Rentech, Inc. v SGI, Inc.

2013 NY Slip Op 31409(U)

June 28, 2013

Sup Ct, NY County

Docket Number: 157359/2012

Judge: Anil C. Singh

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INDEX NO. 157359/2012
RECEIVED NYSCEF: 07/01/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH
SUPREME COURT JUSTICE
Justice

PART 61

Index Number : 157359/2012
RENTECH, INC.
vs
SGI, INC.
Sequence Number : 001
DISMISS

INDEX NO. ____
MOTION DATE ____
MOTION SEQ. NO. ____

The following papers, numbered 1 to ____, were read on this motion to/for ____

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 annexed order

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

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

Dated: 6/26/13

HON. ANIL C. SINGH, J.S.C.
SUPREME COURT JUSTICE

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

[*2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61
--X
RENTECH, INC,

Plaintiff,

-against-

SGI, INC., f/k/a SOLENA GROUP, INC.; SOLENA FUELS CORPORATION; SOLENA FUELS, LLC; and SOLENA FUELS, INC.; each Defendant d/b/a SOLENA GROUP and each other,

Defendants.
--X

DECISION AND ORDER
Index No. 157359/2012

HON. ANIL C. SINGH, J.:

Defendants Solena Fuels Corporation; SFI Investors, LLC, named in the Verified Complaint as Solena Fuels, LLC, and Solena Fuels, Inc. move for an Order to Dismiss Plaintiff's Verified Complaint pursuant to CPLR §§ 301 and 302 and CPLR § 3211(a)(7).

Plaintiff opposes and cross-moves for leave to amend the caption of the summons and complaint, amending the name of Defendant Solena Fuels, LLC, to "SFI Investors LLC, f/k/a Solena Fuels, LLC."

This action was commenced in New York based on a forum selection clause in a Contract signed by the non-moving defendant, SGI, Inc.

Plaintiff alleges that while moving Defendants are non-signatories to the forum selection clause, they are bound by the forum selection clause as alter egos of SGI, or as closely related, or successors in interest, or based on de facto merger.

Defendants move to dismiss on the ground that facts have not been alleged to establish that SGI and the moving defendants are closely related so as to permit exercise of jurisdiction

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over the moving Defendants. Nor does the complaint state a cause of action against the moving defendants on the grounds that they are the alter ego of SGI.

The complaint alleges that Plaintiff and SGI entered into an agreement on March 8, 2010, pursuant to which Plaintiff provided technical services for which SKI agreed to pay $80,000. Based on a change order, an additional $20,000 is due. The $100,000 was to be paid by July 1, 2011. Instead of making the payment, Defendant formed Solana Fuels Corp. in April 2012, to benefit from the services and products delivered by Plaintiff to Defendants without payment.

Plaintiff alleges that the business purpose of each Defendant is identical; that each is simply the continuation of SGI; all defendants operate as alter egos of each other; the ownership and management of each Defendant is identical; the office address and office suite of each Defendant is identical; the telephone numbers of each Defendant are identical; each Defendant operates under the common name "Solena Group"; each defendant is a successor-in-interest to SGI; that each defendant has been de facto merged with SGI; that there is no separate identity of each Defendant; and that websites and press releases reflect that the entities are closely related to SGI.

Plaintiff alleges that all the entities are controlled by Dr. Do, who signed the agreement on behalf of SGI. Further, Plaintiff asserts that the business of SGI and the moving defendants is identical - namely, the production of sustainable jet, diesel and marine fuels from biomass. Plaintiff alleges that, in November 2010, SGI (then known as Solena Group, Inc.) issued a press release announcing the use of plaintiff's proprietary Fischer-Tropsch fuel technology. Subsequently, in September 2012, after the incorporation of Solena Fuels Corporation, Solena Fuels stated in a brochure that it was using the "proven Fischer-Tropsch platform." In short,

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Plaintiff maintains that SGI is continuing its business under the umbrella of Solena Fuels.

Dr. Do, the President and CEO of SGI, and Brian Miloski, the CFO of Solena Fuels Corp. and a director of SFI Investors, LLC, have signed sworn affidavits is support of the motion. They maintain that SGI was formed under Delaware law and is the parent company of SFI Investors, LLC, and the indirect parent of Solana Fuels Corporation. SFI Investors, LLC and Solena Fuels Corporation are Delaware corporations. Each conducts business as a separate legal entity, and they were formed for legitimate business purposes. In connection with the formation of SFI Investors, LLC, SGI contributed assets relating to its British Airways project to be located in London, England.

Defendants contend that the investors, directors, shareholders, and management teams of the various named defendants are not identical. SFC holds a patent for technology for the production of a synthetic fuel gas which can be used to produce electricity, jet, or diesel fuel. SFC licenses a portion of this technology to SGI, Inc.

Defendants state that SGI holds a ninety-five and four-tenths percent ownership interest in SFI, received in consideration of its contribution of assets. SFI owns an eighty percent ownership interest in SFC, received in consideration of its contribution of assets. SGI holds an indirect seventy-six and thirty-two one-hundredths percent ownership interest in SFC. SFC continues to develop the British Airways project in London, England.

<u>Legal Standards</u>

In ruling upon a motion to dismiss, the court must "determine whether plaintiffs' pleadings state a cause of action. The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law. In furtherance of this task, we liberally construe the complaint, and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion. We also accord plaintiffs the benefit of every possible favorable inference." (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 N.Y. 2d 144 [2002], internal quotations and citations omitted.)

Choice of Law

"[U]nder common-law rules matters of procedure are governed by the law of the forum. On the other hand, matters of substantive law fall within the course charted by choice of law analysis." *Tanges v. Heidelberg N. Am., Inc.*, 93 N.Y.2d 48, 53 (1999) (internal citations and quotation marks omitted).

In the present case, the Plaintiff is a Colorado corporation with a primary place of business in California. Defendants are Delaware corporations with a primary place of business in Washington D.C. Venue in New York is based solely upon a forum selection clause in a contract between Plaintiff and SGI, Inc. Each of the defendants is a Delaware entity. Therefore, this Court must look to the substantive law of Delaware.

Forum Selection Clause

In New York, a forum selection clause can be enforced against a non-signatory when the non-signatory defendant has a sufficiently close relationship with the signatory and the dispute to which the forum selection clause applies. *See Tate & Lyle Ingredients Ams., Inc. v. Whitefox*

Tech. USA, Inc., 98 A.D.3d 401 (1st Dep't 2012).

The law of Delaware, the state of incorporation of the defendants, provides that "when a control person agrees to a forum, it is foreseeable that the entities controlled by that person which are involved in the deal will also be bound to that forum. The rationale for binding such entities rests on the public policy that forum selection clauses promote stable and dependable trade relations, and it would be inconsistent with that policy to allow the entities through which one of the parties chooses to act to escape the forum selection clause." *Weygandt v. Weco, LLC*, 2009 Del. Ch. LEXIS 87 (Del. Ch. May 14, 2009).

A three-part test is used by Delaware Courts to determine whether a nonsignatory to a contract is bound by a forum selection clause. "First, is the forum selection clause valid? Second, are the nonsignatories third-party beneficiaries, or closely related to, the contract? Third, does the claim arise from their standing relating to the . . . agreement? If all three questions are answered in the affirmative, the forum selection clause will bind the nonsignatory." *Baker v. Impact Holding, Inc.*, 2010 Del. Ch. LEXIS 111 (Del. Ch. May 13, 2010)(internal citations and quotations omitted). "In general, a non-signatory is estopped from refusing to comply with a forum selection clause when she receives a 'direct benefit' from a contract containing a forum selection clause." *Capital Group Cos. v. Armour*, 2004 Del. Ch. LEXIS 159 (Del. Ch. Oct. 29, 2004).

Plaintiff contends that the moving defendants should be bound by the forum selection clause of the contract with SGI. Defendants do not claim that the forum selection clause is invalid as to SGI. Therefore, this Court has jurisdiction over SGI and must determine whether the moving defendants may be held to the forum selection clause of the contract.

Plaintiff has alleged that all of the defendants are controlled by Dr. Do, the individual who signed the contract containing the forum selection clause. Furthermore, Plaintiff has alleged that the moving defendants have "used the corporate fiction of Solena Fuels Corporation, to take and use the Plaintiff's data and technology, in order to benefit by same to Plaintiff's detriment." (Affirmation of Perry Freedman, ¶ 14). As such, Plaintiff has alleged that the claim against the moving defendants arises from their standing relating to the agreement. Therefore, the question is whether the moving defendants are closely related to the contract. *See Baker v. Impact Holding, Inc.*, supra.

Accepting as true all of the facts alleged in the complaint and giving the plaintiff every reasonable inference, Plaintiff has stated facts which could support a finding that the defendants are closely related to the extent necessary to bind them to the forum selection clause. Namely, the address and phone numbers for each defendant are identical, the officers and directors are the same, the defendants collectively operate under the name Solana Group, the defendants are alter egos of each other, and the websites and press releases of the various defendants indicate that they are closely related.

Liability of Related or Successor Entities

"In Delaware when one company sells or otherwise transfers all of its assets to another company, the buyer generally is not responsible for the seller's liabilities, including claims arising out of the seller's tortious conduct. In limited situations, where avoidance of liability would be unjust, exceptions may apply to enable the transfer of liability to the seller. These exceptions include: (1) the buyer's assumption of liability; (2) de facto merger or consolidation; (3) mere continuation of the predecessor under a different name; or (4) fraud." *Magnolia's at Bethany,*

LLC v. Artesian Consulting Engineers, Inc., 2011 WL 4826106 (Del. Super., 2011).

"The elements necessary to create a de facto merger under Delaware law are the following: (1) one corporation transfers all of its assets to another corporation; (2) payment is made in stock, issued by the transferee directly to the shareholders of the transferring corporation; and (3) in exchange for their stock in that corporation, the transferee agreeing to assume all the debts and liabilities of the transferor." *Id.*

Plaintiff has not alleged that SGI has transferred all of its assets to any other single corporation, that such transfer was made in stock, or that the successor corporation agreed to assume any of the debts or liabilities of the transferor. Therefore, the plaintiff has failed to state facts sufficient to support a finding that there has been a de facto merger.

"The continuation theory of successor corporate liability has been narrowly construed by the Delaware courts. The test is not the continuation of the business operation; rather, it is the continuation of the corporate entity. Imposition of successor liability is appropriate only where the new entity is so dominated and controlled by the old company that separate existence must be disregarded. The primary elements of continuation include the common identity of the officers, directors, or stockholders of the predecessor and successor corporations, and the existence of only one corporation at the completion of the transfer." *Id.* (internal citations and quotation marks omitted).

Multiple corporate entities continue to exist. Therefore, successor liability based upon the continuation theory is not alleged in the complaint.

The Delaware Court of Chancery has found that "in some limited situations where an avoidance of liability would be unjust, a purported sale of assets for cash or other consideration

may be found to transfer liabilities of the predecessor corporation ..." *Corporate Property Assocs. 8, L.P. v. Amersig Graphics*, 1994 Del. Ch. LEXIS 45 (Del. Ch. Mar. 31, 1994) (quoting *Knapp v. North American Rockwell Corp.*, 506 F.2d 361, 363-64 [3d Cir. 1974]). The Court found that "the rule whereby a purchasing corporation is obligated to only those liabilities which it expressly assumes is not absolute." Therefore, theories existed upon which the defendants may be held liable, and it would not be proper to grant a motion to dismiss. The Court stated that "a corporation, under the guise of an asset transfer, should not be permitted to take over the essence of another corporation - that is, essentially merge with that other corporation - yet avoid certain liabilities of the predecessor corporation which it does not wish to assume, applies equally to tort and non-tort cases alike." *Corporate Property Assocs. 8, L.P. v. Amersig Graphics*, *Supra.*

Plaintiff has alleged that the business purpose of each Defendant is identical; that each is the mere continuation of SGI, and that they are all operating as alter egos of each other; that the ownership and management of each Defendant is identical; that the office addresses and office suite of each Defendant is identical; that the telephone numbers of each Defendant are identical; that each Defendant operates under the common name Solena Group; that there is no separate identity of each Defendant apart from the other; and that websites and press releases reflect that the entities are closely related to SGI. Taken together with the allegation that each defendant is benefitting from the use of Plaintiff's data and technology, and that some of the defendants were created for the purpose of defrauding the Plaintiff and other creditors, Plaintiff has stated claims sufficient to withstand a motion to dismiss, that the moving defendants have taken over the essence of the predecessor corporation and should be responsible for its liabilities.

Conclusion

Accordingly, upon the affidavits, affirmations and all other papers submitted in support of and opposition to the motion and cross-motion, it is hereby

ORDERED that Defendants' motion to dismiss the complaint is denied; it is further

ORDERED that Plaintiff's cross-motion to amend the caption of the summons and complaint is granted, amending the name of Defendant Solena Fuels, LLC, to "SFI Investors LLC, f/k/a Solena Fuels, LLC."; and it is further

ORDERED that Defendants are to answer the complaint within ten (10) days of service of this order by Plaintiff upon Defendants.

The foregoing constitutes the decision and order of the court.

Date: 6/28/13
New York, New York

Anil C. Singh

HON. ANIL C. SINGH
SUPREME COURT JUSTICE