

RAO's City View, LLC v Soffes Wood, Inc.

2011 NY Slip Op 31219(U)

April 28, 2011

Supreme Court, New York County

Docket Number: 600326/10

Judge: Donna M. Mills

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

PRESENT: DONNA M. MILLS
Justice

PART 58

RAO'S CITY VIEW, LLC,

INDEX No. 600326/10

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 1

-v-

MOTION CAL. N. **FILED**

SOFFES WOOD, INC. a/k/a SOFFES WOOD
ARCHITECTS a/k/a SOFFES WOOD DESIGN,
JRS ARCHITECTS, PC and ELLIOT SOFFES,

MAY 09 2011

Defendants.

NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to _____ were read on this motion to dismiss.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Exhibits... _____

Answering Affidavits-Exhibits _____

Replying Affidavits _____

CROSS-MOTION: YES No

Upon the foregoing papers, it is ordered that this motions is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 4/28/11

Donna M. Mills
J.S.C.

DONNA M. MILLS, J.S.C.

Check One: FINAL DISPOSITION

 NON-FINAL DISPOSITION

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

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Defendants.

FILED

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DONNA M. MILLS, J.S.C.

**NEW YORK
COUNTY CLERK'S OFFICE**

FACTUAL BACKGROUND

This action arises from a written contract entered into by plaintiff, Rao's City View, LLC (hereinafter "Rao's") and defendants Soffes Wood, Inc., a/k/a Soffes Wood Architects a/k/a Soffes Wood Design (hereinafter "Soffes Wood") and Elliot Soffes, AIA. On or about February 21, 2002, Rao's entered into a written contract with Soffes Wood whereby Soffes Wood was to provide architectural services to Rao's property. Rao's alleges that the architectural services provided by Soffes Wood were not completed correctly, resulting in design and construction defects to the property causing Rao's to suffer damages.

On or about November 10, 2006, Soffes Wood and defendant JRS Architects (hereinafter "JRS") entered into an Asset Purchase. Thereafter, on or about February 8, 2010, Rao's commenced this action against Soffes Wood and JRS alleging that the transfer of assets from Soffes Wood to JRS, pursuant to the Asset Purchase Agreement (hereinafter "Agreement"), constituted a de facto merger and therefore JRS was also liable to Rao's for damages. JRS, alleges that there was no de facto merger and that it did not assume any of Soffes Wood's liabilities. JRS now moves for an Order pursuant to CPLR §3211(a)(1) and (7) dismissing Rao's complaint against JRS in its entirety for failure to state a claim and for such other and further relief as the Court deems just and proper.

APPLICABLE LAW & DISCUSSION

"A de facto merger occurs when a transaction, although not in form a merger, is in substance a consolidation or merger of seller and purchaser." *Cargo Partner AG v. Albatrans, Inc.*, , 45 (2d Cir. 2003). The rationale behind the de facto merger doctrine is that a successor company which successfully takes over another company in its entirety should assume not only the benefits of the acquired company, but also its liabilities.

Klumpp v. Bandit industries Inc., 113 F.Supp.2d 567, 573

(W.D.N.Y. 2000). The purpose of the de facto merger doctrine is

to "avoid the patent injustice which might befall a party simply because a merger has been called something else." *Cargo Partners* 352 F.3d at 46.

To determine whether a transaction constitutes a de facto merger, the court must weigh several factors on a case-by-case basis. See *Sweatland v. Park Corporation*, 181 A.D.2d 243 (4th Dept. 1992). The four factors, considered the hallmarks of a de facto merger are: (1) continuity of ownership; (2) cessation of ordinary business and dissolution of the acquired corporation as soon as possible after the transaction; (3) the buyer's assumption of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and, (4) continuity of management, personnel, physical location, assets, and general business operation." *In re AT&S Transportation LLC*, 22 A.D.3d 750, 752 (2d Dept. 2005). A de facto merger finding does not require the presence of each of these factors, "rather, these factors are only indicators that tend to show a de facto merger." *Sweatland*, 181 A.D.2d at 246.

As a general rule, a "corporation which acquires the assets of another is not liable for the torts of its predecessor." *In re New York City Asbestos Litigation*, 15 A.D.3d 254, 255 (1st Dept. 2005). However, there are four exceptions to this general rule. A buyer may be liable for the liabilities of the seller

if: (1) the buyer expressly or impliedly assumed the seller'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. *In re AT&S Transportation LLC* 22 A.D.3d at 752.

In the instant case, Rao's, in opposition to JRS's motion, contends that to determine whether there was continuity of ownership between Soffes Wood and JRS, the parties must engage in discovery to ascertain the identity and number of shareholders in both Soffes Wood and JRS and whether there is any direct or indirect ownership linking the two entities.

"Continuity of ownership exists where the shareholders of the predecessor corporation become direct or indirect shareholders of the successor corporation as a result of the successor's purchase of the predecessor's assets..." *In re New York City Asbestos Litigation*, 15 A.D.3d at 256. The United States Court of Appeals for the Second Circuit has determined that in New York, continuity of ownership is the essence of a merger. *Cargo Partners* 352 F.3d at 47. Although, standing alone, continuity of ownership will not establish a de facto merger, it is a necessary element. *In re New York City Asbestos Litigation*, 15 A.D.3d at 256.

Rao's has failed to identify any shareholders or directors of Soffes Wood who became shareholders of JRS or assumed any position at JRS as a result of the Agreement. Similarly, in *Buja v. KCI Konecranes International PLC*, 815 N.Y.S.2d 412 (Supreme Court Monroe County 2006) the court held that there was no continuity of ownership because there was no evidence that any shareholders of the seller became direct or indirect shareholders of the buyer as a result of the asset purchase. *Id.* at 416. However, even if Rao's could establish that there was continuity of ownership between Soffes Wood and JRS, alone, that would not be sufficient to make a de facto merger finding. "Because continuity of ownership is the 'essence of a merger,' it is a necessary element of any de facto merger finding, although not sufficient to warrant such a finding by itself." *In re New York City Asbestos Litigation*, 15 A.D.3d at 256.

Additionally, in *In re New York City Asbestos Litigation*, the First Department determined that there was no continuity of ownership because the buyer paid for the seller's assets with cash, not stock, and none of the shareholders of the seller became shareholders of the buyer. *Id.* In the instant case, Rao's has failed to establish with any specificity continuity of ownership, namely stockholders. Additionally, per the Agreement, JRS paid for Soffes Wood's assets with cash. The Agreement provides:

"In consideration for the Assets, Buyer agrees to pay to Seller FIVE HUNDRED THOUSAND and 00/100 DOLLARS (\$500,000) upon the Closing by certified check or wire transfer (the "Closing Date Payment")..."

"Several New York courts have held that because continuity of ownership is the essence of a merger, a de facto merger will not be found in the absence of this element." *New York v. Nat'l Serv. Indus.*, 460 F.3d 201, 212 (2d Cir. 2006). In the instance case, there is no proof of continuity of ownership.

Rao's further alleges that per the asset purchase, Soffes Wood no longer exists. "The dissolution criteria for a de facto merger 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." Therefore, a legal dissolution is not necessary for a finding of de facto merger. *In re New York City Asbestos Litigation*, 15 A.D.3d at 257. Rao's has allegedly conducted multiple internet searches and has not found any indication that Soffes Wood continues to be an operating business, as there allegedly is no website for the company. Rao's has provided two listings that reference a business name containing "Soffes Wood" which lists the current JRS telephone number of its New York City office. However, per Section 6(k) of the Agreement Soffes Wood was not

rendered insolvent as a result of the asset purchase. Section 6(k) states:

"Solvency. Sellers are not now insolvent and will not be rendered insolvent by any of the Contemplated Transactions. As used in this section, "insolvent" means that the sum of the debts and other probable Liabilities of each Seller exceeds the present fair saleable value of each Seller's assets."

Additionally, the official website of the New York State Department of State, Division of Corporations, lists the "Current Entity Status" of Soffes Wood as "Active." In *Buja*, the court relied on the fact that the seller corporation was listed in the New York State Division of Corporations as in active status to hold that the corporation was not dissolved as a result of the asset purchase. *Buja* 815 N.Y.S.2d at 416. Furthermore, the court in *Klumpp*, held that the seller corporation remained a viable company subsequent to the asset purchase. The court stated that the fact that the seller corporation was named as a defendant in the suit "disproved plaintiff's contention that there was a de facto merger between the [seller and buyer]." *Klumpp* 113 F.Supp.2d at 573. It is evident that Soffes Wood remained a viable company following the asset purchase. A finding of dissolution cannot be made for a seller corporation that survives "as a distinct, albeit meager, entity." *Schumacher v. Richard Shear Company*, 59 N.Y.2d 239,

245. Pursuant to the mere continuation exception, "if the predecessor corporation continues to exist after the transaction, in however gossamer a form, the mere continuation exception is not applicable." *Klump*, 113 F. Supp. at 571.

Another factor that Rao's must sufficiently establish is that JRS assumed the liabilities ordinarily necessary for the continuation of Soffes Wood's business. Section 4(b) of the Agreement provides:

"Assumption of Certain Liabilities. '...Buyer shall not assume... any obligations or liabilities of Sellers except [those] arising under the Assets to be performed in respect of periods from and after the Closing Date (collectively the "Assumed Liabilities").'"

Pursuant to the Agreement, JRS only assumed the assets of Soffes Wood relating to its existing business with North Fork Bank. The Recitals section of the Agreement states:

"**WHEREAS**, Sellers are interior design firms that provide design services to North Fork Bank and Capital One and all subsidiaries and affiliates thereof (collective, "North Fork Bank") (the "Business"); and

"**WHEREAS**, Sellers desire to sell, and Buyer desires to purchase, the Assets for the consideration and on the terms set forth in this Agreement."

"'Assets' is defined in Section 2(a) and 2(b)"

"'Business' is defined in the Recitals."

Sections 2(a) and 2(b) define Assets as follows:

"(a) Purchase of Assets. Upon the terms and subject to the conditions set forth in this Agreement, Sellers shall sell, convey, assign, transfer, and deliver to Buyer, and Buyer shall purchase and acquire from Sellers, at Closing, free and clear of any Encumbrance of any kind, except as specifically set forth herein, all of Sellers' right, title and interest in and to all of Seller's property and assets relating to the Business, whether real, personal, or mixed, tangible and intangible, of every kind and description, wherever located, described below (but excluding the Excluded Assets):"

"(b) Assumption of Assets. Upon the terms and subject to the conditions set forth in this Agreement, Sellers shall assign & deliver to Buyer, and Buyer shall assume from Sellers, at Closing, free and clear of any Encumbrance of any kind, except as specifically set forth herein, all of Seller's rights, and interest in and to the following Assets:

- (i) The personal property leases set forth on Schedule 2(b)(i)
- (ii) The Lease and the security deposit made by Soffes Wood, Inc. under and pursuant to the terms of the Lease, and
- (iii) The Sublease and the security deposit made by Calvin Kiffner, RA, as subtenant, under and pursuant to the terms of the Sublease.

All of the property and assets to be transferred to Buyer hereunder, as provided in Sections 2(a) and 2(b) are herein referred to collectively as the 'Assets'".

It is clear from the above provisions in the Agreement that the assets purchased by JRS are limited to the "Business" defined in the recitals as "North Fork Bank and Capital One and all subsidiaries and affiliates thereof." Thus, the Agreement is

not applicable to Soffes Wood's other business relationships, including the architectural services that were provided to Rao's property.

Additionally, Section 8(a) of the Agreement provides:

"(a) No Assumption of Liabilities. This Agreement shall not be construed or interpreted in any manner whatsoever to constitute an agreement or undertaking on the part of Buyer to assume liability for, or pay any of, Sellers' Liabilities, debts, Taxes, duties or other obligations whatsoever, except as is specifically provided in this Agreement."

The recitals section provides:

"'Assumed Liabilities' is defined in Section 4(c)."

Section 4(c) provides:

"(c) Excluded Liabilities. Buyer shall not assume any liabilities, obligations or commitments of Sellers or an affiliate of Sellers of any kind or nature, known or unknown, accrued, absolute, contingent or otherwise, whether now existing or hereafter arising whatsoever that are not included within the definition of Assumed Liabilities (the "Excluded Liabilities")."

It is clear from these Agreement provisions that JRS did not assume any liabilities or obligations of Soffes Wood related to the architectural services to Rao's property or arising from Soffes Wood's other business relationships.

Finally, under the fourth criterion, Rao's contends that there was continuity of a physical location, general business

operation, and significant contract for work. Rao's points to the fact that the business operations of both companies is the same, namely architectural design services, and that JRS assumed the lease for Soffes Wood's New York City office space. JRS also acquired tangible personal property of Soffes Wood along with approximately \$120,000 worth of capital improvements on the leased premises. Although both companies appear to have similar general business operations, pursuant to the Agreement JRS only acquired Soffes Wood's North Fork Bank business. Furthermore, the fact that JRS's assumed Soffes Wood's lease is not sufficient to establish a de facto merger. In *Nettis v. Levitt*, 241 F.3d 186 (2d Cir. 2001) pursuant to an Asset Purchase Agreement, the buyer company acquired "all of [the seller's] real property, its tangible personal property, its inventory...its contract rights...and its business records... Few assets of note were excluded. The purchaser also assumed [the seller's] lease and contract obligations...but the APA purported to exclude all other liabilities." In that case the court nevertheless held that plaintiff could not prove that the transaction was anything but an asset purchase and not a de facto merger. *Id* at 191. Therefore, in the instant case even if Rao's could satisfy the fourth criterion, it would not be determinative of a de facto merger ("In our view, possible satisfaction of only the third and fourth criteria does not

suffice to create a triable de facto merger issue.") *In re New York City Asbestos Litigation*, 15 A.D.3d at 256

CPLR 3211(a)(1) and (7), provides:

(a) **Motion to dismiss cause of action.** A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
(1) a defense is founded upon documentary evidence;
or (7) the pleading fails to state a cause of action.

Pursuant to CPLR 3211(a)(7), "the pleading is to be liberally construed, accepting all the facts as alleged in the pleading to be true and according the plaintiff the benefit of every possible inference."

A court may grant a motion to dismiss pursuant to CPLR §3211 "when documentary evidence submitted, conclusively establishes a defense to the asserted claims as a matter of law." *Beal Savings Bank v. Sommer et al*, 8 N.Y.3d 318, 324 (2007). An unambiguous contract is a matter of law, and therefore the court should look to the contract to understand the parties' intentions and the contract should be enforced according to its terms. "The court should construe the agreements so as to give full meaning and effect to the material provisions." *Beal Savings Bank*, 8 N.Y.3d at 324. In the instant case, Rao's has not successfully established the existence of a de facto merger pursuant to the Agreement because Rao's has not

sufficiently satisfied any of the four criterion which are the hallmarks of a de facto merger. In *Lovisa Contr. Co. v. Metropolitan Transportation Authority*, 198 A.D.2d 333 (2d Dept. 1993), the court dismissed plaintiffs complaint because it "contained little more than bare legal conclusions and factual claims which are either inherently incredible or flatly contradicted by documentary evidence." An example of which is Rao's allegation that as a result of the transaction, Soffes Wood has been dissolved. However, pursuant to Section 2(c) of the Agreement, Soffes Wood retained other assets including "its trade name, taxpayer identification numbers, its corporate charter and other assets that demonstrate that Soffes Wood will remain an independent company.

In the instant case, all of Rao's contentions have been struck down by the provisions in the Agreement and it has failed to successfully meet any of the elements necessary to make a de facto merger finding. Although Rao's states that further discovery is necessary to establish that there was continuity of ownership between Soffes Wood and JRS, even if they can satisfy this element, alone, it is not sufficient to warrant a de facto merger finding. Therefore, further discovery is not necessary.

CONCLUSION

ACCORDINGLY, it is

ORDERED that the motion of defendant JRS Architects, PC to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and contained against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein.

Dated: 04/28/11

FILED

ENTER: MAY 09 2011

NEW YORK
COUNTY CLERK'S OFFICE
[Signature]
J.S.C.