

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

BRUCE & ROBERTS, INC.,  
Employer-Appellant,

v

Case No. 92-1202-AE

MICHIGAN EMPLOYMENT SECURITY  
COMMISSION,

Appellees.

---

HICKS & SCHMIDLIN, P.C.  
ROBERT H. BANCROFT (P40368)  
Attorney for Appellant

FRANK J. KELLEY, Attorney General  
of the State of Michigan  
By: MARTIN J. VITTANDS (P26292)  
Assistant Attorney General  
Attorneys for MESC

---

OPINION AND ORDER

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

BRUCE & ROBERTS, INC.  
Employer-Appellant,

Case No: 92-1202-AE

v.

Hon. Valdemar Washington

MICHIGAN EMPLOYMENT SECURITY COMMISSION, OPINION AND ORDER  
Appellee.

---

HICKS & SCHMIDLIN, P.C.  
Robert H. Bancroft (P 40368)  
Attorney for Appellant

Martin J. Vittands (P 26292)  
Assistant Attorney General  
Representing the MESC  
(313)876-5551

---

FACTS

This case comes before the court on Appeal from the decision of the Michigan Employment Security Commission Board of Review, dated June 18, 1992, affirming the decision given by Administrative Law Judge A. Glen Epps of the Michigan Employment Security Commission, Referee division, dated January 29, 1992. The Referee's decision held that Bruce & Roberts, Inc., d/b/a Sherman's Lounge, is a liable successor employer to Balderstone Company within the meaning of MCL Section 421.41(2)(a).

On October 18, 1985, Robert Clapper and Bruce Hardy, sold their business (Sherman's Lounge), liquor license, inventory, furniture, and equipment to Charles and Jadene Balderstone for a total purchase price of \$160,000.00. (Certified Record, p.53) The Balderstone Company filed for Chapter 11 bankruptcy on June 21, 1988 and for Chapter 7 bankruptcy on March 22, 1989. (Certified Record, p.53). During the Chapter 7 bankruptcy proceeding, Mr. Clapper and Mr. Hardy acquired through foreclosure, all of the equipment and fixtures they sold in 1985. (Certified Record, p.54). Further, Mr. Clapper and Mr. Hardy purchased from the Chapter 7 bankruptcy Trustee, the existing liquor license and inventory. (Certified Record, p.54). Mr. Hardy and Mr. Clapper incorporated under the name Bruce & Roberts, Inc. (hereinafter Appellant) and reopened Sherman's Lounge for business on January 2, 1990. (Certified Record, p.54) Thereafter, on September 26, 1990, Appellee, the Michigan Employment Security Commission (hereinafter MESC), assigned a ten percent employee wage base tax rate to Appellant as a successor employer to Balderstone Company pursuant to MCL Section 421.41(2)(a). (Certified Record, p.54) Appellant contends that Appellant is not a successor employer to Balderstone Company; and therefore should be assigned a 2.7 percent contribution rate as a first time employer.

#### ISSUE

WHETHER ONE BECOMES A SUCCESSOR EMPLOYER  
WHEN ONE ACQUIRES BUSINESS ASSETS AND A  
LIQUOR LICENSE THROUGH A BANKRUPTCY PROCEEDING

## DISCUSSION

Appellant contends that Appellant is not a successor employer to Balderstone Company because Appellant acquired the assets of Balderstone Company from a Chapter 7 Trustee instead of acquiring said assets directly from Balderstone Company; and that a Chapter 7 bankruptcy Trustee can not be an employer. Appellant cites to a 1942 Michigan Federal District Court Decision to support Appellant's contention.

"It being the view of the court that in liquidation proceedings in bankruptcy. . . , the trustee is an officer of the bankruptcy court and is not an employee of the bankrupt, or a successor of bankrupt. . ." In re Park Brewing Co., 48 F. Supp 750,751 (WD Mich 1942). In Park Brewing Co., the Federal District Court denied the Michigan Unemployment Compensation Commission reimbursement of monies that had been paid to a night watchman as compensation during a period of trusteeship . Id. at page 751.

The Court held that a bankruptcy Trustee is not an employee or successor of bankrupt "within the meaning of Section 41(2) of the Michigan Unemployment Compensation Act, " Id. at page 751. This decision was made in an Unemployment Compensation claim, and is thus distinguishable from the case here, as this appeal does not involve an unemployment compensation claim. Moreover, the Court in Park Brewing Co., held that a bankruptcy Trustee is not a . . . successor of bankrupt [emphasis added]. Id. at page 751. The Park decision does not address the issue as to whether or not a bankruptcy Trustee is a successor employer to the business that it

is acting for as Trustee. Therefore, the applicable law to which the Court must look to decide whether a bankruptcy Trustee is an employer, is found in MCL Sections 421.41(2)(a) and 421.40. Pursuant to MCL Section 421.41(2)(a) "[e]mployer means any of the following:

(2)(a) Any individual, legal entity, or employing unit which acquired the organization, trade, or business, or 75% or more of the assets thereof, of another which at the time of the acquisition was an employer subject to this act." MCL Section 421.41(2)(a).

"'Employing unit' means any individual or type of organization, including, but not limited to, . . . trustee in bankruptcy, trustee or successor thereof, which has or subsequent to this amendatory act, had in its employ 1 or more individuals performing services for it within this state. . . ." MCL Section 421.40.

Accordingly, the Chapter 7 bankruptcy Trustee was an employing unit pursuant to MCL Section 421.40 and by definition an "employer subject to this act." MCL Section 421.41(2)(a).

Appellant further contends that a "chain of successor liability" from the bankruptcy Trustee to Appellant must be specifically determined, on the record, pursuant to MCL Section 421.14.

The language of MCL Section 421.14 permits the MESC to make determinations regarding whether an employing unit constitutes an employer, but the statute does not mandate the determination. "The commission, after affording reasonable opportunity for the

submission of relevant information in writing or in person, may make determinations with respect to whether an employing unit constitutes an employer and whether services performed for or in connection with the business of an employing unit constitute employment for that employing unit subject to this act." [emphasis added] MCL Section 421.14.

Though a specific determination is not required on the record, the MESC Board of Review, in its June 18, 1992, decision did in fact determine that "[t]he acquisition of assets from a debtor through bankruptcy proceedings results in an acquisition for the purposes of Section 41(2) of the Michigan Employment Security Act." [page 55 of the transcript] Thus, the Board of Review determined that a bankruptcy Trustee is considered to be an employing unit pursuant to MCL Section 421.40, and therefore an employer for purposes of Section 41(2) of the Michigan Employment Security Act; and that Appellant, through its acquisition of 75% or more of Balderstone Company's assets by means of the bankruptcy proceeding, is a successor employer.

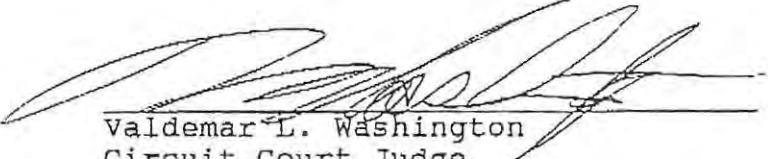
#### HOLDING

The appellate standard of review for Michigan Employment Security Commission Board of Review cases is that, "[the Circuit Court] may review questions of law or fact, . . . but we can reverse only if the order or decision is contrary to law or is unsupported by competent, material, and substantial evidence on the record. If there is no dispute as to the underlying facts, questions presented on appeal are to be treated as matters of law."

Chrysler Corporation v. Sellers, 105 Mich App 715,720; 307 NW2d 72 (1981); Johnides v. St Lawrence Hospital, 184 Mich App 172,175-6; 457 NW2d 123 (1990); and Washington v. Amway Grand Plaza, 135 Mich App 652,656; 354 NW2d 299 (1984). This Court finds that the decision of the Michigan Employment Security Commission Board of Review is not contrary to law or unsupported by competent, material, and substantial evidence on the record [See Record of Proceedings by MESOC Board of Review] and therefore the decision is affirmed.

IT IS SO ORDERED

Dated:

  
Valdemar L. Washington  
Circuit Court Judge

4/21/93