

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

POL AM PACK	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
REDICON CORPORATION, and	:	
STOLLE MACHINERY, INC.	:	
Defendants.	:	NO. 00-1833

M E M O R A N D U M

Newcomer, S.J. October , 2000

Defendant Stolle Machinery ("Stolle") now moves for summary judgment in the above captioned case. In its complaint, plaintiff argues that Stolle is liable to it based upon a de factor merger theory. In the present Motion, Stolle argues that it cannot be liable to plaintiff on a de facto merger theory as a matter of law.

Plaintiff Pol Am Pack is a corporation organized under the laws of Poland, and manufactures metal cans and ends for the food industry. Defendant Redicon is corporation organized and existing under the laws of Ohio, and is engaged in the business of manufacturing, producing and installing manufacturing machinery, specifically for the canning industry. Stolle is a corporation organized and existing under the laws of Ohio, and is engaged in the design, manufacture and sale of equipment useful in the manufacturing of cans for food, beverage and similar applications.

On November 3, 1997, Pol Am Pack and Redicon entered into a written contract which provided that Redicon would manufacture and install certain machinery for plaintiff's production of sanitary steel can ends. This machinery proved to be defective despite Redicon's attempts to fix its deficiencies. Stolle is not a party to the Redicon contract, nor were they involved with the parties' performance of the Redicon contract. Plaintiff alleges that Redicon breached the parties' contract and the contract warranty, and caused plaintiff to be damaged in excess of \$3,228,318.

On December 1, 1999, National City, a secured creditor of Redicon, instituted a lawsuit against Redicon and obtained a confession of judgment against Redicon for Redicon's outstanding loan obligations. These obligations totaled over \$18 million dollars.

In October, 2000, Redicon and National City entered into negotiations with various companies, including Alcoa Co. (Stolle's parent company) regarding a potential sale of Redicon's assets. On or about February 4, 2000, Redicon and National Union executed a Surrender Agreement whereby Redicon surrendered its rights to certain assets in partial satisfaction of the debts it owed National City. The assets Redicon surrendered included Redicon's goodwill, trade name, product lines, inventory, accounts receivable, patents, trademarks, furniture, business

records, and computer goods.

Four days later, on February 8, 2000, Stolle and National City executed a Secured Party Asset Purchase Agreement whereby National City sold Redicon's former assets to Stolle for \$2.3 million. In that transaction, Stolle did not receive any of Redicon's formerly owned real property, nor did that transaction involve the transfer of stock.

On February 17, 2000, David W. Groetsch, the President of Alcoa, sent a press release to Redicon's former customers which stated that "[i]t is the intent of Stolle Machinery to continue the former Redicon product lines...[and that] [a] number of past Redicon employees were offered and accepted positions with Stolle." In fact, Stolle hired 27 former Redicon employees including Harvey Howard as its Operations Manager, Redicon's former Chief Operating Officer, and Robert L. Gary as its Group Vice President, Redicon's former President. Neither Mr. Howard nor Mr. Gray received any Stolle stock when hired, however, they may become eligible for stock options in the future.

Stolle also commenced doing business under the name "Redicon Metal Forming Systems" and acquired the rights to Redicon's domain name on the Internet. Stolle has also incorporated the following Redicon products into its product line: shell presses, Redicon Cupping Systems, and Redicon Draw and Redraw Systems. Stolle has retained the product names they

had before execution of the Asset Purchase Agreement. Finally, Stolle has paid one creditor of Redicon, a cellular phone provider.

II. DISCUSSION

A. Legal Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED.R.CIV.P. 56(c) (1994). The party moving for summary judgment has the initial burden of showing the basis for its motion. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324.

A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable

to the non-movant. See Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3rd Cir. 1992).

Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. See id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. See Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3rd Cir. 1992).

B. De Facto Merger

Generally, when one company sells or transfers all of its assets to a successor company, the successor does not acquire the liabilities of the transferor corporation merely because of its succession to the transferor's assets. See Dawejko v. Jorgensen Steel Co., 434 A.2d 106, 107 (Pa. Super. Ct. 1981); Husak v. Berkel Inc., 341 A.2d 174 (Pa. Super. Ct. 1975).¹ To find that this general rule is not applicable and that the transferee does acquire such liability, one of the following must be shown: (1) the purchaser expressly or impliedly agrees to assume such obligation; (2) the transaction amounts to a consolidation or merger; (3) the purchasing corporation is merely a continuation of the selling corporation; or (4) the transaction

¹The parties agree that Pennsylvania law of successor liability governs this dispute.

is fraudulently entered into to escape liability. See Dawejko, 434 A.2d at 107 (citing Granthum v. Textile Machine Works, 326 A.2d 449 (Pa. Super. Ct. 1974)).

The so called "de facto merger" doctrine is a judge made device that allows courts to decide whether a transaction, even though called something else, amounts to a merger. See In re Penn Central Securities Litigation, 367 F. Supp. 1158, 1170 (E.D.Pa. 1973) ("The de facto merger doctrine is a judge-made device for avoiding patent injustice which might befall a party simply because a merger has been called something else."). To determine the nature of a corporate transaction properly, a court must refer not only to all the provisions of the agreement, but also to the consequences of the transaction. See Farris v. Glen Alden Corp., 143 A.2d 25, 28 (Pa. 1958).

Furthermore, most courts look to the following factors to determine whether a particular transaction amounts to a de facto merger as distinguished from an ordinary purchase and sale of assets:

- (1) There is a continuation of the enterprise of the seller corporation, so that there is 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 obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation.

Philadelphia Elec. Co. v. Hercules, Inc., 762 F.2d 303, 310 (3rd Cir. 1985). Of these four factors, the essential inquiry is whether the shareholders of the predecessor corporation become shareholders of the successor through the successor's use of stock in payment for the predecessor's assets. See Benefit Control Methods, Inc. v. Health Care Servs., Inc., No. 97-4418, 1998 U.S. Dist. LEXIS 20008, *13 (E.D.Pa. December 14, 1998); Gehin-Scott v. Newson, Inc., 93-CV-0321, 1994 U.S. Dist. LEXIS 11, *7 (E.D.Pa. January 6, 1994); Tracey by Tracey v. Winchester Repeating Arms Co., 745 F. Supp. 1099, 1110, n. 18 (E.D.Pa. 1990). Indeed, the absence of a stock transfer is fatal to a claim of de facto merger. See Stutzman v. Syncro Machine Co., Inc., No. 88-9673, 1991 U.S. Dist. LEXIS 5308, *15 (E.D. Pa. April 18, 1991); see also Scanlon v. Devon Systems, Inc. No. 89-CIV-1634, 2000 U.S. Dist. LEXIS 1883, 10-11 (S.D.N.Y. February 24, 2000); Gehin-Scott, 1994 U.S. Dist. LEXIS 11, *9; Tracey, 745 F. Supp. at 1110.

In the present action, plaintiff's de facto merger claim fails as a matter of law because the stock transfer element is completely absent from Stolle's acquisition of assets formerly owned by Redicon. Neither party disputes that the only

consideration Stolle paid for Redicon's former assets was the \$2.3 million Stolle paid to National City. Moreover, Stolle paid no consideration to Redicon, but as just explained, only paid cash to National City. Neither Redicon, nor its shareholders received any interest in Stolle, or any corporate entity related to Stolle.

Plaintiff claims that an issue of material fact exists because Mr. Howard and Mr. Gray may be eligible for stock options as part of their employment package at a later time. However, that claim is entirely speculative, and unpersuasive. Even if true, the fact would remain that no stock was transferred as part of Stolle's acquisition of Redicon's former assets. Plaintiff's weak assertion therefore, is insufficient to withstand Stolle's Motion for Summary Judgment.

Because the Court shall grant defendant's summary judgment motion on the de facto merger issue, summary judgment is also appropriate on plaintiff's breach of contract and warranty claims as both turn upon plaintiff's de facto merger claim.

An appropriate Order will follow.

Clarence C. Newcomer, S.J.