THE STATE OF SOUTH CAROLINA
In The Court of Appeals

ORIGINAL

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2007-CP-42-296
Appellate Case No. 2014-001151

Nationwide Mutual Insurance Company,
and Gilliam Construction Company, Inc..... Respondents,

v.

Eagle Windows & Doors, Inc., ... Appellant.

FINAL REPLY BRIEF OF APPELLANT

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RESPONDENTS' STATEMENT OF THE CASE

At page 7 and 8, C and D, of Respondents' Statement of the Case, the Respondents make a number of statements that are incorrect with respect to the structure of the entities owned by the predecessor company American Architectural Products Company (AAPC). Based on the affidavit of Jonathan Schoenike, General Counsel for AAPC and its companies, (Schoenike Affidavit, Exhibit B to Memorandum in Support of Motion for Summary Judgment) (R. pp. 130-133), the affidavit of Andrew Wickham, Controller of the fictitious entity Eagle Window (Corrected Affidavit filed September 24, 2012) (Wickham Affidavit) (R. pp. 420-423), and the affidavit of Stephen Perry, Co-President and Senior Managing Director of Linsalata Capital Partners (Linsalata), a Cleveland, Ohio middle market private equity buyout firm (Perry Affidavit, p. 1, ¶ 1, Exhibit C to Supplemental Memorandum in Support of Motion for Summary Judgment) (R. pp. 169-170), the correct structure is as follows:

Eagle & Taylor Company, a Delaware corporation (Eagle & Taylor), was the wholly owned subsidiary of AAPC. Eagle & Taylor did business as Eagle Window & Door, Inc. (Eagle Window), a fictitious name, and Taylor Building Products, Inc., also a fictitious name. (Schoenike Affidavit, p. 2, ¶ 4) (R. pp. 130-131)

In 1999, David Beeken became president of Eagle & Taylor Company. (Schoenike Affidavit, p. 2, ¶ 6) (R. p. 131) Pre-bankruptcy, David Beeken was neither a director nor a shareholder of Eagle & Taylor. (Schoenike Affidavit, p. 2, ¶ 5, 6) (R. p. 131) In December of 2000, AAPC filed a petition for reorganization under the United States Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Ohio. (Schoenike Affidavit, p. 3, ¶ 9) (R. p. 132)

While the fictitious company Eagle Window had a number of officers other than Beeken, none of them were officers of Eagle & Taylor. (Schoenike Affidavit, p. 3, ¶ 8) (R. p. 132)

The other officers of the fictitious entity Eagle Window were Ronald Vander Weerd, Vice President of Engineering and Quality Assurance; Charles Daoud, Executive Vice President; and Steven Stoppelmoor, Vice President of Finance. Aside from Beeken, none of the officers of Eagle Window were officers, directors or shareholders of Eagle & Taylor. (Schoenike Affidavit p. 3, ¶ 8; Wickham Affidavit) (R. pp. 132, 126-128)

The Respondents state that an application form and Certificate of Authority of the Secretary of State of Iowa indicated that David Beeken, Charles Dauod, Steven Stooplemoor, Ronald Vander Weerd, Gregory Taber and Andrew Wickham were all directors and officers of EWD Acquisition Company (EWD) and reference Respondents' Request to Admit dated October 18, 2011. (R. p. 401) However, EWD was the wholly owned subsidiary of Linsalata, and the only director and officer of EWD was Stephen Perry. None of the people named by Respondents were ever directors, officers, or shareholders of EWD. (Perry Affidavit, p. 2, ¶ 4; p. 3, ¶ 8; p. 4, ¶ 9-12) (R. pp. 170-172) Respondents also allege that Appellant's Answers to Interrogatories, dated October 28, 2011, indicate that the above officers and directors were officers and directors from 2000 to the present date. (Page 8) (R. p. 431) Respondents further allege that those discovery responses also indicated that those officers were shareholders of Eagle Window prior to and after the sale of the company. Those assertions are unsupported. None of those officers were ever shareholders or directors of Eagle Window, and Eagle Window, as a fictitious entity, had no shareholders. (See Affidavit of Schoenike and Wickham referenced above) Furthermore there was never any commonality of ownership, i.e. the same officers, directors and shareholders, between AAPC and Eagle & Taylor d/b/a Eagle Window & Door, Inc. and Linsalata or EWD (Shoenike Affidavit, p.4, ¶ 14; Wickham Affidavit, p. 3, ¶ 11; and Perry Affidavit, p. 6, ¶ 17) (R. p. 133, 128, 174)

ARGUMENT

In their argument, the Respondents continue to refuse to apply the test for successor liability required by this Court in Walton v. Mazda of Rock Hill, 376 S.C. 301, 657 S.E.2d 67 (not even mentioned in their brief) and the Supreme Court in Simmons v. Mark Lift Industries, Inc., 366 S.C. 308, 622 S.E.2d 213.

The Respondents would argue that the predecessor corporation should be the fictitious Eagle Window and Door, Inc., which has no legal standing, and that the successor should be the incorporated EWD, Inc., which changed its name to Eagle Window & Door, Inc., after the bankruptcy. However, in Walton, this Court emphasized that the predecessor and the successor are properly the seller and the purchaser. The Walton case involved a warranty claim against the purchaser of the assets of an automobile dealership. On August 31, 2002, the plaintiff had purchased a vehicle and a warranty contract issued by C.A.R.S. from Mazda of Rock Hill, a.k.a Faile Enterprises, Inc. On December 19, 2002, Faile Enterprises entered into an asset purchase agreement with Mazda of Rock Hill. In January 2003 Walton brought the vehicle to the dealership for repair. At that time Walton was told of the sale and the purchaser refused to honor the claims. The sale and transfer of the dealership closed on March 27, 2003. At that time the purchasers assigned the asset purchase agreement to Mazda of Rock Hill (Mazda). Walton sued a number of entities, including Mazda, alleging various claims including the Mere Continuation Exception to Successor Liability. The Court held, in a Per Curium Opinion:

> In *Simmons v. Mark Lift Industries, Inc.*, the South Carolina Supreme Court declined to extend the mere continuation exception to situations where there is no commonality between officers, directors, and shareholders of the seller and purchaser. . . . As discussed, McManus and Sigmon did not have any relationship with Mazda of Rock Hill except for the purchase of the assets of the dealership. (Emphasis added)

Walton establishes what the Supreme Court meant by predecessor and successor, that is, the Seller and Purchaser.

In the present case, the Seller and Purchaser are defined in the Asset Sale Agreement attached to the Memorandum in Support of the Appellant's Motion for Summary Judgment:

ASSET SALE AGREEMENT

Between

AMERICAN ARCHITECTURAL PRODUCTS CORPORATION

And

EAGLE & TAYLOR COMPANY,

As the Seller Parties

And

EWD ACQUISITION CO.

As Buyer

Dated as of

April 15, 2002

(R. p. 65) Thus, under the test outlined in Walton, the proper predecessor corporation is AAPC/Eagle and Taylor Company, and the successor corporation is EWD, the wholly owned subsidiary of Linsalata.

The test for commonality of ownership between predecessor and successor corporations, necessary for finding a successor corporation liable for the actions of its predecessor, is found in the Supreme Court's decision in Simmons v. Mark Lift Industries, Inc., 366 S.C. 308, 622 S.E.2d 213. Simmons involved almost identical facts to the case now before this Court. Simmons was injured in 1999 when an elevated scissorlift aerial work platform supporting him collapsed. He brought a products liability

suit against Terex Corporation, which had purchased the assets of the manufacturer of the scissorlift, Mark Industrial (Mark), in 1991 in a bankruptcy sale. The only basis for the action was a successor liability theory. The Supreme Court found:

> Terex did not have any business relation with Mark until purchasing its assets in the Bankruptcy Court action. There has never been any commonality of officers, directors or stockholders between Mark and Terex.

622 S.E. 2d 216 (Emphasis the Court's).

It is significant to note that the decision of the Supreme Court denying successor liability included a twelve page dissent by Justice Burnett in which he raised every argument that could have been articulated for successor liability, including the continuity of enterprise exception urged by the Respondents.

The Majority had the opportunity to read and analyze Justice Burnett's dissent and held, in footnote 1 to their decision, which is both a critique of his argument and a rejection of his advocacy:

> Essentially, the dissent advocates an expansion of the mere continuation exception. However, as noted by the dissent, the majority of courts interpreting the mere continuation exception has found it applicable **only when there is a commonality of ownership, i.e., the predecessor and successor corporations have substantially the same officers, directors or shareholders.*** *We decline to extend the exception to cases in which there is no such commonality of officers, directors and shareholders.*** 622 S.E.2d 217 (*Emphasis the Court's) (**Emphasis added).

Judge Hayes opined that the underlined language allows a finding of successor liability to be based on a finding of commonality of officers, or a finding of commonality of directors, or a finding of commonality of shareholders. However, it is obvious that the final italicized sentence, requiring commonality of officers, directors, and shareholders, is the holding of the Court's Majority.

In the present case, prior to the bankruptcy sale, there was never any commonality of ownership (i.e the same directors, officers, and shareholders) required by the Court in Simmons. It is clearly established by the three affidavits, and it is unrefuted by the Respondents, that Linsalata and EWD never had any commonality of ownership with AAPC and/or Eagle & Taylor and/or Eagle Window until after the bankruptcy. Accordingly, if one considers the proper predecessor and successor corporations, there can be no successor liability.

CONCLUSION

The holding of the Court of Appeals in Walton is binding precedent in this case and, in light of that holding, the Respondents cannot seek to impose a different test for successor liability than the test required by the Court of Appeals. Furthermore, the test urged by the Respondents is the continuity of enterprise exception, which was rejected by the majority opinion in Simmons. Judgment must be entered for the Appellant.

Respectfully submitted,

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November 12, 2014

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Appellant and the Final Reply Brief of Appellant comply with Rule 211(b), SCACR.

November 12, 2014

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PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant and the Final Reply Brief of Appellant on Jason M. Imhoff, attorney for Respondents, by depositing a copy of it in the United States Mail, postage prepaid, on November 12, 2014, addressed as follows:

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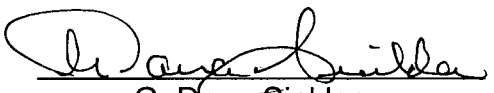
November 12, 2014



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