

Diamond Collectibles, LLC v Devix Corp.

2009 NY Slip Op 31460(U)

June 29, 2009

Supreme Court, New York County

Docket Number: 600443/08

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN
Justice

PART 17

Index Number : 600443/2008
DIAMOND COLLECTIBLES, LLC
VS.
DEVIX CORPORATION
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*and cross motion
be decided as*

advised

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

FILED
JUL 06 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/29/09

[Signature]
EMILY JANE GOODMAN *s.c.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----x
DIAMOND COLLECTIBLES, LLC, f/k/a
DIAMOND COLLECTIBLES, INC.,

Plaintiff,

Index No.: 600443/08

-against-

DEVIX CORPORATION and DEVIX GROUP LLC.

Defendants.

-----x
EMILY JANE GOODMAN, J.S.C.:

FILED
JUL 06 2009
COUNTY CLERK'S OFFICE
NEW YORK

BACKGROUND

Defendant Devix Corporation (Devix Corp.) moves, pursuant to CPLR 3211 (a) (7), to dismiss the complaint against it.

Plaintiff cross moves to amend the complaint, pursuant to CPLR 3025 (b).

Plaintiff is in the business of providing integrated e-commerce solutions for companies selling sports memorabilia. Devix Group LLC (Devix Group) was in the business of developing and licensing software for client account management and sales order management for internet sales, referred to as EDevix Interlink U4*X Enterprise Software (EDevix).

On or about July 12, 2005, plaintiff and Devix Group entered into a software development agreement whereby Devix Group agreed to provide plaintiff with a customized version of EDevix, and, simultaneously, the same parties entered into a software

licensing agreement. The complaint alleges that Devix Group failed to fulfill its obligations under these agreements.

On or about March 30, 2006, plaintiff gave Devix Group written notice of default, and provided Devix Group 30 days in which to cure the alleged default. Just over one month later, on or about May 2, 2006, Devix Corporation (Devix Corp.) purchased the assets of Devix Group, pursuant to an Asset Purchase Agreement. According to this agreement, Guy Praisler, the sole member of Devix Group, was employed by Devix Corp. as an "Officer of the Company (Opp. Ex. 4)."

Pursuant to § 2.1 of the Asset Purchase Agreement, Devix Corp. specifically states that it is acquiring all of the assets of Devix Group, except for the assets appearing as Excluded Assets. Under subsection (iv) of this section of the agreement, the purchased assets include:

"all of Seller's [Devix Group's] rights and benefits under all contracts, agreements, leases (including equipment leases and capital leases), licenses, client contracts, sales and purchase orders and other documents, including those listed on Schedule 2.1(iv) (the "Contracts")."

The above-referenced Schedule does not include the contract subject of the instant litigation.

Section 2.4 of the Asset Purchase Agreement indicates the excluded liabilities, which excludes all contracts entered into prior to the date of the Asset Purchase Agreement. Section 2.3 of the Asset Purchase Agreement specifies the contract

liabilities that Devix Corp. is specifically assuming, which appear on a separate Schedule. The contract subject of this lawsuit does not appear on this Schedule. In its papers, defendant explains that this is because the contract at issue was already cancelled by plaintiff on March 30, 2008.

In June, 2006, Devix Group changed its name to Daze Consulting LLC, and it was dissolved by the authority of its managing member, Guy Praisler, on March 31, 2008 (Aff. Of John C. Crow), approximately one month after the instant litigation was commenced. It appears that both Devix Group and Devix Corp. use the same business address.

Devix Corp. argues that, since it was not a party to the contract between Devix Group and plaintiff, and since it did not assume that contract when it purchased the assets of Devix Group, plaintiff has failed to assert a cause of action against it. However, Devix Corp. is asserted a counterclaim against plaintiff based on this same contract, although in this motion, it withdrew its Second Counterclaim (see Affirmation of John C. Crow In Support of Motion To Dismiss). Because defendant moved to dismiss plaintiff's Verified Complaint before plaintiff moved to amend, defendant had the option of deciding whether the original motion to dismiss should be applied against the new pleadings. *Sage Realty Corp. v Proskauer, Rose, L.P.*, 251 AD2d 35 (1st Dept 1998). As defendant has not made its election known, and as the

arguments are the same whether the Court applies the motion dismiss against the Verified Complaint or the proposed Amended Verified Complaint, the Court will apply the arguments against the Amended Verified Complaint.

DISCUSSION

The court grants plaintiff's motion to amend the verified complaint, pursuant to CPLR 3025 (b), to include a theory of successor liability.

Devix Corp. opposes plaintiff's cross motion on the grounds that it is procedurally defective, in that plaintiff has failed to submit an affidavit of merit along with the cross motion. However, to support such a motion, the movant must supply either an affidavit of merit or an offer of evidence similar to that supporting a motion for summary judgment. *Schulte Roth & Zabel, LLP v Kasso*, 28 AD3d 404 (1st Dept 2006). In support of its cross motion, plaintiff supplied an attorney affirmation introducing numerous exhibits, which the Court finds sufficient to support its cross motion to amend the verified complaint, which does not add any new causes of action. Under these circumstances, the court exercises its discretion, pursuant to CPLR 3021 (b), to grant this cross motion to amend the verified complaint.

CPLR 3211 (a), Motion to dismiss cause of action, states that "[a] party may move for judgment dismissing one or more

causes of action asserted against him on the ground that:

(7) the pleading fails to state a cause of action

On a motion to dismiss pursuant to CPLR 3211, the pleading should be liberally construed, the facts alleged by the plaintiff should be accepted as true, and all inferences should be drawn in the plaintiff's favor (*Leon v Martinez*, 84 NY2d 83 [1994]); however, the court must determine whether the alleged facts "fit within any cognizable legal theory." *Id.* at 88. Further, "[a]llegations consisting of bare legal conclusions . . . are not presumed to be true [or] accorded every favorable inference." *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 (1st Dept 1999), *affd* 94 NY2d 659 (2000).

The primary issue to be addressed is whether, under any cognizable legal theory, Devix Corp. may be held liable for an alleged breach of a contract entered into by Devix Group prior to Devix Corp. acquiring the latter's assets. Devix Corp. maintains that it cannot be held to successor liability for the contracts entered into by Devix Group prior to the execution of the Asset Purchase Agreement because it did not specifically agree to assume such liability.

In *Schumacher v Richards Shear Company, Inc.* (59 NY2d 239, 245 [1983]), the court held that, whereas the general rule is that a corporation which acquires the assets of another is not responsible for the liabilities of the predecessor, there are

four exceptions to this general proposition:

"(1) it [the acquiring corporation] expressly or impliedly assumed the predecessor's ... 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."

Although *Schumacher* concerned the obligations of a purchasing corporation with respect to the tort liabilities of the acquired company, courts have applied the same principles to contractual obligations when a company's assets are acquired by another entity. *Burgos v Pulse Combustion, Inc.*, 227 AD2d 295 (1st Dept 1996).

Successor liability may be predicated under the doctrine of a de facto merger.

"A transaction structured as a purchase-of-assets may be deemed to fall within [the above-noted] exception as a 'de facto' merger, even if the parties chose not to effect a formal merger, if the following factors are present: (1) continuity of ownership; (2) cessation of ordinary business operations and the dissolution of the selling corporation as soon as possible after the transaction; (3) the buyer's assumption of the liabilities ordinarily necessary for the uninterrupted continuation of the seller's business; and (4) continuity of management, personnel, physical location, assets and general business operation."

Matter of New York City Asbestos Litigation, 15 AD3d 254, 256 (1st Dept 2005).

In the case at bar, the sole member of Devix Group became an officer of Devix Corp.; Devix Group ceased its operations, became

inactive, and, immediately after the instant litigation was commenced, dissolved; Devix Corp. assumed assets and liabilities of Devix Group necessary to continue the general business of Devix Group (see Section 3.17 of the Asset Purchase Agreement provides that the purchased assets are sufficient to conduct the business as defined thereunder); and the operations apparently continued at the same physical location. All of these circumstances indicate the hallmarks of a de facto merger. *Fitzgerald v Fahnstock & Co., Inc.*, 286 AD2d 573 (1st Dept 2001); *City of New York v AAER Sprayed Insulations, Inc.*, 281 AD2d 228 (1st Dept 2001).

Even though Devix Group did not actually dissolve for two years after the Asset Purchase Agreement was executed, the allegation that it essentially became a shell after the sale of its assets is sufficient to raise an inference that a de facto merger occurred. *Holme v Global Minerals and Metals Corp.*, 2009 NY Slip Op 4283, 2009 NY App Div Lexis 4109 (1st Dept 2009). Further, the mere fact that Devix Group was sold free of any liabilities for pre-existing contracts does not require a finding that no successor liability attaches as a matter of law. *Burgos v Pulse Combustion, Inc.*, 227 AD2d 295, *supra*.

Based on the foregoing, the Court concludes that plaintiff has stated sufficient facts to state a claim under a theory of successor liability, thereby precluding dismissal. *Teachers Ins.*

Annuity Association of America v Cohen's Fashion Optical of 485 Lexington Avenue Inc., 45 AD3d 317 (1st Dept 2007).

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the plaintiff's cross motion for leave to amend the complaint herein is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that defendants shall serve an answer to the amended complaint within 20 days from the date of said service; and it is further

ORDERED that defendant Devix Corporation's motion to dismiss the complaint is denied; and it is further

ORDERED that the attorneys and the parties personally appear for a settlement conference on September 3, 2009 at 2:15 PM, Part 17, Room 422.

Dated: June 29, 2009

ENTER:

Emily Jane Goodman J.S.C.

FILED
JUL 06 2009
COUNTY CLERK'S OFFICE
NEW YORK