COURT OF APPEALS
DECISION
DATED AND FILED

March 27, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1833 **Cir. Ct. No. 02-CV-37**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

SCHAWK, INC. D/B/A SCHAWK/LSI DIVISION OF SCHAWK, INC.,

PLAINTIFF-APPELLANT,

V.

CITY BREWING COMPANY, LLC F/K/A CBC ACQUISITION, LLC,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Affirmed.*

Before Vergeront, P.J., Deininger and Lundsten, JJ.

¶1 DEININGER, J. Schawk, Inc. appeals a judgment which dismissed its complaint against City Brewing Company, LLC. Schawk's action sought payment of a debt incurred by the previous owner of a brewery that was acquired

by City Brewing Company, LLC in an asset purchase. We conclude that Schawk has pointed to no disputes of material fact that preclude summary judgment, and that the circuit court did not err in granting the motion for summary judgment of dismissal. Accordingly, we affirm.

BACKGROUND

¶2 A corporation, referred to in the record as "City Brewery,"[1] owned and operated a brewery in La Crosse. The corporation failed to pay Schawk for printing goods and services Schawk had provided to it for the brewery. Several months after Schawk's bills became overdue, City Brewery's mortgage lender began foreclosure proceedings.

¶3 A group of investors formed a limited liability company called "CBC Acquisition, LLC" to acquire the brewery.[2] CBC Acquisition set out to settle City Brewery's debts on favorable terms, including its debt to Schawk. Toward that end, CBC Acquisition wrote a letter to Schawk offering to pay a reduced amount of the debt "in exchange for a release of your company's claim." An individual named Jon Reynolds signed the letter on CBC Acquisition's behalf. Reynolds included a signature line at the bottom of the letter by which Schawk could indicate acceptance of the offer.

¶4 Schawk did not accept the offer, however. Instead, Schawk sent Reynolds a "Settlement Statement" in which it consented to the proposed

[1] City Brewery's full corporate name was "City Brewing Company, Inc."

[2] CBC Acquisition, LLC subsequently changed its name to "City Brewing Company, LLC," the respondent in this appeal. To avoid confusion of the selling and acquiring entities, we will refer to the respondent as CBC Acquisition.

settlement figure "on the condition that City Brewery [sic] makes [the] payment" on or before a certain date. The payment deadline set forth in Schawk's "Settlement Statement" passed without payment. Several weeks later, Reynolds wrote Schawk concerning the "Settlement Statement." This time, however, Reynolds identified himself as a representative of "City Brewery." Reynolds attached a copy of the "Settlement Statement" and stated that "[p]ayment of the agreed upon amount" would occur "upon closure of a new financing deal with [the] new owners of the City Brewery, CBC Acquisition, LLC."

¶5 The "new financing deal" materialized in the form of an asset purchase agreement between CBC Acquisition and City Brewery. Although the agreement is not included in the record, neither party disputes that it required CBC Acquisition to purchase City Brewery's assets for cash. The circuit court supervising the foreclosure proceedings against City Brewery approved the agreement, and City Brewery subsequently withdrew its status as a Wisconsin corporation. Schawk's account, however, remained unpaid.

¶6 Schawk sued the brewery's new owner, CBC Acquisition, seeking a money judgment for the full amount of the debt plus prejudgment interest, asserting breach of contract and quantum meruit claims. CBC Acquisition moved for summary judgment of dismissal. The trial court, concluding that the general rule against successor liability protected CBC Acquisition from responsibility for the debt to Schawk, granted the motion. Schawk appeals.

DISCUSSION

¶7 We review a trial court's grant or denial of summary judgment de novo, owing no deference to the trial court's decision. ***Waters v. United States Fid. & Guar. Co.,*** 124 Wis. 2d 275, 278, 369 N.W.2d 755 (Ct. App. 1985). "[S]ummary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." ***M&I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 497, 536 N.W.2d 175 (Ct. App. 1995); WIS. STAT. § 802.08(2) (2001-02).[3] We will reverse a decision granting summary judgment if either: (1) the trial court incorrectly decided legal issues; or (2) material facts are in dispute. ***Coopman v. State Farm Fire & Cas. Co.***, 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993). In our review, we, like the trial court, are prohibited from deciding issues of fact; our inquiry is limited to a determination of whether a factual issue exists. ***Id***.

¶8 We note as well that, as the party against whom summary judgment is sought, Schawk may not rely on conjecture but must counter the motion with evidentiary materials demonstrating there is a dispute of material fact. *See* ***Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.***, 2001 WI App 148, ¶48, 246 Wis. 2d 933, 632 N.W.2d 59, *aff'd*, 2002 WI 80, 254 Wis. 2d 77, 646 N.W.2d 777. Moreover, "once sufficient time for discovery has passed, it is the burden of the party asserting a claim on which it bears the burden of proof at trial 'to make a showing sufficient to establish the existence of an element essential to that party's

[3] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

case.'" ***Transportation Ins. Co., Inc. v. Hunzinger Constr. Co.***, 179 Wis. 2d 281, 291-92, 507 N.W.2d 136 (Ct. App. 1993) (citation omitted).

¶9 As an initial matter, we conclude that the trial court properly dismissed Schawk's quantum meruit claim. "'[R]ecovery in quantum meruit is based upon an implied contract to pay reasonable compensation for services rendered.'" ***W.H. Fuller Co. v. Seater***, 226 Wis. 2d 381, 385, 595 N.W.2d 96 (Ct. App. 1999) (citation omitted). Quantum meruit is applicable where: (1) the defendant requested the plaintiff to perform services; (2) the plaintiff complied with the request; and (3) the services were valuable to the defendant. ***Id***. at 386 n.2. None of these elements are present here. CBC Acquisition neither requested nor received any services from Schawk. Because Schawk did not submit evidence that would establish or place in dispute any of the required elements for establishing a quantum meruit claim, we conclude that the trial court did not err in dismissing the claim.

¶10 We next address Schawk's breach of contract claim. "A contract obligation is ordinarily due only to those with whom it is made, and generally corporations purchasing assets of other corporations will not be subject to the seller's liabilities." ***Parker v. Western Dakota Insurors, Inc.***, 605 N.W.2d 181, 184 (S.D. 2000); *see also* ***Fish v. Amdsted Indus., Inc.***, 126 Wis. 2d 293, 298, 376 N.W.2d 820 (1985). This general rule against successor liability has four exceptions: (1) when the purchasing company expressly or implicitly agrees to assume liability; (2) when the transaction amounts to a consolidation or merger of the two companies; (3) when the purchasing company is merely a continuation of

the seller company; or (4) when the transaction is entered into fraudulently to escape liability for such obligations. ***Fish***, 126 Wis. 2d at 298.[4]

¶11 Thus, to warrant reversal of the trial court's order granting summary judgment, Schawk must convince us that the record either establishes or creates a factual dispute concerning the existence of at least one of these four exceptions. *See* ***National Soffit & Escutcheons, Inc. v. Superior Sys.'s, Inc.***, 98 F.3d 262, 266 (7th Cir. 1996) (Party seeking recovery from successor entity has burden of proof on issue of successor liability.).

¶12 We address only the first three exceptions, inasmuch as Schawk does not contend that the asset purchase was fraudulently entered into in order to defraud creditors of the brewery's former corporate owner. Concerning the first exception (express or implicit assumption of liabilities by an asset purchaser), we note that the record does not contain a copy of the asset purchase agreement. This is the document a court would typically examine in order to determine whether this exception applies. *See* ***Columbia Propane, L.P. v. Wisconsin Gas Co.***, 2002 WI App 9, ¶11, 250 Wis. 2d 582, 640 N.W.2d 819 (Ct. App. 2001), *review granted*, 2002 WI 48, 252 Wis. 2d 148, 644 N.W.2d 685 (Wis. Apr. 22, 2002) (No. 01-0090) ("[U]nder the first exception, [the purchasing company] would be

[4] Although Wisconsin courts typically apply the successor liability rule and its exceptions to corporate entities, we see no reason why the principles of successor liability should not apply to limited liability companies such as CBC Acquisition. *See* ***Graham v. James,*** 144 F.3d 229, 240 (2nd Cir. 1998) ("'The traditional rule of corporate successor liability and the exceptions to the rule are generally applied regardless of whether the predecessor or successor organization was a corporation or some other form of business organization.'") (citation omitted); *see also* ***Tift v. Forage King Indus., Inc.,*** 108 Wis. 2d 72, 77, 322 N.W.2d 14 (1982) ("We hold as a matter of law that the rule and its exceptions are applicable, irrespective of whether a prior organization was a corporation or a different form of business organization.").

liable … if [it] agreed to assume liability for [the relevant] claims in the asset purchase agreement.").[5]

¶13 Lacking proof in the record of specific terms of the asset purchase agreement favorable to its position, Schawk may establish the applicability of this exception only by demonstrating that CBC Acquisition separately agreed to assume the debt in question. Schawk claims that just such an agreement is reflected in the copies of correspondence which it submitted in response to CBC Acquisition's motion. We thus turn our attention to that correspondence.

¶14 We conclude that the three pieces of correspondence, individually or collectively, do not provide support for Schawk's claim that CBC Acquisition agreed to assume liability for City Brewery's debt to Schawk. The first item, an offer ostensibly made on behalf of CBC Acquisition to pay the debt on certain terms,[6] and the second, Schawk's "Settlement Statement" calling for City Brewery

[5] CBC Acquisition asserts that the asset purchase agreement "specifically set forth that [CBC Acquisition] was not … acquiring any of the liabilities" of City Brewery. This statement, like Schawk's suggestion to the contrary, also lacks a proper evidentiary basis in the summary judgment record. CBC Acquisition's only record support for the statement is an affidavit of its president, in which he relates several terms of the asset purchase agreement in summary fashion, but neither quotes the provisions nor incorporates an attached copy of the agreement itself. The affidavit thus falls short of the requirement that "[c]opies of all papers or parts thereof referred to in an affidavit shall be attached thereto and served therewith, if not already of record." WIS. STAT. § 802.08(3). The affidavit also runs afoul of the "best evidence" rule. *See* ***Mack Trucks, Inc. v. Sunde***, 19 Wis. 2d 129, 134, 119 N.W.2d 321 (1963) (The "best evidence" rule requires parties to prove the terms of a document by the document itself.); *see also* WIS. STAT. § 910.02 (codifying the best evidence rule).

[6] We note that CBC Acquisition was not officially formed at the time this offer was made. The record indicates that the Wisconsin Department of Financial Institutions received CBC Acquisition's articles of organization for filing approximately one week after it made the offer to Schawk. *See* WIS. STAT. § 183.0204(1) (A limited liability company is formed when the articles of organization become effective.); WIS. STAT. § 183.0111 (Articles of organization become effective "on the date … received by the department for filing.") Thus, the offer, even if it had been accepted, is of questionable import because it was made by or on behalf of an as-yet-unformed limited liability company.

to pay the debt on different terms, produced no agreement, express or implied, regarding payment of the debt. *See* ***Farmer v. Pick Mfg. Co.***, 227 Wis. 99, 101-02, 227 N.W. 668 (1938) (A counteroffer constitutes a rejection of an offer.).

¶15 The third piece of correspondence also fails to support Schawk's claim. This fax "transmittal sheet" identifies "Jon Reynolds—City Brewery" as its sender and bears "City Brewery" below his name on the signature line. The document promises "[p]ayment of the agreed upon amount" set forth in Schawk's "Settlement Statement" "shortly []after" the "closure of a new financing deal with [the] new owners of the City Brewery, CBC Acquisition, LLC." We conclude that this document can be interpreted only as reflecting a promise by *City Brewery* to pay Schawk from the proceeds of its asset sale to CBC Acquisition, not an agreement by CBC Acquisition to assume the debt.[7]

¶16 Without evidence that the asset purchase agreement obligated CBC Acquisition to assume City Brewery's debts, and with no evidence in the record indicating CBC Acquisition agreed to assume the debt to Schawk, we conclude that Schawk has failed to establish that his contract claim against CBC Acquisition can survive summary judgment by virtue of the first exception to the general rule against successor liability. *See* ***Transportation Ins. Co., Inc.***, 179 Wis. 2d at 291-92 (In order to survive summary judgment, the party asserting a claim on which it

[7] Although it is not clear whether Reynolds accurately described himself as a representative of City Brewery in this correspondence, Schawk has not raised a misrepresentation or similar claim that would preserve the issue for appeal. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997) (This court generally will not review issues which were not presented to the trial court.). Regardless of whether Reynolds was authorized to obligate City Brewery to the Schawk payment at this juncture, the point remains that the fax transmittal sheet provides no indication whatsoever that it was sent by or on behalf of CBC Acquisition.

bears the burden of proof at trial must make a showing sufficient to establish or place in dispute the existence of each element essential to that party's case.).

¶17 Similarly, Schawk fails to carry its burden as plaintiff with regard to the second exception to the rule against successor liability, the "de facto merger" exception. We examine four factors in order to determine whether a company's purchase of another's assets constitutes a de facto merger of the two companies:

> (1) the assets of the seller corporation are acquired with shares of the stock in the buyer corporation, resulting in a continuity of shareholders; (2) the seller ceases operations and dissolves soon after the sale; (3) the buyer continues the enterprise of the seller corporation so that there is a continuity of management, employees, business location, assets and general business operations; and (4) the buyer assumes those liabilities of the seller necessary for the uninterrupted continuation of normal business operations.

Sedbrook v. Zimmerman Design Group, Ltd., 190 Wis. 2d 14, 20-21, 526 N.W.2d 758 (Ct. App. 1994). Although not every factor need be present, "'[t]he key element in determining whether a … de facto merger has occurred is that the transfer of ownership was for stock in the successor corporation rather than cash.'" ***Id***. at 21, 22-24 (citation omitted).

¶18 There is no dispute that City Brewery ceased operations and withdrew its Wisconsin corporate registration soon after the sale. The three remaining de facto-merger factors find no support in the record, however. Significantly, Schawk does not dispute that the "key" factor—the purchasing company's acquisition of assets in exchange for its own stock (or here, membership interests)—is entirely absent.

¶19 Additionally, the only "evidence" that Schawk cites in support of the third and fourth factors (continuity of management and business operations, and

assumption of liabilities necessary for the uninterrupted continuation of normal business) consists entirely of articles from a local newspaper and an internet site that are attached to its counsel's affidavit. Because the content of these articles would be inadmissible as hearsay, we may not rely on them for summary judgment purposes. WIS. STAT. § 802.08(3) ("Supporting and opposing affidavits shall be made on personal knowledge and shall set forth such evidentiary facts as would be *admissible in evidence*.") (emphasis added).

¶20 Because Schawk failed to submit any evidence that would establish or place in dispute several of the required elements (including the "key element"), its claim that CBC Acquisition incurred successor liability because of a de facto merger with City Brewery cannot survive summary judgment.

¶21 Finally, Schawk maintains that its claim should survive summary judgment because CBC Acquisition continued the business of City Brewery. Schawk's argument on this remaining exception to the rule against successor liability suffers from the same defect as its previous arguments—a lack of evidentiary support in the record. In determining whether a successor company is a "mere continuation" of its predecessor, the key element "'is a common identity of the officers, directors and stockholders in the selling and purchasing corporations.'" ***Fish***, 126 Wis. 2d at 302 (citation omitted). Again, however, the only record support that Schawk cites for the application of this exception is the hearsay contained in the newspaper and Internet articles attached to its counsel's affidavit.

¶22 Moreover, according to an affidavit filed by CBC Acquisition's president, the members of CBC Acquisition, LLC are "entirely different" than the shareholders of City Brewery. Schawk points to no submissions contradicting this

statement.[8] We thus conclude that Schawk has failed to submit any evidence to support the continuation exception, and this exception, like its predecessors, also cannot save Schawk's claim from dismissal on summary judgment. *See* ***Wisconsin Elec. Power Co. v. California Union Ins. Co.***, 142 Wis. 2d 673, 684, 419 N.W.2d 255 (Ct. App. 1987) ("Evidentiary matters in affidavits accompanying a matter for summary judgment are deemed uncontroverted when competing evidentiary facts are not set forth in counteraffidavits.").[9]

¶23 Because the record on summary judgment does not establish or place in dispute any of the exceptions to the general rule against successor liability, we conclude that the trial court did not err in dismissing Schawk's breach of contract claim.

[8] In fact, one of the articles submitted by Schawk actually provides support for the CBC Acquisition president's averment: "[P]roduction was resuming after the brewery's sale by Jim Strupp and John Mazzuto to the 12 investors who now own it. Strupp and Mazzuto bought the former G. Heileman Brewery in November 1999, but sold it in November 2000 after the brewery ran into financial problems."

[9] CBC Acquisition invites us to conclude that because it acquired City Brewery's assets through a foreclosure sale supervised by both a receiver and the circuit court, an independent ground exists for us to reject the de facto merger and continuation exceptions to the general rule against successor liability. We note, however, that there is persuasive authority to the contrary. *See* ***Ed Peters Jewelry Co., Inc. v. C&J Jewelry Co., Inc.***, 124 F.3d 252, 267 (1st Cir. 1997) ("[E]xisting case law overwhelmingly confirms that an intervening foreclosure sale affords an acquiring corporation no automatic exemption from successor liability."); *see also* ***Glynwed, Inc. v. Plastimatic, Inc.***, 869 F. Supp. 265, 274-75 (D.N.J. 1994) (Successor's purchase of assets at a foreclosure sale under UCC § 9-504 does not protect the successor from the liabilities of the predecessor if one of the exceptions to the rule against successor liability otherwise applies.).

CONCLUSION

¶24 For the reasons discussed above, we affirm the appealed order.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.