IN THE COMMON PLEAS COURT OF DARKE COUNTY, OHIO

MOSE COHEN & SONS, et al.,	**:**	**CASE NO. 01-CV-59499**
Plaintiffs	**:**	**JONATHAN P. HEIN, Judge**
vs.	**:**	
NEWLON METALS, INC., et al.,	**:**	**DECISION AND JUDGMENT ENTRY -**
Defendants.	**:**	**Motion to Dismiss filed by Defendant Newlon Metals., Inc.**

This matter came before the Court upon the Motion to Dismiss filed by the Defendant, Newlon Metals, Inc., pursuant to Civil Rule 12(B)(2). Pleadings in opposition have been filed by the Plaintiffs, RSR Corporation and Mose Cohen & Sons. The Court originally deferred a ruling on this motion and allowed the parties to conduct discovery on this issue. Essentially, Newlon Metals, Inc. (NMI) claims that this Court lacks personal jurisdiction over NMI, which claims to be a foreign corporation and which lacks any minimum contacts with Darke County, Ohio.

Summary of Case

As a result of litigation conducted in the Federal District Court for the Southern District of Ohio, the Plaintiffs paid approximately $1.6 million to clean up air, water and soil toxins which were caused as a result of a battery cracking and lead recycling facility located in Arcanum, Darke County, Ohio. Plaintiffs claim that the Defendants herein provided batteries to

the site which contributed to the air, water and soil pollution. Therefore, Plaintiffs bring this matter seeking contribution and indemnification for costs which Plaintiffs incurred.

NMI claims that it did not provide any toxic materials (in the form of recycled automotive batteries) to the site. Instead, it claims that an unrelated, similarly named company, Newlon Metals Company, Inc. (NMCI), provided the batteries to the Arcanum site. NMI was incorporated under the laws of the State of Indiana on September 18, 1987 and the toxic materials were apparently provided to the Arcanum site before this date. NMI claims that it never transacted any business in Ohio nor caused tortious injury by any act or omission in Ohio. In the absence of minimum contacts, NMI claims that this Court does not have personal jurisdiction over it.

Plaintiffs claim that NMI should be held liable under a successor-liability theory. More particularly, Plaintiffs claim that NMCI sold its assets to NMI on or about September 15, 1987 in an attempt to shield the new corporation from liability and to diminish any obligation to contribute to environmental clean-up costs. If there is successor liability, then the minimum contacts of the prior corporation are sufficient for this Court to possess jurisdiction over NMI.

Standard of Proof

In determining whether a party should be dismissed from a matter pursuant to Civil Rule 12 (B)(2), the Plaintiffs need only make a prima facia showing of jurisdiction. If the Plaintiffs produce evidence upon which reasonable minds could find personal jurisdiction, then the motion must be denied. Giachetti v. Holmes (1984), 14 Ohio App. 3d 306. The trial court is not limited to a review of the pleadings but may consider other evidence, including affidavits and interrogatories. Price v. Wheeling Dollar Savings and Trust (1983), 9 Ohio App. 3d 315; Grossi v. Presbyterian University Hospital (1980), 4 Ohio App. 3d 51.

Legal Analysis

In determining whether this Court has personal jurisdiction over a foreign corporation, the analysis begins with R.C. 2307.382, which provides as follows:

R.C. 2307.382 Personal jurisdiction.

(A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:

(1) Transacting any business in this state;

(2) Contracting to supply services or goods in this state;

(3) Causing tortious injury by an act or omission in this state;

(4) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

(5) Causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when he might reasonably have expected such person to use, consume, or be affected by the goods in this state, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

(6) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state;

(7) Causing tortious injury to any person by a criminal act, any element of which takes place in this state, which he commits or in the commission of which he is guilty of complicity.

(8) Having an interest in, using, or possessing real property in this state;

(9) Contracting to insure any person, property, or risk located within this state at the time of contracting.

(B) For purposes of this section, a person who enters into an agreement, as a principal, with a sales representative for the solicitation of orders in this state is transacting business in this state. As used in this division, "principal" and "sales representative" have the same meanings as in section 1335.11 of the Revised Code.
(C) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him.

The "test for minimum contacts is not susceptible to mechanical application; rather, the facts of each case must be weighed to determine whether the requisite affiliating circumstances are present." Wayne County Bureau of Support v. Wolfe (1991), 71 **Ohio** App.3d 765 at 769.

From the discovery conducted thus far and based upon the pleadings herein, there is no evidence that NMI has transacted business within Ohio or caused any tortious conduct within Ohio. Instead, the Plaintiffs argue that NMI should be held liable for the conduct of NMCI based upon a theory of successor liability.

The leading Ohio cases on successor liability are Flaugher v. Cone Automatic Machine Co. (1987), 30 Ohio St. 3d 60, and Welco Industries, Inc. v. Applied Companies (1993), 67 Ohio St. 3d 344. The syllabus of Welco is as follows:

> "A corporation that purchases the assets of another is not liable for the contractual liabilities of its predecessor corporation unless (1) the buyer expressly or impliedly agrees to assume such liability; (2) the transaction amounts to a de facto consolidation; (3) the buyer corporation is merely a continuation of the seller corporation; or (4) the transaction is entered into fraudulently for the purpose of escaping liability. (Flaugher v. Cone Automatic Machine Co. [1987], 30 Ohio St.3d 60, 30 OBR 165, 507 N.E.2d 331, followed.)

Therefore, unless the Plaintiffs can prove that NMI comes within one of the four exceptions set forth in Flaugher/Welco, then this Court will not have personal jurisdiction over NMI.

Test No. 1: Did the buyer expressly or implicitly agree to assume the liabilities of the predecessor corporation? In analyzing this test, the Court has reviewed the Purchase and Sales Agreement between NMCI and J. Joseph Klein. [See Exhibit 2 to Plaintiffs' brief in opposition.] Mr. Klein was the initial purchaser who apparently signed the agreement because NMI was not incorporated until shortly after the date of the Agreement. Mr. Klein was an original officer of NMI. This document clearly indicates that NMCI was to assume all liabilities of its prior activities. While tangible assets and good will were sold to NMI, the

accounts receivable for NMCI were to remain its own. [See Interrogatory No. 8 attached as Exhibit 3 to plaintiffs' brief in opposition.] Therefore, this Court finds that Plaintiffs have failed to prove successor liability under the first Flaugher/Welco test.

Test No. 2: Did the transaction between NMCI and NMI amount to a de facto consolidation or merger? For the plaintiffs to prevail under this test, Plaintiffs must prove all of the following: (1) the continuation of the previous business activity and corporate personnel; (2) a continuity of shareholders resulting from a sale of assets in exchange for stock; (3) the immediate or rapid dissolution of the predecessor corporation; and (4) the assumption by the purchasing corporation of all liabilities and obligations ordinarily necessary to continue the predecessor's business operations.

The Court finds: (1) that NMI did continue the business activities of NMCI with essentially the same employees as employed by NMCI (management employees excluded); (2) that there was no continuity of shareholders after the sale since NMI was a new corporation and the shareholders of NMI were not overlapping; (3) that there was a rapid dissolution of NMCI after the sale of its assets based upon the Sale Agreement being signed on September 15, 1987; the inventory being valued as of September 30, 1987; the transfer of assets occurring on October 1, 1987; and with NMCI dissolved as of October 1, 1987 [See Exhibits 2 and 11 to Plaintiff's brief in opposition.]; and (4) that NMI assumed corporate obligations to continue the business through use of identical facilities and vehicles and their operating expenses; maintaining phone listings and telephone bills; maintaining nearly identical employees and pay-roll; assuming advertising expenses; etc. [See Exhibits 7 and 8 of Plaintiffs' brief in opposition.] As all parts of the test were not met, this Court finds that Plaintiffs have failed to prove successor liability under the second Flaugher/Welco test.

Test No. 3: Was the successor corporation (NMI) a "mere continuation" of

the predecessor corporation (NMCI)? In determining this test, the Court is guided by the explanation from Welco that "the basis of this theory is the continuation of the corporate entity, not the business operation, after the transaction." Welco, supra. at p. 350. Essentially, this calls into question whether there was adequate consideration for the transfer of assets and whether the owners of the predecessor corporation are basically the same as the owners of the successor corporation. Whether there was adequate consideration cannot be discerned from the record. While the purchase price was $395,000, with a possible adjustment for inventory, there was no appraisal or valuation of the tangible assets and no valuation for good will and other intangible benefits of purchasing an ongoing business. However, the Court can conclude that the successor owners were not the same as the predecessor owners. Except for a consulting arrangement between NMI and the former owner, James Newlon, there was no overlapping or interlocking ownership or directorship. Therefore, this Court finds that Plaintiffs have failed to prove successor liability under the third Flaugher/Welco test.

Test No. 4: Was the transaction between NMCI and NMI entered into fraudulently for the purpose of escaping liability? Based upon the affidavit of Plaintiffs= expert, Edward Mange, it appears that individuals involved in the recycling industry would have been aware of likely environmental liability as a result of their conduct. [See affidavit attached to Exhibit 15 of Plaintiffs' brief in opposition.] Since the Arcanum site was closed by the Ohio E.P.A. in 1982 due to its toxic condition and based upon common knowledge of environmental liability, it can reasonably be concluded that NMCI, by its officers and owners, would have known of contingent liabilities due to its past recycling business. Since it is not possible to look into the mind of a person to discern their actual knowledge, it is necessary to look at the person's conduct and to make reasonable conclusions therefrom.

In this matter, certain conduct of NMCI and H. Joseph Klein calls into question

whether indicia of fraud existed at the time of the transfer of assets. For example, there is no indication of price negotiation on the sale of the business, but only a "drop dead" price, apparently with little negotiation. Only one attorney represented both sides of the transaction. There was no agreed allocation of the purchase price between various categories of assets (which would presumably be very important to an arms-length purchaser for expense deductions, depreciation schedules and other income tax purposes, and equally important for an arms-length seller for capital gains, depreciation recapture and other income tax purposes) but only a decision by the purchaser to assign values to tangible property. There was no compliance with the Indiana Bulk Sales transfer act which would insulate both parties from liabilities incurred by the other. The successor paid some of the predecessor's operating bills after the closing. There were only 16 days between the sale agreement and the closing, yet this was a transaction that could be described as complex regarding asset transfers, notices to governmental entities and creditors, transferring or procuring insurance coverages and vehicle title transfers, etc. NMI portrays itself as a continuation of the predecessor corporation when in its own best interests [eg. Dunn and Bradstreet reporting records; corporate name similarity; and advertising], but desires to be a wholly separate corporation when seeking to avoid liability [eg. litigation pending in both this Court and in the Federal District Court]. Therefore, this Court finds that Plaintiffs have established a prima facia case regarding successor liability under the fourth Flaugher/Welco test.

Conclusion

For purposes of a motion for dismissal under Civil Rule 12(B)(2), the Court finds that Newlon Metals, Inc. is not entitled to the relief requested.

IT IS, THEREFORE, ORDERED AND DECREED that the motion to dismiss

by Newlon Metals, Inc. is overruled. This matter remains scheduled for trial pursuant to the Court's order previously issued herein.

Jonathan P. Hein, Judge

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