

**Mitchell v FBM, LLC**

2010 NY Slip Op 32660(U)

September 20, 2010

Supreme Court, New York County

Docket Number: 114876/07

Judge: Joan A. Madden

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

PRESENT: MADDEN  
Justice

PART 11

MITCHELL  
- v -  
F B M

INDEX NO. 114876/07  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 003  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on 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 is decided in accordance with the annexed Memorandum Decision + Order.

**FILED**  
SEP 27 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: September 20, 2010 \_\_\_\_\_ J.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  
JUSTIN MITCHELL,

Plaintiff,

-against-

FBM, LLC, and VANGUARD FUNDING, LLC

Defendants.

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

INDEX NO. 114876/07

**FILED**

SEP 27 2010

NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff moves for an order pursuant to CPLR 3212 granting summary judgment on his first cause of action for a declaratory judgment that defendant FBM, LLC ("FBM") and Vanguard Funding, LLC ("Vanguard LLC"), is the successor-in interest to and/or the alter corporate entities of Fidelity Borrowing, LLC ("Fidelity Borrowing"). Defendant opposes the motion.

**Background**

In January 2005, plaintiff commenced an action against Fidelity Borrowing seeking damages for breach of an employment contract (Justin Mitchell v. Fidelity Borrowing LLC, Index No. 100724/05, Supreme Court, New York County)(hereinafter "the Fidelity Borrowing action"). By a decision and order entered May 31, 2007, the Appellate Division, First Department determined that plaintiff was entitled to summary judgment on his breach of contract claim against Fidelity Borrowing. The Appellate Division awarded plaintiff damages in the amount of \$160,000, plus interest from May 12, 2004, and remanded the issue of mitigation of damages to the Supreme Court for a "determination of how much, if any, should be deducted for

mitigation, or failure to mitigate damages.”

On remand, the court issued a decision and order dated July 31, 2007, which “determined on consent that \$5,000 be deducted from the total amount awarded to plaintiff by the Appellate Division, First Department.” On August 14, 2007, a judgment was entered in plaintiff’s favor in the sum of \$155,00, together with interest in the sum of \$45,442.60, and costs and disbursements of \$1,780.92, for a total amount of \$202,224.53. Plaintiff has not collected any of these amounts from Fidelity Borrowing which ceased doing business in April 2006.

On November 7, 2007, plaintiff commenced the instant action against FBM. The complaint asserts a first cause of action for a declaratory judgment that defendant FBM “is the successor-in-interest and/or alter corporate entity” of the judgment debtor, Fidelity Borrowing. The complaint also asserts second, third, fourth, fifth, sixth and seventh causes of action for fraudulent conveyance under various provisions of the Debtor and Creditor Law.

Plaintiff previously moved for summary judgment on his first cause of action for a declaration that defendant FBM is the successor-in-interest and/or alter corporate entity of Fidelity Borrowing. Defendant opposed the motion, arguing, *inter alia*, that the motion was premature. By decision and order dated July 17, 2008, the court denied the motion with leave to renew upon completion of discovery. Plaintiff appealed, and the decision was affirmed by the Appellate Division, First Department. Mitchell v. FBM, LLC, 58 AD3d 577 (1<sup>st</sup> Dept 2009).

On May 12, 2009, plaintiff was granted leave to add Vanguard as a co-defendant on the ground that FBM changed its name to Vanguard. After discovery was complete, plaintiff renewed his motion for summary judgment on his first cause of action, arguing as he did previously that defendants are the successors to Fidelity Borrowing because the creation of FBM

was a de facto merger and mere continuation of Fidelity Borrowing. Specifically, plaintiff argues that the record shows there is 1) a continuity of ownership between FBM and Fidelity Borrowing, 2) a cessation of ordinary business of Fidelity Borrowing, 3) the assumption by FBM of the liabilities ordinarily necessary for the uninterrupted continuation of the business of Fidelity Borrowing and 4) a continuity of management, personnel, physical location, assets, and general business operation. In addition, plaintiff argues that FBM and Vanguard are the alter corporate entities of Fidelity Borrowing, and as such they are liable for any judgment obtained against Fidelity Borrowing.

In support of his position, plaintiff relies on much of the same evidence he submitted in support of his earlier motion, including his affidavit, the pleadings and discovery from the Fidelity Borrowing action, and FBM's mortgage banking application which identified Brian Ofsie and Robert Jayne as the owners and principals of FBM.

In his affidavit, plaintiff states that from November 2002 until April 2006, Fidelity Borrowing was a mortgage broker, and that on August 23, 2005, "approximately six months after filing its Answer in the Fidelity Borrowing Lawsuit, Fidelity Borrowing's principals filed an application on behalf of defendant FBM, LLC to become a mortgage bank." Citing to New York Banking Law §590(2)(b), plaintiff asserts that a mortgage banker need not have a separate license to serve as a mortgage broker, because a mortgage banker can act as both a mortgage banker and broker. Based on the Banking Law, plaintiff argues that since a mortgage bank can also operate as a mortgage broker, there was no "legitimate reason" for defendant to apply for a mortgage banking license, as opposed to Fidelity Borrowing, and for Fidelity Borrowing to close its operations once defendant obtained the license.

Plaintiff also states that “there was no basis for transferring the business of Fidelity Borrowing to defendant except as an illegal effort to avoid” liability to him, since when Fidelity Borrowing ceased operations in April 2006, it “was a valuable going concern with approximately 100 employees.” Plaintiff asserts that on April 11, 2006, defendant obtained its mortgage banking license using the trade name “Fidelity Borrowing,” and on the same day, Fidelity Borrowing surrendered its mortgage broker license. Plaintiff also asserts that FBM’s website and Fidelity Borrowing’s website, are “identical,” and that FBM used the same toll-free telephone number as Fidelity Borrowing. Plaintiff states that a comparison of the two websites “clearly indicates that, aside from expanding the business to include mortgage banking in addition to mortgage brokering, no other changes in business occurred when defendant became the successor to Fidelity Borrowing.”

Plaintiff also points to Fidelity Borrowing’s February 2006 representations to the court in the Fidelity Borrowing action that it possessed furniture, fixtures and other assets worth \$151,110. Plaintiff states that “[g]iven that defendant started and continued in business at the exact same location as Fidelity Borrowing on April 11, 2006, without interruption whatsoever, and that all of Fidelity Borrowing’s furniture, fixtures and assets are now in defendant’s possession,” defendant “must have assumed all liabilities ordinarily necessary for the uninterrupted continuation of Fidelity Borrowing’s business such as rent, utilities, telephone bills, employees’ salaries and insurance.”

Plaintiff also relies on information obtained during discovery in this action, including the transcript of the deposition of Mr. Ofsie and documents obtained from HUD showing that FBM continues to act as a mortgage broker under the trade name Fidelity Borrowing Mortgage

Banker.

During his deposition, Mr. Ofsie testified that Fidelity Borrowing ceased originating new business after FBM started doing business in New York but that all the loan originations starting before FBM's existence had to be finished by Fidelity Borrowing (Ofsie Deposition, at 12, 13). He also testified that approximately one-half of the employees from Fidelity Borrowing came to work for FBM but that they "lost a lot of people" due to stricter regulations for operating a mortgage bank (Id. at 24). He later testified, however, FBM kept most of the key personnel from Fidelity Borrowing (Id. at 113). He testified that in or about two years prior to its closing in 2006, Fidelity Borrowing was "losing money every month" (Id., at 33, 48). He also testified that he and Robert Jayne were the principals of both Fidelity Borrowing and FBM; but that he changed the name of the company to Vanguard after Jayne left.

According to Ofsie, FBM has acted as a mortgage broker since it got its banking license, and estimated that it had acted in this capacity more than 100 times (Id., at 59). HUD documents obtained by plaintiff in discovery confirm that FBM has acted as a mortgage broker using FBM's trade name Fidelity Borrowing Mortgage Bank. However, Ofsie also testified that 99.8 percent of defendants' business is banking and the rest is the mortgage broker business (Id., at 78), but he does not explain how he came to this percentage.

He further testified that FBM used Fidelity Borrowing's website address but ceased to so when it became Vanguard. Ofsie testified that there was no oral agreement between Fidelity Borrowing and FBM and he was not sure whether there was a written agreement between the two (Id. at 55). The record contains no written agreement between Fidelity Borrowing and FBM or Vanguard.

Defendant opposes the motion and in support of its opposition submits an affidavit Mr. Ofsie and various documents. In his affidavit, Ofsie states that FBM was not formed “with the intent of purchasing or succeeding to Fidelity Borrowing’s business” and that “there was no purchase and assumption of Fidelity’s liabilities” (Ofsie Affidavit, ¶6). He states that FBM, LLC was formed not to conduct mortgage brokerage business, but “to be an actual lender bank” (Id. at ¶5) and that defendant is now a bank licensed to conduct business in New York and nine other states, that it has a \$10 million line of credit for use in its origination of mortgage loans, and that it takes its own applications, has its own internal underwriters employed by FBM, and makes its own determinations as to loan approval.

Ofsie also states that FBM’s business operations and the process of the licensing applications was started before plaintiff’s lawsuit against Fidelity Borrowing. Specifically, he states that FBM was formed in June 2004, almost a year before Plaintiff commenced his lawsuit against Fidelity Borrowing and submits a copy of the New York Department of State Records establishing the date of formation.

#### Discussion

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).

When, as here, the plaintiff seeks declaratory relief, this court “may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is claimed.” Long Island Lighting Co. v. Allianz Underwriters Ins. Co., 35 AD3d 253, 253 (1<sup>st</sup> Dept 2006). At the same time, however, when issues of fact exist as to whether declaratory relief is warranted, summary judgment should be denied and the issues resolved at trial. Id.; see also, Gazza v. United California Bank Intern., 88 AD2d 968 (2d Dept 1982).

In general, when one corporation sells or otherwise transfers all of its assets to another corporation, the acquiring corporation is not liable for the debts and liabilities of the transferor unless 1) the successor has 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. Schumacher v. Richards Shear Co., Inc., 59 N.Y.2d 239, 244-245 (1983); Sweatland v. Park Corp., 181 A.D.2d 243, 245 (4<sup>th</sup> Dept 1992).

While there was no formal merger between Fidelity Borrowing and defendants, the primary issue here is whether there was a de facto merger, such that the third exception applies. 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 N.Y.2d 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 A.D.2d 573, 574 (1<sup>st</sup> Dep’t 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 factor merger.” See Sweatland v. Park Corp., 181 A.D.2d at 246 (internal quotations and citations omitted).

Considering these factors in the instant case, and given the factually intensive nature the inquiry, the court finds that there are triable issues of fact as to the existence of a de facto merger. As a preliminary matter, the court notes that the only additional evidence submitted since the plaintiff’s prior motion is Ofsie’s deposition testimony and documents showing that defendants are in the mortgage brokerage business. Furthermore, even if the evidence were sufficient to meet plaintiff’s prima facie burden, the affidavit from Osie creates factual questions.

For example, while defendants do not dispute that there was a continuity of ownership insofar as Fidelity Borrowing and FBM appear to have both been owned by Ofsie and Jayne, or that once FBM got its license to operate as a mortgage bank that Fidelity Borrowing discontinued its business as soon as permissible by law, in his affidavit Ofsie denies that defendants were formed with the intent of purchasing or succeeding Fidelity Borrowing or that it assumed Fidelity Borrowing’s liability. In addition, there is no evidence of any oral or written agreement between defendants and Fidelity Borrowing from which such an intent could be inferred.

Next, although FBM began and continued business in the same location as Fidelity

Borrowing, and had most of the key personnel as Fidelity Borrowing and used the same website for a time, these factors are insufficient to find for plaintiff as a matter of law in light of evidence that the defendants were primarily in the mortgage banking business, even if they continued to perform some mortgage brokerage work. In addition, the record is inconclusive regarding what portion of FBM's business is comprised of mortgage brokerage work done by its predecessor as opposed to banking, so that factual issue exist as to whether defendants are "a mere continuation" of Fidelity Borrowing. Moreover, defendants submit evidence showing that as a mortgage banker, FBM's general business operations differed significantly from that of its predecessor and involved additional risks, the hiring of new types of employees and the obtaining of a license to operate in numerous additional states.

Plaintiff has also failed to show that FBM was fraudulently formed to avoid paying plaintiff's claim, particularly as the record indicates that FBM applied to become a mortgage banker before plaintiff commenced his action against Fidelity Borrowing.

Finally, plaintiff has not shown that defendants are the alter corporate entities of Fidelity Borrowing as the record contains insufficient evidence to demonstrate that defendants dominated and/or controlled Fidelity Borrowing and caused it to cease doing business and/or stripped it of its assets so as to avoid paying the judgment in favor of plaintiff. See Holme v. Global Minerals and Metals Corp., 63 AD3d 417, 418 (1<sup>st</sup> Dept 2009).

### Conclusion

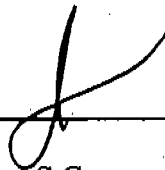
In view of the above, it is

ORDERED that the motion for summary judgment and the first cause of action is denied; and it is further

ORDERED that parties shall appear for a pre-trial conference in Part 11, room 351, on November 18, 2010 at 2:30 pm.

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

Dated: September 20, 2010

  
\_\_\_\_\_  
J.S.C.

**FILED**  
**SEP. 27 2010**  
**NEW YORK**  
**COUNTY CLERK'S OFFICE**