

Powell Communications, LLC v Ideacast, Inc.

2010 NY Slip Op 32285(U)

August 17, 2010

Supreme Court, New York County

Docket Number: 602948/09

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

POWELL COMMUNICATIONS, LLC,
Plaintiff,

INDEX NO. 602948/09

-against-

MOTION DATE _____

IDEACAST, INC., DANOO, INC.,
DANOOCAST, LLC, REACH MEDIA GROUP,
and NATIONAL CINEMEDIA, LLC,
Defendants.

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 2 were read on this motion by plaintiff(s) for a an order and Judgement of dismissal pursuant to CPLR 3211.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	FILED	<u>PAPERS NUMBERED</u>
Answering Affidavits — Exhibits (Memo)		<u>1</u>
Replying Affidavits (Reply Memo)		_____

AUG 25 2010

NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

In this case involving successor liability, defendants Danoo, Inc., DanooCast, LLC, Reach Media Group (RMG), and National Cinemedia, LLC (NCM) move to dismiss the complaint, pursuant to CPLR 3211 (a) (1) and (7). Defendant IdeaCast, Inc. does not join the motion.

IdeaCast supplied(s) advertising to the captive and away-from-home television business for airlines, hotels, and health clubs. In June 2008, IdeaCast hired plaintiff Powell Communications, LLC, to provide public relations services. Plaintiff provided services until March 2009, although IdeaCast stopped making payments in September 2008. Plaintiff continued to send invoices, which IdeaCast accepted without objection. Allegedly, IdeaCast's management told plaintiff that the invoices would be paid. Subsequently, plaintiff alleges, the

moving defendants became IdeaCast's successors and assumed its liabilities. Plaintiff alleges that the other defendants are obligated to pay IdeaCast's bill of \$82,000.

Defendants made the instant motion without including a copy of the complaint. Ordinarily, this omission would preclude consideration of their motion (*see Alizio v Perpignano*, 225 AD2d 723, 724-725 [2d Dept 1996]; *6 W. 37 Street Realty LLC v Karey Kassl Corp.*, 2009 WL 1764479, 2009 NY Misc Lexis 5818 [Sup Ct, NY County 2009]). However, in this case, the motion will be entertained. After defendants made their motion, plaintiff served and filed an amended complaint, included with plaintiff's opposition papers. Defendants' reply papers address the allegations in the amended complaint. Thus, the original complaint is not required. The court will consider the motion in light of the amended complaint.

Allegations are taken from the amended complaint and the documents included with defendants' motion, a notification of the sale of IdeaCast and a bill of sale. The sale notice shows that IdeaCast owed NCM nearly \$21 million in loans, that NCM had a security interest in almost all of IdeaCast's assets, that IdeaCast defaulted on the loans, and that its assets were to be sold at a public foreclosure sale in June 2009. The bill of sale reveals that NCM sold the bulk of IdeaCast's assets to an NCM subsidiary, NCM Out of Home, LLC (NCMOOH), for \$17 million. NCMOOH obtained a secured claim against IdeaCast for the \$4 million balance and reserved the right to enforce the secured claim against IdeaCast.

Plaintiff alleges that, after the sale, NCM transferred its ownership of NCMOOH to Danoo. Danoo changed the name of NCMOOH to Danocast. Soon after, Danocast was merged with Danoo. The entity resulting from this merger was named RMG. The amended complaint alleges that RMG and the other defendants thus became the owner of all or substantially all of the assets that previously belonged to IdeaCast, including good will, trademarks, patents, customer lists, and the right to use the IdeaCast name.

The amended complaint alleges that RMG has the same management, personnel,

physical location, and general business operations as IdeaCast and that RMG continues to perform all of the obligations required of IdeaCast with respect to certain exclusive contracts made by IdeaCast. The amended complaint further states that the moving defendants are successors in interest to IdeaCast and legally obligated to perform its obligations. Plaintiff also seeks to pierce the corporate veil between IdeaCast and the moving defendants, on the ground that they are IdeaCast's alter egos. The amended complaint contains causes of action for breach of contract, account stated, quantum meruit, and unjust enrichment.

Defendants allege that NCMOOH purchased the assets free and clear of any subordinate security interests or liens and did not assume any contracts or liabilities to plaintiff. Therefore, they claim, none of IdeaCast's debts were transferred to any of the defendants.

On a CPLR 3211 (a) (7) motion, the court determines only whether the facts as alleged fit within any cognizable legal theory, thus answering the query of whether plaintiff has a cause of action, not whether it has proven, or can ultimately prove, a cause of action (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Sanders v Winship*, 57 NY2d 391, 394 [1982]). To achieve dismissal on a CPLR 3211 (a) (1) motion, the movant must provide documentary evidence which conclusively establishes a defense to the asserted claims as a matter of law (*IMO Indus. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 11 [1st Dept 1999]).

Generally, a company that purchases another company, including a purchaser of assets at a foreclosure sale, does not assume the liabilities of the purchased company (*Quinn v Thomas H. Lee Co.*, 61 F Supp 2d 13, 21 [SD NY 1999], *affd sub nom. Quinn v Teti*, 234 F3d 1262 [2d Cir 2000]). This rule has four exceptions: (1) the purchaser expressly or impliedly assumes the liabilities of the purchased company; (2) there was a consolidation or de facto merger of the purchased and the purchaser; (3) the purchaser is a mere continuation of the purchased; or (4) the transaction is entered into fraudulently to enable the purchased company to escape its obligations (*Schumacher v Richards Shear Co.*, 59 NY2d 239, 245 [1983]).

Plaintiff contends that the purchase of IdeaCast's assets effected a de facto merger between IdeaCast and the moving defendants or a continuation of IdeaCast.

A de facto merger occurs where one corporation absorbs another, without adhering to the statutory requirements for a merger (*Arnold Graphics Indus., Inc. v Independent Agent Ctr., Inc.*, 775 F2d 38, 42 [2d Cir 1985]). 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 the 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 operations (*Matter of New York City Asbestos Litig.*, 15 AD3d 254, 255-56 [1st Dept 2005]).

While a finding of de facto merger does not require the presence of each of these factors, the continuity of ownership factor is indispensable (*id.* at 256, 258). Continuity of ownership alone is not sufficient to warrant finding a de facto merger; nonetheless, it is the essence of a merger (*id.*; *Cargo Partner AG v Albatrans, Inc.*, 352 F3d 41, 47 [2d Cir 2003]; *Washington Mut. Bank, F.A. v SIB Mtge. Corp.*, 21 AD3d 953, 954 [2d Dept 2005]). The continuity of ownership factor looks to whether the predecessor company's shareholders become shareholders of the successor corporation (*Shamis v Ambassador Factors Corp.*, 34 F Supp 2d 879, 897 [SD NY 1999]). In harmony with this theory, some courts have held that there is no continuity of ownership where assets are purchased solely with cash (*see Peralta v WMH Tool Group, Inc.*, 2005 WL 2002454, *3, 2005 US Dist LEXIS 41755, *11 [ED NY 2005]; *New York City Asbestos*, 15 AD3d at 256). Continuity "exists where the shareholders of the predecessor corporation become direct or indirect shareholders of the successor corporation as the result of the successor's purchase of the predecessor's assets, as occurs in a stock-for-assets transaction" (*New York City Asbestos*, 15 AD3d at 256).

Continuity of ownership is undeniably absent here. The complaint does not allege that

IdeaCast's owners continued to be its owners after it was transferred to defendants, or that they retained any interest or control in it. Nor does the complaint allege that IdeaCast's owners became owners of the successor companies and through them retained ownership in IdeaCast. The documents show that defendants paid cash for IdeaCast's assets. There is no indication that IdeaCast's owners were granted any stock or membership interests in the allegedly successor companies.

The amended complaint also fails to allege the second element of a de facto merger, which is cessation of the ordinary business and dissolution of the predecessor. The dissolution criterion may be satisfied, notwithstanding the selling corporation's continued formal existence, if that entity "is shorn of its assets and has become, in essence, a shell" (*Fitzgerald v Fahnestock & Co.*, 286 AD2d 573, 575 [1st Dept 2001]). Here, plaintiff alleges that all or substantially all of IdeaCast's assets were sold; however, it is not alleged that it is dissolved or defunct or a mere shell (see *New York City Asbestos*, 15 AD3d at 257 [dissolution not found where sold corporation "remained in existence in a meaningful way" retaining corporate records and converting to a limited liability company after being sold]). Indeed, defendants' documents show that NCMOOH retained a security interest in IdeaCast. Similarly, plaintiff's own submissions indicate that IdeaCast continues to have some meaningful existence.

The mere continuation exception applies to a corporate reorganization where only one corporation survives the transaction and the predecessor is extinguished (*Schumacher*, 59 NY2d at 245). The theory does not apply where the predecessor survives "as a distinct, albeit meager, entity" (*id.*; see also *Klumpp v Bandit Indus., Inc.*, 113 F Supp 2d 567, 571 [WD NY 2000]). Plaintiff alleges that defendants purchased all or substantially all of IdeaCast's assets, but not that IdeaCast was dissolved. Therefore, the amended complaint does not allege that defendants were IdeaCast's successors.

Plaintiff also seeks to render the moving defendants liable for IdeaCast's debt by

piercing its corporate veil. It has long been held that the corporate veil may be pierced only when necessary to prevent fraud or to achieve equity (*Matter of Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 140 [1993]). Whether to pierce the corporate veil in a given instance is a flexible inquiry that depends upon the attendant circumstances (*id.* at 141). Piercing the corporate veil requires a showing that: "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*id.*).

Plaintiff states that the moving defendants own IdeaCast, that they continue to perform IdeaCast's obligations with respect to certain exclusive IdeaCast contracts, and that there remains a continuity of IdeaCast management, personnel, physical location, and business operations. These allegations are sufficient to suggest domination and control (*see Ledy v Wilson*, 38 AD3d 214, 215 [1st Dept 2007]). Plaintiff also alleges that defendants refused to pay IdeaCast's bill despite due demand. That suggests injury caused by defendants. The court will not dismiss the alter ego theory of liability. The complaint here is not so totally devoid of such allegations so as to warrant its dismissal at this early pre-answer stage of the action and prior to affording plaintiff an opportunity to engage in discovery (*see Thompson v Cooper*, 24 AD3d 203, 205-206 [1st Dept 2005]; *International Credit Brokerage Co. v Agapov*, 249 AD2d 77, 78 [1st Dept 1998]).

Whether IdeaCast, and through it, the other defendants are liable to plaintiff under any of the theories of liability cannot be determined at this stage of the case.

Counsel for the moving defendants states that RMG Networks, Inc. is the correct name for the defendant identified as Reach Media Group or RMG. Upon submission of an affidavit from the defendant itself stating its name, together with an order that the caption should henceforth reflect the correct name, the court will sign the order.

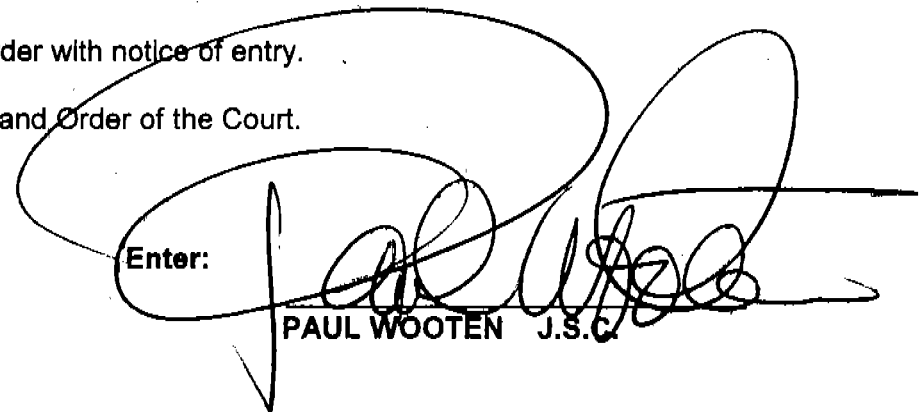
In conclusion, it is

ORDERED that the motion of defendants Danoo, Inc., Danocast, LLC, Reach Media Group, and National Cinemedia, LLC to dismiss the complaint is granted to the extent that claims against said defendants that involve successor liability are dismissed, and the motion is otherwise denied; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

This constitutes the Decision and Order of the Court.

Dated: 8-17-2010

Enter: 
PAUL WOOTEN J.S.C.

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

FILED
AUG 25 2010
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