SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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LONG ISLAND MEDICAL AND GASTROENTEROLOGY ASSOCIATES, P.C. and DAY OP OF NORTH NASSAU, INC.,

Plaintiffs,

-against-

LLIGAM ASSOCIATES, INC., formerly known as MAGILL ASSOCIATES, INC. and TEMPOSITIONS, INC.,

Defendants.

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TRIAL/IAS PART: 20
NASSAU COUNTY

Index No: 005500-10
Motion Seq. No: 2
Submission Date: 10/7/11

The following papers having been read on this motion:

Notice of Motion and Statement of Facts Pursuant to 22 NYCRR § 202.70.....x
Affidavit in Support and Exhibits.....x
Affirmation in Support and Exhibits.....x
Memorandum of Law in Support.....x
Affirmation in Opposition and Exhibits.....x
Counter Statement of Facts Pursuant to 22 NYCRR § 202.70.....x
Memorandum of Law in Opposition.....x
Defendant's Responses to Plaintiffs' Counter Statement of Facts.....x
Memorandum of Law in Reply/Further Support.....x

This matter is before the Court for decision on the motion filed by Defendant TemPositions, Inc. ("TemPositions") on September 14, 2011 and submitted on October 7, 2011. For the reasons set forth below, the Court denies the motion.

BACKGROUND

A. Relief Sought

TemPositions moves for an Order, pursuant to CPLR § 3212, granting summary judgment dismissing the Amended Verified Complaint ("Complaint") in its entirety.

Plaintiffs oppose the motion.

B. The Parties' History

The parties' history is outlined in detail in a prior decision of the Court dated October 26, 2010 ("Prior Decision") and the Court incorporates the Prior Decision herein by reference. As noted in the Prior Decision, in which the Court denied Plaintiffs' motion for a default judgment against Defendant Lligam Associates, Inc., formerly known as Magill Associates, Inc. ("Magill"), Plaintiffs allege in the Amended Complaint that Magill and TemPositions ("Defendants") are alter egos of each other, and allege facts in support of that assertion. On or about July 2, 2007, Defendants recommended Sonia Morales Bonilla ("Bonilla") for the Position of Practice Administrator and Plaintiffs hired Bonilla. Plaintiffs subsequently terminated Bonilla after discovering that she had embezzled approximately $900,000 of Plaintiffs' funds. The Amended Complaint contains four (4) causes of action. In the first, Plaintiffs allege that Defendants breached their contract with Plaintiffs. In the second, Plaintiffs allege that Defendants were grossly and wantonly negligent. In the third, Plaintiffs seek compensation for damage that Bonilla caused to their computer system and operational manuals. In the fourth, Plaintiffs seek the refund of the $15,000 agency fee. Plaintiffs demand judgment against the Defendants, jointly and severally.

In support of the instant motion, James A. Essey ("Essey"), the President and Chief Executive Officer of TemPositions affirms that the contract ("Contract") at issue was between Plaintiffs and Magill and, therefore, TemPositions cannot be held liable for the Contract as it was neither a party to, nor intended beneficiary of, the Contract. Essey submits that "it would appear that the intended party was Essey, LLC, who acquired certain specific assets of [Magill], including the trade name "Magill Associates" and does business as "The TemPositions Group of Companies" (Essey Aff. in Supp. at ¶ 5). TemPositions is a member of the TemPositions Group of Companies. Essey avers that Plaintiffs were made aware of Essey, LLC when they were

provided a copy of the Asset Purchase Agreement but notes that Plaintiffs did not amend their complaint to name Essey, LLC. Essey submits that neither TemPositions nor Essey is liable to Plaintiffs.

Essey affirms, *inter alia*, that 1) Essey, LLC, of which Essey is the Managing Member, entered into an Asset Purchase Agreement with Magill dated June 28, 2007 (Ex. 2 to Essey Aff. in Supp.), pursuant to which Essey, LLC acquired certain assets of Magill; 2) Essey, LLC did not acquire the stock of Magill, which continued to exist after July 2, 2007 under the name Lligam Associates, Inc., as the name "Magill Associates" was included in the asset purchase; 4) Joel Hamroff ("Hamroff"), to whom Essey is not related, was the sole shareholder of Magill, did not acquire an ownership in Essey, LLC or TemPositions and was never a shareholder, officer, director or member; 5) Hamroff became an employee of Essey, LLC effective July 2, 2007 until his death in December of that year; 6) pursuant to the terms of the Asset Purchase Agreement, Essey, LLC did not assume the liabilities of Magill; 7) only specific assets were include in the Asset Purchase Agreement, including clients lists; 8) no receivables were acquired as part of the Asset Purchase Agreement, and that Agreement provided for a "carve-out of "pre-closing" receivables which would remain the assets of [Magill]" (Essey Aff. in Supp. at ¶ 13); 9) the contract between Plaintiffs and Magill was not included as an asset acquired by Essey, LLC from Magill; and 10) neither Essey, LLC nor TemPositions received any compensation for the Bonilla placement.

Counsel for TemPositions provides documentary evidence, including TemPosition's Verified Answer with Cross-Claims, a June 25, 2007 email produced by Plaintiffs regarding the Bonilla hiring and a check in the amount of $15,000 payable to Magill which refers to Bonilla in the subject line. *See* Exhibits 7-12 to DeVito Aff. in Supp.

Counsel for Plaintiffs provides documentary evidence, including transcripts of the depositions of Essey and Dr. Nathan Shulman, a printout from the TemPositions website and an employment agreement between "Magill/Tempositions ("Company") and Kadejhra Barnes" effective as of July 2, 2007. *See* Exhibits 1-10 to Epstein Aff. in Opp.

C. The Parties' Positions

TemPositions submits that the evidence submitted establishes that the Bonilla Contract was not an acquired asset included in the Asset Purchase Agreement and, in fact, was expressly

included and, therefore, neither TemPositions nor Essey, LLC can be held liable for that Contract. TemPositions contends, further, that neither TemPositions nor Essey, LLC is the alter ego or successor in interest of Magill and, therefore, there is no basis for holding those entities liable for any breach of the Bonilla Contract. TemPositions argues that no *de facto* merger occurred in light of the fact, *inter alia*, that 1) Hamroff, the sole shareholder of the predecessor corporation, did not become a shareholder, member, director or officer of the successor entity as a result of the Asset Purchase Agreement; and 2) Hamroff, rather than acquiring an interest in Essey, LLC or TemPositions, instead became an employee of Essey, LLC, further supporting TemPosition's argument that there was no continuity of ownership.

TemPositions also argues that the Court should dismiss the Second Cause of Action sounding in gross negligence based on the principle that a breach of contract is not to be considered a tort unless a legal duty independent of the contract has been violated. Given Plaintiffs' failure to allege the violation of such an independent legal duty, the Second Cause of Action is simply a restatement of the breach of contract claim, and should be dismissed.

Plaintiffs oppose the motion, submitting that the motion papers establish that 1) TemPositions acquired Magill's business on July 2, 2007, pursuant to the Asset Purchase Agreement dated June 28, 2007; 2) pursuant to that Agreement, TemPositions acquired Magill's good will, trade name, accounts receivable, and tangible and intangible assets; 3) TemPositions hired Hamroff after the acquisition and he continued working until his death; 4) TemPositions signed several Magill employees to employment contracts, including Kadejhra Barnes ("Barnes") who was the recruiter who placed Bonilla with Plaintiffs; 5) a July 2, 2007 email from Hamroff to Barnes (Ex. 6 to Epstein Aff. in Opp.) supports the inference that Barnes was a TemPositions' employee; 6) Essey testified at his deposition that Hamroff was authorized to have an address at the Magill/TemPositions domain site (Ex. 1 to Epstein Aff. in Opp. at p. 54) which, Plaintiffs argue, demonstrates that Hamroff was authorized to identify himself as an employee of TemPositions on his email; and 7) TemPositions intended to benefit from Magill's good will, as demonstrated by the fact that Tempositions acquired Magill's trademark and modified its website/domain name to reflect its continuation of Magill's business. Plaintiffs argue that these facts "plainly evidence Tem[P]ositions' intent to absorb and continue Magill's operations" (Ps' Memorandum of Law at p. 6). Thus, Plaintiffs contend, there exist material

issues of fact whether TemPositions is liable under the *de facto* merger doctrine and summary judgment is not appropriate.

RULING OF THE COURT

A. Summary Judgment Standards

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

B. *De Facto* Merger Doctrine

The purchaser of a corporation's assets ordinarily does not, as a result of the purchase, become liable for the debts of its predecessor. *AT&S Transp., LLC v. Odyssey Logistics & Tech. Corp.*, 22 A.D.3d 750, 752 (2d Dept. 2005), citing *Schumacher v. Richards Shear Co.*, 59 N.Y.2d 239, 244-245 (1983). There are, however, four exceptions to this rule. Generally, the buyer is not liable for the liabilities of the seller unless: 1) the buyer 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. *Id.*, quoting *Klumpp v. Bandit Indus., Inc.*, 113 F. Supp. 2d 567, 571 (2000) (internal quotation marks omitted). A transaction structured as a purchase of assets may be deemed to fall within this exception as a *de facto* merger. *Id.*, citing *New York City Asbestos Litig.*, 15 A.D.3d 254 (1st Dept. 2005).

C. Viability of Tort Claim

A tort claim is not duplicative of a contract claim if it arises out of the violation of a legal duty that springs from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent on the contract. *Community Counseling & Mediation Services v. Chera*, 78 A.D.3d 554 (1st Dept. 2010), quoting *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 389 (1987).

D. Application of these Principles to the Instant Action

The Court denies the motion, based on the conclusion that there exist issues of fact regarding the applicability of the *de facto* merger doctrine and, therefore, whether TemPositions should be liable under the Bonilla Contract. The Court reaches this conclusion in light of evidence, including the retention of employees following the execution of the Asset Purchase Agreement, and the website and emails which suggest that Magill and TemPositions were viewed as a single entity, that supports the conclusion that TemPositions was a mere continuation of Magill. The Court also denies the motion to dismiss the cause of action for gross negligence, based on the Court's conclusion that the allegations in the Complaint (Ex. 7 to DeVito Aff. in Supp.) regarding representations made by Defendants, *e.g.*, that "they had interviewed at least one (1) prior medical employer of Bonilla, and received no negative information from her prior employer" (Compl. at ¶ 18), support the conclusion that this cause of action arises out of the violation of a legal duty that springs from circumstances extraneous to the Contract.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Pre-Trial Conference on November 4, 2011 at 9:30 a.m.

ENTER

DATED: Mineola, NY
November 1, 2011

HON. TIMOTHY S. DRISCOLL
J.S.C.