; 802 NW2d 712 (2010)[internal citations omitted].

In its response, Defendant Hawk first asserts that the doctrine of successor liability does not apply to judgment creditors, like Plaintiff, under *Starks v Michigan Welding Specialists*, 477 Mich 922 (2006). Specifically, Defendant Hawk relies on the following portion of the one paragraph opinion in *Starks*:

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.

Id. at 889.

The Court is convinced that Defendant Hawk's interpretation of *Starks* is too broad. The United States Court of Appeals for the Sixth Circuit has held that *Starks* did not abolish the traditional exceptions to the general rule of successor nonliability. *C.T. Charlton & Assocs. Inc. v. Thule, Inc.*, 541 F App'x 549, 552–53 (6th Cir 2013)(holding that the "mere continuation" doctrine of successor liability still applies under Michigan law, and is not limited to products liability cases, even after *Starks*.) Further, published Michigan Court of Appeals decisions have continued to recognize the five exceptions to the traditional rule of nonliability after *Starks*. See *Lakeview Commons v Empower*

Yourself, 290 Mich App 503; 802 NW2d 712 (2010); *RDM Holdings, Ltd v Cont'l Plastics Co*, 281 Mich App 678; 762 NW2d 529 (2008). Moreover, the facts in *Starks* are clearly distinguishable from those presented in this case. In *Starks*, the successor purchased the assets of the predecessor from the predecessor's creditor after that creditor foreclosed on the assets. In this case, the assets in question were used by the same individual's successor entity after the predecessor entity ceased operations. Consequently, the link between the two entities is clearly less attenuated than the entities in question in *Starks*. For all these reasons, the Court is convinced that the holding in *Starks* does not operate to bar Plaintiff's successor liability claims in this case.

With respect to the mere continuation doctrine factors, the Court must first look to whether Defendant Hawk included a continuation of the management, personnel, physical location, assets and general business operation of Defendant Oximetry. With respect to physical location, while Defendant Hawk began its operations out of Dr. Rudowski's home, it is undisputed that Defendant Hawk began operating out of the Subject Property after Defendant Oximetry ceased its operations. With regards to management and personnel, both entities were owned by Dr. Rudowski; however, Defendant Hawk only contacted 6 of Defendant Oximetry's 35 former employees about working for Defendant Hawk. Further, Defendant Hawk hired a different medical director and office manager. (See Defendant Hawk's Exhibit F to its February 1, 2016 Response.) In terms of assets, Dr. Rudowski has testified that Defendant Hawk and Defendant Oximetry utilize different equipment and that most the equipment utilized by Defendant Oximetry has been disposed of. (See Defendant Hawk's Exhibit A to 1/12/16

Motion, at 26-27.) Further, Plaintiff has not identified any assets which were utilized by both entities.

As to the general business operation of Defendant Oximetry and Defendant Hawk, both fall under the umbrella of providing sleep testing. However, Defendant Oximetry conducted type-I sleep testing, which Dr. Rudowski testified is a procedure that tests for 72 different sleep disorders, while Defendant Hawk engages in type-III testing, which tests for only obstructive sleep apnea, one of the 72 tests Defendant Oximetry tested for. (See Defendant Hawk's Exhibit A to 1/12/16 Motion, at 10.) Further, Mr. Rudowski testified that type-III testing requires completely different types of machines and systems (Id. at 11.)

The second factor of the mere continuation test is whether Defendant Oximetry ceased its ordinary business operations, liquidated, and dissolved as soon as legally and practically possible. *Lakeview Commons* 290 Mich App at 507. In this case, it appears undisputed that Defendant Hawk was founded near the time that Defendant Oximetry ceased its operations.

The third factor requires the Court to look at whether Defendant Hawk assumed those liabilities and obligations of the Defendant Oximetry that it needed in order for the uninterrupted continuation of normal business operations of Defendant Oximetry. *Lakeview Commons*, 290 Mich App at 507. In this case, it is undisputed that Defendant Hawk did not assume any of Defendant Oximetry's liabilities. Nevertheless, Plaintiff asserts that Defendant Hawk entered into a lease for the same business location as Defendant Oximetry and had access to the same assets as Defendant Oximetry because Dr. Rudowski owned both entities and was the owner of the assets utilized by

Defendant Oximetry. However, Dr. Rudowski has testified that the equipment used by Defendant Oximetry is not used by Defendant Hawk; rather, most of it has been disposed of. (See Defendant Hawk's Exhibit A to 1/12/16 Motion, at 26-27.) Further, Dr. Rudowski has testified that Defendant Hawk utilizes equipment from ResMed, a separate entity. (See Defendant's Exhibit C to 1/12/16 Motion.)

The final factor requires the Court to examine whether Defendant Hawk held itself out as an effective continuation of Defendant Oximetry. *Lakeview Commons*, 290 Mich App at 507-508. In its pleadings, Plaintiff points to the fact that a google search for Defendant Oximetry allegedly directs the searcher to Defendant Hawk. However, this allegation has not been supported with any evidence. A party may not merely state a position and then leave it to the Court to rationalize and discover the basis for the claim, nor may he leave it to the Court to search for authority to sustain or reject his position. *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000). As Plaintiff has failed to establish that a search for Defendant Oximetry led searchers to Defendant Hawk's website, such allegations will not be considered.

The only other evidence Plaintiff relies on with respect to the fourth factor is that Defendant Hawk was founded in the same year as Defendant Oximetry ceased its operations. However, Defendant Hawk contends that the close proximity in time is outweighed by the Dr. Rudowski's testimony that the entities provide different tests, utilize different equipment, and employ mostly different individuals.

Upon reviewing the record, the Court is convinced that a genuine issue of material fact exists that precludes summary disposition in favor of either party on the issue of whether Defendant Hawk is a mere continuation of Defendant Oximetry. The

facts in favor of successor liability are that Defendant Oximetry ceased its operations near the time that Defendant Hawk was founded, both entities utilized the same place of operation, both entities were owned entirely by Dr. Rudowski, Defendant Hawk employed at least some of the same employees as Defendant Oximetry, and both are in the business of providing sleep testing. However, several facts weigh against a finding of mere continuation. Specifically, Plaintiff has failed to identify any physical assets that were used by both entities, the entities engage in different types of sleep testing, the entities entered into completely separate leases for the Subject Property, they had mostly different employees, and Plaintiff has failed to present any evidence that Defendant Hawk has held itself out to the world as providing the same services as Defendant Oximetry. Based on this conflicting evidence, the Court is satisfied that reasonable minds could differ regarding whether Defendant Hawk was the mere continuation of Defendant Oximetry. Consequently, the parties' motions for summary disposition must be denied.

IV. Conclusion

Based upon the reasons set forth above, Plaintiff's and Defendant Night Hawk Sleep Systems, Inc.'s motions for summary disposition are DENIED. This Opinion and Order does not resolve the last claim and does not close the case. See MCR 2.602(A)(3).

IT IS SO ORDERED.

Date: MAR 18 2016

Kathryn A. Viviano
Hon. Kathryn A. Viviano, Circuit Court Judge