

Shields v First Ave. Bldrs. LLC

2010 NY Slip Op 32386(U)

August 27, 2010

Supreme Court, New York County

Docket Number: 100620/07

Judge: Joan A. Madden

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

PRESENT: Hon Joan A. Madden
Justice

PART 11

Index Number : 100620/2007
SHIELDS, JAMES
VS.
FIRST AVENUE BUILDERS LLC
SEQUENCE NUMBER : 004
SUMMARY JUDDGMENT

INDEX NO. _____

MOTION DATE 12-16-09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

in this motion to ~~for~~ Summary Judgment

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 is decided in accordance with the attached Memorandum Decision + Order

FILED

SEP 02 2010

NEW YORK COUNTY CLERK'S OFFICE

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

Dated: August 27, 2010

[Signature]
HON. JOAN A. MADDEN ^{s.c.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
JAMES SHIELDS and EILEEN CAVANAGH,

Plaintiffs,

INDEX NO. 100620/07

-against-

FIRST AVENUE BUILDERS LLC, HOUSING
PARTNERSHIP DEVELOPMENT CORPORATION,
FSLM ASSOCIATES LLC and WORTHINGTON S.p.A.,

Defendants.

-----X
WORTHINGTON S.p.A.,

Third-Party Plaintiff,

-against-

MC & O MASONRY, INC.,

Third-party Defendant.

-----X
JOAN A. MADDEN, J.

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NEW YORK
COUNTY CLERK'S OFFICE

Defendant third-party plaintiff Worthington S.p.A. ("Worthington") moves for summary judgment dismissing the complaint, cross claims and counterclaims against it. Plaintiffs oppose the motion, which is denied for the reasons below.

This action seeks to recover for personal injuries sustained by plaintiff James Shields ("Shields") in October 2006 when he was cleaning a concrete pump designed and manufactured by non-party Reinert Manufacturing Company ("Reinert"), a company organized under the laws of Kentucky, that dissolved in December 1989. The Amended Complaint asserts claims for negligence, products liability and breach of warranty against Worthington based on allegations

that “upon information and belief...on October 15, 1984, ...Worthington entered into an agreement with... Reinert...for the purchase of assets and liabilities of Reinert...” (Amended Complaint ¶ 34).

Worthington moves for summary judgment, asserting that the October 15, 1984 agreement, which it produced in discovery and is attached to its motion papers, demonstrates that it was a stock purchase agreement under which Worthington, an Italian Corporation, purchased 602 shares of outstanding shares of Reinert’s stock, or 50.14%. Worthington argues that as a result of the purchase, Worthington became Reinert’s parent and that under well established precedent, a parent corporation cannot be held liable for the torts of its subsidiaries. See e.g., Garcia v. Union Carbide Corp., 176 AD2d 219 (1st Dept 1991)(“even complete ownership ... will not alone render a parent corporation liable for the torts of its subsidiary”).

Worthington also argues that Reinert continued to exist as a separate corporation after the October 15, 1984 agreement and submits certificates showing that in June 1986, Reinert amended its Articles of Incorporation to update the names of its officers and to authorize the issuance of additional stock and that in August 1986, Reinert amended its Articles of Incorporation for the purpose of changing the company’s name to Wortech. Worthington also submits a certificate indicating that on December 21, 1989, Wortech filed Articles of Dissolution with the Kentucky Secretary of State.

Plaintiffs oppose the motion, asserting that it is premature as it was made before the completion of discovery, including the deposition of a representative from Worthington.

Plaintiffs further assert that the facts to be determined during the deposition are relevant to whether successor liability can be established based on Worthington's purchase of Reinert's capital stock, and that discovery is needed so it can respond to the arguments made in Worthington's moving papers. In addition, in its supplemental opposition, plaintiffs submit the affidavit of Reinert's founder and former President, Gerald Reinert who states that at the time of the October 15, 1984 sale "all assets and liabilities of Reinert Manufacturing Company were transferred to Worthington S.p.A. via a stock transfer" (Reinert Affidavit, ¶ 3).

In reply, Worthington argues that discovery is not needed as the October 15, 1984 agreement, together with the subsequent filings by Reinert with the Kentucky Secretary of State, demonstrate that the Worthington/Reinert transaction was limited to the purchase of stock for cash and did not provide for the sale or transfer of assets or liabilities from Reinert to Worthington as is necessary to establish a de facto merger.

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

The de facto merger doctrine is based on the concept that "a successor that effectively

takes over a company in its entirety should carry the predecessor's liabilities as a concomitant to the benefit it derives from the good will purchased." Grant-Howard Associates v. General Housewares Corp., 63 NY2d 291, 296 (1984). The characteristics of a de facto merger are the "[c]ontinuity of ownership; cessation of ordinary business and dissolution of the predecessor as soon as possible; assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and a continuity of management, personnel, physical location, assets, and general business operation" Fitzgerald v. Fahnestock & Co., 286 AD2d 573, 574 (1st Dept 2001). At the same time, "not all of these factors are needed to demonstrate merger; rather these factors are only indicators that tend to show de facto merger." See Sweatland v. Park Corp., 181 AD2d 243, 245 (4th Dept 1992)(internal quotations and citations omitted).

In view of the factually intense nature of the de facto merger doctrine, at the very least, plaintiffs are entitled to take the deposition testimony of a representative of Worthington before it can be determined whether this doctrine applies. Furthermore, while the October 15, 1984 agreement and other documentary evidence submitted by Worthington arguably support Worthington's position, this evidence is not dispositive of the issues raised here, particularly in light of Mr. Reinert's statement that at the time of the October 15, 1984 sale the assets and liabilities of his company were transferred to Worthington. Notably, Worthington fails to submit an affidavit of a person with knowledge of the transaction, and there may be other evidence regarding the nature of the transaction that will be revealed as a result of further discovery that

may support plaintiffs' position.

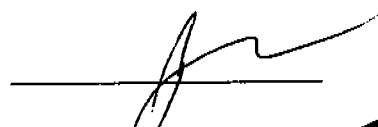
Accordingly, it is

ORDERED that Worthington's motion for summary judgment is denied without prejudice to renewal upon completion of relevant discovery; and it is further

ORDERED that parties shall appear for a status conference in Part 11, room 351, on September 16, 2010 at 9:30 am.

A copy of this decision and order is being mailed by my chambers to counsel for the parties.

Dated: August 27, 2010


J.S.C.

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