

Shields v First Ave. Bldrs., LLC

2013 NY Slip Op 30160(U)

January 14, 2013

Supreme Court, Westchester 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. Blodde
Justice

PART 11

Index Number : 100620/2007
SHIELDS, JAMES
vs.
FIRST AVENUE BUILDERS LLC
SEQUENCE NUMBER : 007
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 10/4/12
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached Memorandum Decision and Order

FILED
JAN 30 2013
NEW YORK
COUNTY CLERKS OFFICE

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

Dated: January 17, 2013

[Signature], J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT 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.,

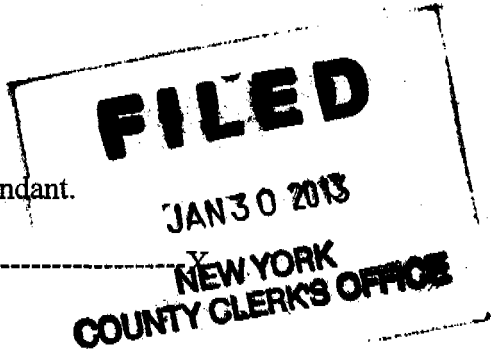
Third-Party Plaintiff,

-against-

MC & O MASONRY, INC.,

Third-party Defendant.

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



Defendant third-party plaintiff Worthington S.p.A. (“Worthington”) moves for renewal of its motion for summary judgment dismissing the complaint, cross claims and counterclaims against it. Plaintiffs and defendants First Avenue Builders LLC Housing Partnership Development Corporation and FLSM Associates, LLC (“First Avenue”) (together “the opposing parties”) oppose the motion, which is granted for the reasons below.

Background

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 Mfg"), 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).

Before the completion of discovery, Worthington moved for summary judgment, asserting that the October 15, 1984 agreement identified in the complaint, which it produced in discovery and 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 Mfg's stock, or 50.14%. Worthington argued that as a result of the purchase, Worthington became Reinert Mfg'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 argued that Reinert Mfg continued to exist as a separate corporation after the October 15, 1984 agreement and submitted certificates showing that in June 1986, Reinert Mfg. 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 Mfg amended its Articles of Incorporation for the purpose of changing the company's name to Wortech. Worthington also submitted a certificate indicating

4]

that on December 21, 1989, Wortech filed Articles of Dissolution with the Kentucky Secretary of State.

Plaintiffs opposed the motion, arguing, *inter alia*, that it was premature as it was made before the completion of discovery, including the deposition of a representative from Worthington. In addition, in its supplemental opposition, plaintiffs submitted the affidavit of Reinert Mfg's founder and former President, Gerald Reinert who stated 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 its decision and order dated August 27, 2010, this court denied Worthington's motion for summary judgment with leave to renew upon completion of relevant discovery, finding that in light of the factually intensive nature of the de facto merger doctrine, "plaintiffs are entitled to take the deposition testimony of a representative of Worthington before it can be determined whether this doctrine applies." The court also wrote that "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."

Following the court's issuance of its decision and order, Worthington was unable to locate documents relating to the 1984 stock transaction or the subject pump or an employee with knowledge of these subjects. Pursuant to court order, Worthington provided the other parties

with an affidavit from its General Manager detailing the efforts Worthington undertook and its inability to locate documents or employees with relevant knowledge. The court advised the parties that if they still wanted to depose a representative of Worthington, they should provide notice to Worthington; however, no such notice was given.

Worthington now moves to renew its summary judgment motion based on additional evidence. This evidence includes documents subpoenaed from Frost Brown Todd, LLC ("Frost Brown"), which served as Worthington's counsel in connection with the 1984 transaction. Worthington maintains that these documents show an intent that Reinert Mfg, which subsequently became Wortech, to continue to operate after the 1984 transaction until it was dissolved in 1989. These documents include, *inter alia*, the Stock Purchase Agreement, dated November 20, 1984, which describes Reinert Mfg as a "subsidiary" of the purchaser (i.e. Worthington), and provides for Worthington to purchase additional stock of Reinert Mfg on the second, third and fourth anniversary of the closing.

Worthington also submits a five-year employment agreements entered between Reinert Mfg and Mr. Reinert and another employee of Reinert Mfg, David Venneman, after the closing of the 1984 transaction. The employment agreements state that Worthington "acquired a majority interest in Reinert" and that the employment of the two men was "critical" to the operation of Reinert. Worthington also submits an Agreement and Bill of Sale showing Reinert's/Wortech's sale of \$400,000 worth of assets to Jones Manufacturing in December 1986. In further support of these documents, Worthington submits the affidavits of Jack Jones and

Mike Jones, the owners of Jones Manufacturing, who authenticate the Bill of Sale for this transaction. Worthington maintains that this evidence and various other evidence demonstrates that Reinert Mfg continued to operate as a separate entity after the 1984 transaction.

Worthington also submits the affidavit of Samuel Scoggins an attorney for Frost Brown, who served as Worthington's attorney from 1986 to 1990, and who produced many of the documents on which Worthington relies and authenticates them as business records. Mr. Scoggins avers that Reinert Mfg was operating as a going concern during the years after the 1984 transaction and that he "helped ensure that proper corporate formalities were followed during the Reinert/Wortech business operations until it dissolved due to financial struggles several years after Worthington became a majority shareholder." (Scoggins Aff. ¶ 13).

In addition, Reinert Mfg submits an affidavit from Gerald Reinert who acknowledges his 2009 affidavit submitted in connection with the prior motion was "confusing" and clarifies that Reinert Mfg only sold Worthington the majority of his shares in exchange for cash and thereby transferred control over Reinert Mfg to Worthington as Worthington became the new majority shareholder. He also states that he did not receive any stock of Worthington or other ownership interest in Worthington as part of the 1984 transaction.

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 NY2d

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 NY2d 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).

With respect to the continuity of ownership aspect the First Department has written:

the first criterion, continuity of ownership, exists where the shareholders of the predecessor corporation become direct or indirect shareholders of the successor corporation as the result of the successor's purchase of the predecessor's assets, as occurs in a stock-for-assets transaction. Stated otherwise, continuity of ownership describes a situation where the parties to the transaction “become owners together of what formerly belonged to each” (Cargo Partner AG v Albatrans, Inc., 352 F3d 41, 47 [2d Cir 2003] [applying New York law]). It has been held that, 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 (*id.* at 46-47).

8]
Matter of New York City Asbestos Litig., 15 AD3d 254, 256 (1st Dept 2005).

Here, the evidence submitted by Worthington is sufficient to make a prima facie showing that no de facto merger took place between Reinert Mfg and Worthington such that Worthington would be responsible for Reinert Mfg's liabilities. Specifically, that evidence shows that Worthington purchased the majority of Reinert Mfg's stock and that Reinert Mfg (and subsequently Wortech) maintained a separate existence and continued to operate as a business until Wortech's dissolution in 1989. In addition, to support the absence of continuity of ownership, Worthington asserts that there is no evidence that Worthington stock was transferred to Reinert Mfg and notes that Mr. Reinert states in his affidavit that he did not receive any Worthington stock or other ownership interest in Worthington in connection with the 1984 transaction.

Moreover, the opposing parties fail to controvert this showing. First, plaintiffs' arguments that the court should disregard Worthington's evidence as the documents "are not certified" and that there is an insufficient foundation for the introduction of business records are availing. Documents introduced by counsel have been held to provide a sufficient basis for granting summary judgment. Alvarez v. Prospect Hospital, 68 N.Y.2d at 325. In any event, Worthington's motion is further supported by the affidavit Mr. Scoggins, who introduces many of the documents relied on by Worthington, and the affidavits of Jack Jones and Mike Jones who corroborate the documents showing that in December 1986, their company purchased concrete pumping equipment from Reinert Mfg.

9]

Furthermore, the opposing parties wholly fail to submit any evidence supporting their claim of de facto merger by, for example, establishing that Reinert Mfg ceased operations after the 1984 transaction or became on mere shell. Likewise, they have failed to present any evidence any continuity of ownership following the transaction.

Next, contrary to First Avenue's position, that Reinert Mfg entered into a requirements contract with a subsidiary of Worthington, for the benefit of both parties, does not raise an issue of fact as to whether there was a de facto merger. Finally, even assuming *arguendo*, that Worthington purchased certain patents from Reinert Mfg, in light of the evidence showing that the 1984 transaction involved the purchase of Reinert Mfg's stock and not the physical and fixed assets of Reinert Mfg and that Reinert Mfg continued to operate as a separate business following the transaction, such evidence is not a basis for denying Worthington's motion for summary judgment.

Accordingly, it is

ORDERED that Worthington's motion for summary judgment is granted and the claims against, cross claim and counterclaim against it are severed and dismissed.

Dated: ~~December 2012~~ January 14, 2013

FILED
S.C.
JAN 30 2013
NEW YORK
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