STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

ARNOLD F. SARYA, DDS, M.S., P.C.,
Plaintiff-Appellee,

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Circuit Court
File No. 94-12588-AV

NORTHWEST TITLE CORPORATION,
a Michigan corporation,
Defendant-Appellant

District Court
File No. 93-9411-GC
HON. PHILIP E. RODGERS, JR.

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Attorney for Plaintiff-Appellee

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DECISION AND ORDER RELATING TO APPEAL

The 86th Judicial District Court ruled in favor of Plaintiff-Appellee (hereafter Plaintiff) and ordered a Judgment, entered June 16, 1994, against Defendant-Appellant (hereafter Defendant) Defendant filed an appeal of the District Court's decision. Plaintiff filed a brief in response to the appeal. The parties made their oral arguments at a hearing held on April 3, 1995. This Court has reviewed the claim of appeal, the briefs, the transcript of the District Court bench trial held on March 28, 1994, and the District Court file.

The District Court case represents Plaintiff's efforts to secure satisfaction of a Judgment against Tonimar Corporation d/lo/a Northwest Title Company in District Court File No. 88-752-LT. The subject money judgment in the amount of $5,793.15, in favor of Plaintiff, was obtained on August 18, 1989. At issue is whether Defendant is liable, as a successor corporation, for liabilities of Tonimar Corporation which operated a title insurance business under the name of Northwest Title Company.

Defendant argued, in its brief, that the evidence presented at the bench trial held on March 28, 1994 did not support a verdict in favor of Plaintiff. Plaintiff argued that Michigan case law supports Plaintiff's claim that Defendant is a successor corporation to Tonimar and that Defendant is liable for payment of the outstanding judgment due to Plaintiff. Inter alia, Plaintiff

relied on Antiphon v LEP Transport, 183 NW2d 377; 454 NW 2d 222 (1990) to support its argument.

This Court finds the following text, from the Antiphon opinion, helpful and instructive:

> Generally, when one corporation sells its assets to another, the purchaser is not responsible for the debts and liabilities of the selling corporation. Stevens, supra at 371.1 However, as with any general rule, there are exceptions:
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> The law is well settled in regard to liability of the consolidated or purchasing corporation for the debts and liabilities of the consolidating or selling corporation. Such obligations are assumed (1) when two or more corporations consolidate and form a new corporation, making no provision for the payment of the obligations of the old; (2) when by agreement, express or implied, a purchasing corporation promises to pay the debts of the selling corporation; (3) when the new corporation is a mere continuance of the old; (4) when the sale is fraudulent, and the property of the old corporation, liable for its debts, can be followed into the hands of the purchaser. Austin v Bank, 49 Neb. 412 [68 NW 628 (1896)1.[Chase, supra at 634. 2]
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> In the realm of corporate successor liability, a successor corporation may be held responsible for the liabilities incurred by its predecessor where the facts demonstrate that there existed an implied agreement to assume liability. Chase, sunra at 634. Although there is no precise rule governing the finding of implied liability, there is authority that suggests such a

Footnote 1: Referring to Stevens v McLouth Steel Products Corp, 433 Mich 365; 446 NW2d 95 (1989).

Footnote 2: Referring to Chase v Michioan Telechone Co, 121 Mich 631; 80 NW 717 (1899).

finding may be made where the conduct or representations relied upon by the party asserting liability indicate an intention on the part of the buyer to pay the debts of the seller. See Ladjevardian v Laidlaw-Coggeshall Inc, 431 F Supp 835, 839 (SD NY, 1977); 15 Fletcher, Cyclopedia Corporations, S 7124, p 211. Whether such an intent exists must be determined from the facts and circumstances of each case. Ladjevardian, supra; Fletcher, supra. The factors to consider are: (1) the effect of the transfer on the creditors of the predecessor corporation; and (2) admissions of liability on the part of officers or other spokespersons of the successor corporation. Ladjevardian, supra; Fletcher, supra.

Antiphon, supra at 382 and 384. The one-paragraph Judgment does not state the trial court's reasoning in making its award to the Plaintiff. Defendant, in its Claim of Appeal, stated, inter alia, that, "[the] grounds of the appeal [are] that the decision of the Court that the Defendant/Appellant received assets from the Plaintiff/Appellee was incorrect and in error".

This Court now turns to the factual development of the matter. The following statement of facts, as presented on pages 1 and 2 of Plaintiff's brief, succinctly describes the entities and ownership details:

There are three corporations involved in this present matter. The first is Northwest Financial Corporation which is owned by John Markle. The second is Tonimar Corporation which is now a defunct corporation. Tonimar, doing business as Northwest Title [Company], operated a title insurance business. [Tonimar] was owned by Antoinette Markle until 1988 when it ceased operations. The Michigan Department of Commerce dissolved Tonimar on or about [May 15, 1992]. [Defendant], which was formed on or about July 25, 1988, began doing business on or about August 30, 1989. Northwest Title Corporation is owned by both John and Antoinette Markle.

The record clearly shows that Mr. and Mrs. Markle have worked together in the two title businesses, Tonimar, d/lo/a Northwest Title Company, and Northwest Title Corporation. Tonimar existed as a corporation from 1979 until it ceased operations in 1988. Trial transcript, p 14. As a business, Tonimar lost money during most of those years. Trial transcript, p 17. With regard to Tonimar, Mr.

Markle stated at trial that he "was in charge of the finances, and [his] wife was in charge of the decision making".

The following exchange between Mr. Markle and Defendant's counsel on cross-examination at the trial is helpful to this Court in its efforts to track the demise of Tonimar and the emergence of the Defendant corporation:

Q When was the decision made to open a new corporation doing essentially the same type of work?

A That decision was made in early 1988. My wife and I were having a difference of opinion. As a financial person, I could see what was happening in the business end in that Tonimar was trying to compete on price by discounting, doing closings for free. And I told her that that was the road to ruin, and that she should be competing on service instead of price. And she said, "Well, if you think you can do better, why don't you start your own title company."

Q Okay. When did you open Northwest Title Corporation?

A I received my approval as a license agent of commonwealth at the end of August, in 1989. And it was at that point in time that I was able to begin soliciting business.

Q And Tonimar was completely liquidated and had been out of business for some time by then.

A Yes.
Trial transcript, pp 44-45.

In response to Plaintiff's counsel, on direct examination, Mr. Markle has testified that Northwest Title Corporation was formed on July 25th, 1988. Trial transcript, p 32. Mrs. Markle went to work in the newly formed corporation. When Mrs. Markle testified at the trial, the following exchange took place on direct examination by defense counsel:

Q Basically, ma'am, has your job changed from being at Tonimar Corporation to Northwest Title Company? [sic]

A Yes.

Q And how has it changed?

A I am the -- only a part owner.

Q All right. Anything else?

A I do closings.

Trial transcript, p 11.

This litigation stems from Tonimar's failure to make rent payments to Plaintiff/Dr. Sarya. Mr. Markle testified that Tonimar rented space from Dr. Sarya at a time when Mrs. Markle needed cheaper rent because Tonimar was "financially bound". Trial transcript, p 45. Eventually Tonimar went out of business when it ran into difficulties with its title insurance underwriter, Tricor. Mr. Markle testified at the trial that as a result of Antoinette Markle's failure to pay premiums to Tricor, the underwriter demanded that John and Antoinette Markle personally guarantee a loan to Tricor in the amount of the unpaid premiums. John Markle refused to personally guarantee such a loan. Tricor then terminated the Tonimar agency agreement which led to Tonimar's cessation as a title insurance business. Trial transcript, pp 39-41.

Mr. Markle testified that when Tonimar ceased operations, its only assets were office equipment, furniture, vehicles and accounts receivable. It is undisputed that the accounts receivable were turned over to Plaintiff "a few years ago". Northwest Financial Corporation, owned by Mr. Markle, was involved in the dissolution of Tonimar. The trial transcript, at pages 26 and 27, consists of the following pertinent remarks by Mr. Markle, on direct examination by Plaintiff's counsel:

Q Did Northwest Financial assume any of the liabilities of Tonimar Corporation?

A Yes, it did.

Q And which liabilities did it assume?

A Well, now I -- I take that back. It didn't assume them. It paid some of them off as part of the payment, because some of the assets had loans against them.

Q All right.

A And in order for the assets to be transferred, Northwest Financial was required to take out it's own loan and pay off the loans of Tonimar..

Q And how much did Northwest Financial have to take out to pay off the loans of Tonimar?

Q Northwest Financial paid $37,608.90 for the assets which I have a -- a list of, copies of the checks in which it paid cash, copies of the Tonimar amount being paid off, a $28,000 loan paid off by Northwest Financial that Tonimar had with NBD Bank securing all of the assets, plus paying off a note for a 1986 Nissan.

Tricor was paid in full. Those transactions left Tonimar "with no assets whatsoever". Trial transcript, pp 43-44.

Mr. Markle acknowledged that the Defendant corporation purchased some of the assets which Northwest Financial had purchased from Tonimar. He testified that, "Northwest Financial sold some assets to Northwest Title Corporation over a period of time. There were some initial assets that were sold; a few desks, some chairs -- obviously, have had to have a place for people to sit." Trial transcript, p 46. Mrs. Markle continued to drive a 1986 Nissan Stanza after Northwest Financial Corporation purchased it from Tonimar. Trial transcript, p 51.

This Court must determine whether the trial court correctly found that Defendant corporation is liable, as a successor corporation, for the rent owed by Tonimar to Plaintiff. The record clearly shows that John and Antoinette Markle own Northwest Title Corporation; Antoinette Markle owned the now-defunct Tonimar and John Markle provided financial management; John Markle owns Northwest Financial Corporation. Now, Mr. and Mrs. Markle, as principals of Northwest Title Corporation are doing the same things as before the dissolution of Tonimar. They also caused Northwest to satisfy some of Tonimar's obligations.

The consolidation of these business entities was a de facto merger as described by the Michigan Supreme Court in Turner v Bituminous Casualty Co, 397 Mich 406, 420; 244 NW2d 873 (1976). In Turner, the highest court addressed a products liability case and made the following pertinent statement:

[T]he traditional corporate law approach in non-products-

liability cases has been to largely condition successor responsibility on whether the transaction is labeled a merger, a de facto merger, or a purchases of assets for cash.

It is the law in Michigan that if two corporations merge, the obligations of each become the obligations of the resulting corporation. (Citations omitted.)

Turner, pp 419-420. See also Haney v Bendix Corp, 88 Mich App 747, 750; 279 NW2d 544 (1979) and MCL 450.1724; MSA 21.200(724). Defendant's counsel provided no legal authority to support the following argument:

[T]he corporation does not have to assume the debts just because the people happen to be involved with different corporations that did the same thing prior. That would violate the very basis of what corporations are about.

The corporate assets were disposed of and liquidated and used to pay debt of the corporation, Tonimar -- every single dime. The -- and Northwest Financial did it because of the fact that, I guess, that Northwest Financial was owned by the husband, and Tonimar was primarily the wife's corporation, and he bailed 'em out. He gave -- he put enough money into Tonimar for the assets to pay all the debts and bail his wife out of some problems. That's -- that's total good faith on the part of him. He was simply trying to help out his wife. Trial transcript, p 56.

Pursuant to Ladjevardian, supra and Fletcher, supra, this Court reviewed the facts to determine whether there existed an implied agreement on the part of the buyers, Northwest Financial Corporation and Northwest Title Company to pay the debts of the seller, Tonimar. Clearly the effect of the transfer on Dr. Sarya, as a creditor of Tonimar, was that the Judgment, issued more than six years ago, has not been satisfied. The trial court record is replete with admissions of Tonimar's liability and of Northwest's payment of its debt. It is the opinion of this Court that Mr. and Mrs. Markle, as principals of the title companies, and Mr. Markle as owner of Northwest Financial Corporation, in transferring assets from one entity to another and failing to pay rent owed to Plaintiff, violated obligations of corporate ownership and failed to pay a valid debt.

For the foregoing reasons, Defendant's appeal is denied. Plaintiff may submit an affidavit setting forth the fees and expenses incurred in bringing the District Court action and defending against this appeal within the next 7 days or the Court will deem that fees and costs have been waived. This Court will determine the amount of reasonable attorney fees and costs and issue an Order to Satisfy Judgment, which will require that Defendant pay Plaintiff the full amount of the Judgment and reasonable attorney fees and costs within 10 day of the order.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge
Dated: 11/07/95