

**Crown Painting & Decorating, Inc. v VBH Luxury,  
Inc.**

2009 NY Slip Op 30447(U)

February 24, 2009

Supreme Court, New York County

Docket Number: 601423/06

Judge: Milton A. Tingling

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MILTON A. TINGLIN

PART 44

Index Number : 601423/2006  
CROWN PAINTING & DECORATING  
VS.  
VBH LUXURY  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE 8/6/08  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

his motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance  
with annexed decision.

**FILED**  
MAR - 3 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 2/24/09 \_\_\_\_\_ mot \_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 44

-----X  
CROWN PAINTING & DECORATING, INC.,

Plaintiff,

Index No. 601423/06

- against -

VBH LUXURY, INC., OMNICON INTERIORS, INC.,  
MAXCON GENERAL CONTRACTING CORP.,

Defendant.

-----X

TINGLING, J.:

Plaintiff Crown Painting & Decorating, Inc. brings this action to recover \$31,300 in payment on a contract. Defendant Maxcon General Contracting Corp. (Maxcon) hired plaintiff to work at a building owned by defendant VBH Luxury, Inc. (VBH). Plaintiff commenced this action because it was not paid. In addition to suing Maxcon and the building owner, plaintiff sued Omnicon Interiors, Inc. (Omnicon), on the basis that it is Maxcon’s successor corporation.

Omnicon moves for summary judgment dismissing the complaint as against it. Omnicon contends that it is not Maxcon’s successor corporation, that it is completely separate from Maxcon, and that it is not liable for Maxcon’s obligations. Omnicon and Maxcon are represented by the same counsel.

The complaint alleges that after plaintiff finished its work, it sought the balance of payment that was due. Maxcon advised plaintiff that “Maxcon was no longer on the job” (Complaint, ¶ 12), and that plaintiff should seek payment from VBH. The complaint contains causes of action for “work, labor & services”, breach of contract, account stated, unjust

enrichment, and quantum meruit. It states that Omnicon is the successor corporation to Maxcon, but offers no supporting facts.

The moving affidavit by Gctulio Echeandia states as follows. Echeandia is president of Maxcon and Omnicon. In June 2002, Maxcon and plaintiff entered into their contract. Plaintiff finished the work in August 2002. Omnicon was incorporated in January 2003. It had no involvement in plaintiff's work and has never made any contracts with plaintiff. Omnicon's place of business has at all times been different from that of Maxcon's. "Maxcon is no longer doing business" (Echeandia Affidavit [Aff.], ¶ 5).

The opposing affidavit attempts to correct the deficiency in the complaint. Plaintiff's principal, Lawrence O'Shea, states that he worked with Echeandia on the project. After the work was done, O'Shea telephoned Echeandia seeking payment. O'Shea says that Echeandia "had closed Maxcon and opened Omnicon..." (O'Shea Aff., ¶ 5), and that Omnicon had the same secretary and telephone number as Maxcon, and that it was right around the corner from Maxcon. Echeandia told O'Shea that Omnicon was doing "similar work as Maxcon, and had the same big accounts ... and the same architect or designer..." (*id.*, ¶ 7).

O'Shea's affidavit states that Echeandia told him to come to the office and that he would give him some money. On March 10, 2004, O'Shea went to the address given as Omnicon's address and received a check for \$1,500. On November 11, 2004, O'Shea received a check for \$750. O'Shea alleges, and Omnicon admits, that both checks were paid from Omnicon's bank account.

Plaintiff commenced this action in 2006. On September 12, 2007, it served a notice to admit upon defendants Omnicon and Maxcon. Defendants did not respond and Omnicon made

this motion over a year later.

The test on a motion for summary judgment is whether the pleadings raise a triable issue of fact (*Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169, 172 [1973]). The function of the court is one of issue finding, not issue determination (*Ferrante v American Lung Assn.*, 90 NY2d 623, 630 [1997]). The credibility of the parties is not a proper consideration for the court (*id.* at 631), and statements made in opposition to the motion must be accepted as true (*Lehrer McGovern Bovis, Inc. v New York Yankees*, 207 AD2d 256, 258 [1<sup>st</sup> Dept 1994]). The movant bears the burden of establishing his entitlement to summary judgment as a matter of law (*Ferrante*, 90 NY2d at 631).

A successor corporation is one that “that, through amalgamation, consolidation, or other assumption of interests, is vested with the rights and duties of an earlier corporation” (Black’s Law Dictionary [Westlaw 8th ed 2004]). A corporation does not become a successor corporation responsible for the obligations of the putative predecessor merely by acquiring the latter’s assets (*Schumacher v Richards Shear Co.*, 59 NY2d 239, 244 [1983]). There are four ways in which a corporation may become liable for a predecessor’s obligations. The corporation “(1) ... expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations” (*id.* at 245).

That Omnicon may have assumed Maxcon’s assets does not mean that Omnicon became liable for Maxcon’s debts. To establish Omnicon’s liability, plaintiff advances the first three theories, two of which are applicable to the facts alleged here. First, plaintiff argues that

Omnicon assumed Maxcon's debt to Crown by promising to pay plaintiff and by partly performing that promise.

Second, the factors considered in determining whether a de facto merger has occurred include: (1) continuity of ownership; (2) cessation of the ordinary business and dissolution of the predecessor, as soon as practical; (3) assumption by successor of liability necessary for the uninterrupted continuation of the predecessor's business; and (4) continuity of management, personnel, assets, physical location and general business operation (*Matter of New York City Asbestos Litig.*, 15 AD3d 254, 255-56 [1st Dept 2005]). A de facto merger finding does not require the presence of each of these factors (*id.*).

Here, plaintiff sufficiently alleges that Maxcon and Omnicon have continuity of ownership and management, and personnel, assets, and general business operation. The fact that Omnicon used its checks to pay part of the debt incurred by Maxcon hints at a close relationship. Although Maxcon is still extant, a finding of de facto merger does not always require the legal dissolution of the predecessor corporation (*see Fitzgerald v Fahnestock & Co.*, 286 AD2d 573, 575 [1st Dept 2001]). It is enough that the successor takes the assets of the predecessor and leaves it a shell (*id.*). Here, it is alleged that Maxcon no longer does business. All these allegations suffice to raise factual questions as to whether Omnicon assumed Maxcon's obligations to plaintiff and/or whether there was a de facto merger between the corporations.

Third, the mere continuation theory applies where only the successor corporation survives and the predecessor corporation is extinguished (*Schumacher*, 59 NY2d at 245). The theory does not apply where the predecessor survives "as a distinct, albeit meager, entity" (*id.*). Because Maxcon is still alive, Omnicon cannot be deemed a mere continuation of Maxcon. The

allegations do not fit the third basis for successor liability.

Summary judgment is denied. Defendants should respond to the notice to admit, which seeks information about the relationship between Maxcon and Omnicon.

In conclusion, it is

ORDERED that the motion by defendant Omnicon Interiors, Inc. for summary judgment dismissing the complaint as against it is denied; and it is further

ORDERED that defendants Omnicon Interiors, Inc. and Maxcon General Contracting Corp. respond to the notice to admit within 30 days after receiving a copy of this order with notice of entry,

Dated: 2/24/09

ENTER:

mat

J.S.C.  
HON. MILTON A. TIGLIONE  
J.S.C.

**FILED**

MAR -3 2009  
COUNTY CLERK'S OFFICE  
NEW YORK