STATE OF MICHIGAN
IN THE BUSINESS COURT FOR THE COUNTY OF LIVINGSTON

MICHIGAN LAWN & SNOW SERVICE, LLC,
Plaintiff

Case No. 21-31150-CB
Hon. Michael P. Hatty

v

JERRAD BEAUCHAMP, KEN MARONE,
and THE POND PLACE of MICHIGAN, LLC,
Defendants
_____/

OPINION AND ORDER ON MOTION FOR PARTIAL SUMMARY DISPOSITION BY DEFENDANTS MARONE AND THE POND PLACE OF MICHIGAN, LCC

At a session of the 44th Circuit Court,
Held in the City of Howell, Livingston County,
on the 9th day of February, 2022

THIS MATTER comes before this Court on Motion for Partial Summary Disposition by Defendants Ken Marone (hereinafter "Marone") and The Pond Place of Michigan, LLC (hereinafter "Pond Place") pursuant to MCR 2.116(C)(8) and (10). This Court, having reviewed the parties' written briefs, having heard the parties' oral arguments, being otherwise fully advised in the premises, and for the reasons stated herein, DENIES Defendants' Motion without prejudice.

I

In October 2018, Defendant Jerrad Beauchamp (hereinafter "Beauchamp") was the owner of a business called Beauchamp Lawn and Snow Services, Inc (hereinafter "BLSS") and Pond Place. At that time Marone was an employee of BLSS. On October 26, 2018, Beauchamp sold BLSS to Plaintiff for a purchase price of $8.8 million. The agreement reached between the parties provided that Beauchamp was able to retain his ownership of Pond Place, among other companies he owned which have not been discussed in this matter. However, Beauchamp agreed that he

would not compete against Plaintiff within a 500 mile radius of Brighton, Michigan for a period of six years. Beauchamp further agreed that he would not hire or solicit employees of Plaintiff during that six-year period. Beauchamp further agreed not permit other businesses under his ownership or control, including Pond Place, to so compete or solicit. Specifically, the agreement reached between BLSS, by and through Beauchamp, and Plaintiff, was memorialized in an Asset Purchase Agreement (hereinafter "APA"), which provided, in pertinent part, as follows:

> **ARTICLE I DEFINITIONS… "Affiliate"** of a Person means any other Person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, such Person. The term "control"… means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract or otherwise.
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> **"Person"** means an individual, corporation, partnership, joint venture, limited liability company, Governmental Authority, unincorporated organization, trust, association or other entity.
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> **"Restricted Business"** means grounds maintenance, landscape construction and snow removal services and in no event shall it include…(iii) the business of The Pond Place as historically conducted…
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> * * *
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> **"Territory"** means the territory within a 500-mile radius of Seller headquarters at 3589 Old US Highway 23, Brighton, MI.
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> **Section 6.03 Non-competition Non-solicitation:** (a) For a period of six (6) years commencing on the Closing Date (the "Restricted Period"), Seller and Owner shall not, and shall not permit any of their respective Affiliates to, directly or indirectly, (i) engage in or assist others in engaging in the Restricted Business in the Territory; (ii) have an interest in any Person that engages directly or indirectly in the Restricted Business in the Territory in any capacity… (iii) cause, induce or encourage any material actual or prospective client, customer, supplier, or licensor of Buyer… or any other Person who has a material business relationship with Buyer, to terminate or modify any such actual or prospective relationship…
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> (b) During the Restricted Period, neither Seller nor Owner shall, and shall not permit any of their respective Affiliates to, directly or indirectly, hire or solicit any person who is offered employment by Buyer… or is or was employed by Buyer during the Restricted Period, or encourage any such employee to leave such employment or hire any such employee who has left such employment… provided

> that nothing in this Section 6.03(b) shall prevent Seller or Owner or any of their respective Affiliates from hiring (i) any employee whose employment with Buyer has been terminated by Buyer after one hundred (180) days from the date of termination of employment with Buyer, (ii) any employee whose employment has been terminated by the employee or (iii) employment of Owner or Ken Marone by a separate entity that Owner owns.
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> **Section 9.06 Successors and Assigns:** This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and permitted assigns. Neither party may assign its rights or obligations hereunder without the prior written consent of the other party, which consent shall not be unreasonably withheld or delayed… No assignment shall relieve the assigning party of any of its obligations hereunder.

On March 5, 2021, Beauchamp sold Pond Place to Marone and a non-party individual named John Smith for $764,094.93. Of that purchase price, $650,000 was provided by way of a promissory note issued to Beauchamp and secured by both personal property of Pond Place and the "membership interests" of Pond Place. Further, at the time of the sale Pond Place, Pond Place, by and through its new owners, leased the premises of its operations from an entity called Champ Two, LLC, through a lease executed by Beauchamp on behalf of the landlord. The annual base rent of this lease, with an initial three-year term, is $33,600.

Plaintiff commenced this action on May 14, 2021, asserting that Defendants had breached the provisions of the APA discussed above concerning the agreement not to compete and to not solicit Plaintiff's employees. Plaintiff's complaint further alleges tortious interference and civil conspiracy. Plaintiff's specific allegations relative to the instant motion concern purported activity of Marone Pond Place subsequent to the sale from Beauchamp. Simply put, Pond Place and Marone point out that they were not a party or signor to the APA, cannot be bound to its terms and obligations, and thus cannot be held liable for a breach thereof. Accordingly, these defendants argue this Court should dismiss the breach of contract claims brought against them as a matter of law pursuant to MCR 2.116(C)(8) and (10). Procedurally, Plaintiff asserts the instant motion is

premature because there is still considerable discovery outstanding. Substantively, Plaintiff argues Marone purchased Pond Place subject to the obligations Beauchamp held to Plaintiff under the APA under a theory of successor liability.

II

MCR 2.116(C)(8) permits summary disposition when "the opposing party has failed to state a claim on which relief can be granted." MCR 2.116(C)(8) tests the legal sufficiency of the plaintiff's claim and results in a determination whether the plaintiff's allegations are sufficient to establish a prima facie case. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The motion should be granted if the claim is so clearly unenforceable that no factual development could justify the plaintiff's claim for relief. *Id*.

A motion brought under MCR 2.116(C)(8) is decided on the pleadings alone; no other evidence may be considered. MCR 2.116(G)(5); *Maiden*, supra. However, in an action based on a contract, the court may examine the contract. *Woody v Tamer*, 158 Mich App 764, 770; 405 NW2d 213 (1987). "When the parties rely on documentary evidence to support their arguments, appellate courts proceed under the standards of review applicable to a motion made under MCR 2.116(C)(10)." *Krass v Tri-County Sec, Inc*, 233 Mich App 661, 665; 593 NW2d 578 (1999).

A motion brought under MCR 2.116(C)(10) tests the factual support for a plaintiff's claim. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Summary disposition under MCR 2.116(C)(10) is available when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10); see also *Coblentz v City of Novi*, 475 Mich 558; 719 NW2d 73 (2006). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds

might differ." *Atty Gen v PowerPick Players' Club of Mich, LLC*, 287 Mich App 13, 26–27; 783 NW2d 515 (2010). In reviewing a motion brought under MCR 2.116(C)(10), the court must consider the pleadings, affidavits, depositions, admissions, and any other admissible evidence in favor of the nonmoving party. MCR 2.116(G)(5); *Maiden* at 120. Granting the nonmoving party the benefit of any reasonable doubt regarding material facts, the court must then determine whether a factual dispute exists to warrant a trial. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617–618; 537 NW2d 185 (1995). If there is no genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 363; 547 NW2d 314 (1996).

> As a general rule, summary disposition is premature if granted before discovery on a disputed issue is complete. However, summary disposition may be proper before discovery is complete where further discovery does not stand a fair chance of uncovering factual support for the position of the party opposing the motion.
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> *Village of Dimondale v Grable*, 240 Mich App 553, 564-565; 618 NW2d 23 (2000).

III

> The traditional rule of successor liability examines the nature of the transaction between predecessor and successor corporations. If the acquisition is accomplished by merger, with shares of stock serving as consideration, the successor generally assumes all its predecessor's liabilities. However, where the purchase is accomplished by an exchange of cash for assets, the successor is not liable for its predecessor's liabilities unless one of five narrow exceptions applies. The five exceptions are as follows:
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> > "(1) where there is an express or implied assumption of liability; (2) where the transaction amounts to a consolidation or merger; (3) where the transaction was fraudulent; (4) where some of the elements of a purchase in good faith were lacking, or where the transfer was without consideration and the creditors of the transferor were not provided for; or (5) where the transferee corporation was a mere continuation or reincarnation of the old corporation. (19 Am Jur 2d, Corporations, § 1546, pp. 922–924; *Malone v. Red Top Cab Co.*, 16 Cal.App.2d 268, 273 [60 P.2d 543 (1936)].)" [*Turner* [*v. Bituminous Casualty Co.*, 397 Mich. 406,] 417, n. 3[;] 244 N.W.2d 873, quoting *Schwartz v. McGraw–Edison Co.*, 14 Cal.App.3d 767, 92 Cal.Rptr. 776 (1971).]

> The traditional rule reflects the general policy of the corporate contractual world that liabilities adhere to and follow the corporate entity. It serves to protect creditors and shareholders, to facilitate determination of tax responsibilities, and to promote free alienability of business assets.
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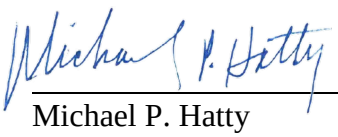
> *Foster v Cone-Blanchard Mach Co*, 460 Mich 696, 702–03; 597 NW2d 506 (1999).

This Court finds that at the time Plaintiff and Beauchamp entered into the APA, Pond Place was an affiliate of Beauchamp, BLSS, or both. Thus, at the time Marone purchased the Pond Place from Beauchamp, Pond Place was subject to the obligations at issue under the APA at issue in this matter. The resulting issue then before this Court is whether those obligations survived the subsequent sale from Beauchamp to Marone. This Court finds that there exists a question of fact, especially at this stage of litigation, as to whether such a transfer of the obligations under the APA occurred. Specifically, Plaintiff points to Section 9.06, quoted above, regarding successor liability; the mention of Marone in the APA, such as in Section 6.03(b), quoted above; and provisions of the agreement conveying Pond Place, such that Marone would "operate [Pond Place] as it has historically been conducted" as evidence, pursuant to *Foster*, that Pond Place and Marone assumed liability for the obligations in the APA at issue in this matter.

IV

Accordingly, this Court DENIES Defendants' Motion for Partial Summary Disposition without prejudice.

IT IS SO ORDERED.



Michael P. Hatty
Circuit Court Judge