

<b>90 Broad Owner, LLC v Flomenhaft &amp; Cannata, LLP</b>
2011 NY Slip Op 32973(U)
November 9, 2011
Supreme Court, New York County
Docket Number: 116934/09
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

JANE S. SOLOMON

PRESENT: \_\_\_\_\_

PART 55

Justice

Index Number : 116934/2009

90 BROAD OWNER, LLC

vs.

FLOMENHAFT & CANNATA, L.L.P.

SEQUENCE NUMBER : 002

RENEWAL

INDEX NO. \_\_\_\_\_

MOTION DATE 10/3/11

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1-3  
4-5  
5

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 enclosed memorandum decision and order.

FILED

NOV 10 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 11/9/11

  
JANE S. SOLOMON J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 55

-----X  
90 BROAD OWNER, LLC,

Plaintiff,

-against-

FLOMENHAFT & CANNATA, LLP, MICHAEL  
FLOMENHAFT, and JACOBY & MEYERS, LLP,

Defendants.  
-----X

Index No. 116934/09

DECISION AND ORDER

**FILED**

**NOV 10 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

SOLOMON, J.:

Plaintiff 90 Broad Owner, LLC (90 Broad) moves to renew a prior motion that resulted in the dismissal of its claim against defendant Jacoby & Meyers, LLP (J&M), a law firm. 90 Broad also seeks leave to re-plead with an amended complaint. The motion is denied for the following reasons.

90 Broad leased office space to defendant law firm Flomenhaft & Cannata, LLP (F&C), and sues for breach of that lease. J&M was sued as the successor to F&C's liability under the doctrine of continuation of business or de facto merger (Prior Order, dated July 21, 2010, annexed to Notice of Motion, Ex. 4).<sup>1</sup> 90 Broad alleged that because J&M hired several F&C attorneys, J&M should be deemed a continuation of F&C's business

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<sup>1</sup> Relevant facts, as known at the time, are set forth in the Prior Order.

and therefore is liable for payment of rent under F&C's lease.

The Prior Order granted J&M's motion to dismiss because 90 Broad had failed to allege the elements of a de facto merger. When the prior motion was submitted, 90 Broad already had settled its claim against F&C and defendant Michael Flomenhaft (Flomenhaft), who guaranteed F&C's obligation.

In the instant motion, 90 Broad claims that renewal under CPLR 2221(e) should be granted because it has obtained new information since the Prior Order issued that allow it to establish its de facto merger claim against J&M. It further contends that it should be permitted leave to serve an amended complaint, although no proposed amended pleading is provided for consideration.

In connection with settling the claim against him, which seems to be related to his resumption of occupancy in plaintiff's building, Flomenhaft provided 90 Broad with an affirmation describing his relationship with J&M (Flomenhaft Aff., Notice of Motion, Ex. 5): He states as follows: He joined J&M to start a new practice group, and although F&C was never dissolved, it moved nearly all of its records, case files, computers and furniture to J&M's office. His partner at F&C, Benedene Cannata, became a non-equity partner at J&M. He posted a statement on F&C's website that F&C had moved its practice to

[\*4]

J&M. J&M helped F&C wind up its business by providing money for salaries and the physical relocation of F&C's office material. Flomenhaft was named the director of J&M's neurolaw trial group, in which capacity he helped J&M assess cases, and advised on how to manage these cases.

Flomenhaft's tenure with J&M did not last long, and he left the firm after just eight months. He then sued J&M's managing partner, Andrew Finkelstein, Esq., in Supreme Court, Orange County, alleging tortious interference and other claims. In connection with that lawsuit, Finkelstein, who also is the managing partner of Finkelstein & Partners, LLP, a law firm affiliated with J&M, submitted an affidavit that 90 Broad relies on as well (Notice of Motion, Ex. 6). The Finkelstein affidavit, dated August 4, 2010, states that J&M agreed to employ Flomenhaft in March 2009. After relating a variety of problems with Flomenhaft's employment, Finkelstein states that he "understood and appreciated that the de-facto merger of Flomenhaft's practice into J&M required time to develop before it could be definitively judged a success or failure" (Finkelstein Aff., paragraph 8). 90 Broad cites the latter comment as an admission by J&M that it had a de facto merger with F&C.

90 Broad also relies on the June 14, 2010 affirmation by Jennifer Safier, Esq., an associate of the law firm Fine, Olin

[\* 5]

& Alderman, LLP (Fine Olin) submitted in connection with a motion for a charging lien made in a personal injury lawsuit. The associate states that "Plaintiff was initially represented by [F&C], which later merged with [J&M]" (Aff. of Jennifer Safier, Esq., Notice of Motion, Ex. 8, paragraph 4).

90 Broad's motion is denied because, even when the above material is considered, it has failed to rebut the evidence provided in the prior motion.

The elements of a de facto merger are set forth in the Prior Order, and are not contested here. It states:

The elements of a de facto merger include (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 (*In re New York City Asbestos Litigation*, 15 AD3d 254, 256 [1st Dept, 2005]). Continuity of ownership is "a necessary element of any de facto merger finding" (*Id.*), and is found when the parties to the transaction "become owners together of what formerly belonged to each" (*Id.*).

Prior Order, 2-3.

It is uncontested that Flomenhaft was hired by J&M as an associate (see Hearing Transcript, Notice of Motion, Ex. 7, 4), so there is no continuity of ownership. Flomenhaft admits

[\* 6]

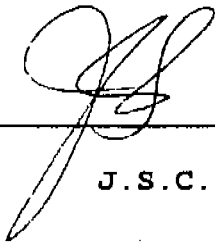
that he, and not J&M, retained ownership of many of F&C's assets. Indeed, according to Finkelstein's August 4, 2010 affidavit, relied upon by 90 Broad, Flomenhaft took F&C's furniture and other property with him when he quit J&M in December 2009 (Finkelstein Aff., paragraph 10). Flomenhaft also maintained that he was entitled to legal fees in matters he brought to J&M, an indication that, in his mind, J&M had not taken possession of the right to collect these fees (Hearing Transcript, Ex. 7). By his conduct, Flomenhaft has demonstrated that F&C and J&M did not "become owners together of what formerly belonged to each" (Prior Order, 3). 90 Broad's reliance on the recent decision in *Kaur v American Transit Ins. Co.* (86 AD3d 455 [1<sup>st</sup> Dept 2011]) is unpersuasive because the facts of that case are significantly different from those herein.

Finally, Ms. Safier, as an associate of an affiliated law firm, is not in a position to make admissions binding upon J&M. New York adheres to the rule that the statements of an agent may be received against the principal only if the agent had authority to speak on behalf of the principal (see, *Prince, Richardson on Evidence* § 8-208, at 515 [Farrell 11<sup>th</sup> Ed.]). In light of the foregoing, there is no basis for granting leave to amend the complaint. Accordingly, it hereby is

ORDERED that plaintiff's motion to renew and for leave  
to amend the complaint is denied.

Dated: November 9, 2011

ENTER:

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

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