SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER Justice

PART 30

Index Number : 190203/2012
LOGAN, JOHN
vs
A.P. MOLLER-MAERSK, INC.,
Sequence Number : 006
SUMMARY JUDGMENT (CEMEX / MOORE MCCORMACK)

INDEX NO. 190203/12

MOTION DATE _____

MOTION SEQ. NO. 006

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

is decided in accordance with the memorandum decision dated 6.27.13

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

Dated: 6.27.13

HON. SHERRY KLEIN HEITLER, 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 30

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JOHN LOGAN and GAIL LOGAN,

Plaintiffs,

-against-

A.P. MOLLER-MAERSK, INC., et. al.,

Defendants.

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Index No. 190203/12
Motion Seq. No. 006

DECISION & ORDER

SHERRY KLEIN HEITLER, J.:

In this asbestos personal injury action, defendant CEMEX, Inc., individually and as successor-in-interest to Southdown, Inc. and Moore-McCormack Resources, Inc. ("Cemex"), moves pursuant to CPLR 3212 for summary judgment dismissing all claims and cross-claims asserted against it on the ground that it did not own the vessels upon which plaintiff John Logan alleges he was exposed to asbestos and therefore cannot be responsible for Mr. Logan's injuries.[1] For the reasons set forth below, the motion is denied.

BACKGROUND

John Logan served as a Merchant Marine aboard several "Robin Line" ships during the early 1950's. It is undisputed on this motion that he was exposed to asbestos aboard those ships and that such exposure was a substantial contributing cause of his injuries. It is also undisputed that the Robin Line ships were owned by Seas Shipping Company, Inc. ("Seas Shipping") during the time of Mr. Logan's exposure.

On March 1, 1957, subsequent to Mr. Logan's service in the Merchant Marine, Seas

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[1] Mr. Logan has been diagnosed with mesothelioma.

Shipping sold twelve of its Robin Line vessels for cash and stock to Moore-McCormack Lines, Inc. ("Moore-McCormack"), a predecessor of defendant Cemex. In or about April of 1957, Moore-McCormack sold two of those ships to another company, realizing a short term gain of $98.985.29. That sale caused the IRS to determine an income tax deficiency against Moore-McCormack for the 1957 tax year predicated on Moore-McCormack's cost basis of the two vessels. Both Seas Shipping and Moore-McCormack filed suits in the United States Tax Court concerning the valuation of the shares of Moore-McCormack issued to Seas Shipping in connection with the purchase and sale of the two ships.[2] In respect thereof the Tax Court had before it three contemporaneous agreements between Moore-McCormack and Seas Shipping, namely a March 1, 1957 asset purchase agreement ("APA")[3], a stockholders' agreement ("Stockholders Agreement"), and a memorandum of understanding ("Memorandum").

Cemex contends that the Robin Line transaction between Seas Shipping and Moore-McCormack was nothing more than a simple asset purchase pursuant to which Moore-McCormack purchased certain vessels from Seas Shipping. Plaintiffs assert that the issue is whether the three agreements, taken together, constituted a *de facto* merger of Seas Shipping and Moore-McCormack, thereby imposing Seas Shippings' liabilities upon its successor. Cemex argues that there was no *de facto* merger because Seas Shipping continued to operate after the execution of the APA until 1970 when it formally dissolved. Plaintiffs argue that Cemex has not met its burden on this summary

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[2] *See Moore-McCormack Lines, Inc. v Commissioner of Internal Revenue*, 44 TC 745 (1965); *Seas Shipping Co., Inc. v Commissioner of Internal Revenue*, 24 TC 1222 (1965)

[3] The Asset Purchase Agreement between Seas Shipping Company, Inc. and Moore-McCormack Lines, Inc., dated March 1, 1957, is submitted as exhibit B to the defendant's moving papers. The Stockholders Agreement and Memorandum are not included as submissions on this motion.

judgment motion to eliminate all material issues of fact because it has not produced the Stockholders' Agreement or Memorandum.

DISCUSSION

The defendant contends that it has searched for but has been unable to locate either the Stockholders' Agreement or the Memorandum. However, the Tax Court discussed the terms of these documents in significant detail (*Moore-McCormack Lines, Inc. v Commissioner*, *supra*, 44 TC at 748-749, 760):

> On March 1, 1957, contemporaneously with the execution of the above-described contract of sale, Seas entered into a stockholders' agreement with certain principal stockholders of Mooremac under which it was agreed that the parties to the agreement would vote their stock to elect directors, two of whom were to be nominated by Seas and the remaining seven by a majority of the parties to the agreement. This agreement was to continue in effect for 5 years or until Seas ceased to own beneficially at least 100,000 shares of Mooremac's stock, whichever event first occurred. Also on March 1, 1957, contemporaneously with the agreement of sale and the stockholders' agreement, Mooremac entered into a "memorandum of understanding" with Seas which provided, *inter alia*, that Mooremac would continue to employ certain key men of Seas. Mooremac, however, was not required to employ these persons for any specific length of time. The memorandum of understanding also required that Mooremac continue to use the name "Robin Line" for a period of 5 years on the ships purchased. It was agreed that the contract of sale and the stockholders' agreement as well as the memorandum of understanding would be considered as interrelated and complementary one to another.
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> * * * *
>
> The shares which were received by Seas were received with certain additional rights and privileges which did not attach to the shares which changed hands on the stock exchange. The 300,000-share block received by Seas carried with it a promise by petitioner to continue to operate the Robin Line and to employ certain of Seas' key men "in positions carrying responsibility and compensation comparable to that which they have enjoyed . . . in the employ of [Seas]." It also carried the guarantee of petitioner's controlling shareholders that the 300,000 shares in the hands of Seas would control two seats on the board of directors for at least 5 years. These rights had some value above and beyond the value of the stock alone, as reflected in stock exchange prices, absent such collateral rights, and, hence, the mean stock exchange price is not determinative of the overall value of the 300,000 shares coupled with the bundle of collateral rights involved in this case. In the circumstances it is not unreasonable that the size of the block involved plus the collateral rights received in the transaction resulted in a per share value over $7 in excess

of the weighted average stock exchange price of $22.81.

There is no question that Seas Shipping and the defendant's predecessor, Moore-McCormack, entered into three agreements on March 1, 1957. The fact that these agreements are interrelated and complementary to one another is readily apparent from the Tax Court's decision. But the extent to which they are interrelated and complementary cannot be determined without having complete copies thereof.[4] Accordingly, the defendant's motion for summary judgment must be denied.

That being said, I also find that plaintiffs' opposition is sufficient to raise an issue of fact in respect of plaintiffs' *de facto* merger claim. Under well-settled New York law, a corporation which acquires the assets of another may be deemed to have acquired a selling corporation's tort liabilities where: (1) the purchasing corporation expressly or impliedly assumes the predecessor's tort liability; (2) there is a *de facto* merger of seller and purchaser; (3) the purchasing corporation is a mere continuation of the selling corporation; or (4) the transaction is entered into fraudulently to escape such obligations. *See Schumacher v Richards Shear Co.*, 59 NY2d 239, 245 (1983). As the First Department instructed in *Fitzgerald v Fahnestock & Co.*, 286 AD2d 573, 574-575 (1st Dept 2001)

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[4] As an example, in *Overseas Reliance Tours & Travel Service, Inc. v Sarne Co.*, 17 AD2d 578 (1st Dept 1963), the First Department affirmed a trial court's denial of summary judgment where the record did not contain critical facts that were known to the movant. In that case, the defendant purchased airline tickets from the plaintiff and made payment for those tickets to an agent of the plaintiff, but the agent absconded with the money. The plaintiff filed an action to recover the price of the tickets, and then moved for summary judgment, which the trial court denied. On appeal, the First Department affirmed partly because the nature of the plaintiff's arrangement with the agent was unclear. The court explained that "[i]f the facts on which the application for summary judgment is based are exclusively within the knowledge of the moving party, the relief asked for will be denied. If this were not so, summary judgment would be a perversion of justice, instead of in furtherance thereof." *Id.* at 579-80.

(internal citations omitted):

> The hallmarks of a de facto merger include: continuity of ownership; cessation of ordinary business and dissolution of the acquired corporation 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 continuity of management, personnel, physical location, assets and general business operation . . . Not all of these elements are necessary to find a de facto merger. Courts will look to whether the acquiring corporation was seeking to obtain for itself intangible assets such as good will, trademarks, patents, customer lists and the right to use the acquired corporation's name.

Notwithstanding that the Stockholders Agreement and Memorandum are missing from the record, the APA, by its explicit terms, gave Seas Shipping a 300,000 share interest in Moore-McCormack, which according to the Tax Court made Seas Shipping the largest single shareholder in Moore- McCormack following the transaction. The terms of the APA also appear to have left Seas Shipping virtually shorn of its assets. Seas Shipping sold all but two of its Robin Line vessels and associated equipment[5] and excluded itself from the contracts and shipping routes that made up its business, leaving Moore-McCormack to fulfill all of Seas Shippings' outstanding commitments and to continue to do business with Seas Shippings' clients. Moreover, the Tax Court explained that Moore-McCormack promised to "continue to employ certain key men of Seas" and gave Seas Shipping two unchallengeable positions on its board of directors for five years.

Cemex argues that plaintiffs' *de facto* merger claims are meritless because Seas Shipping remained a viable, active business for 13 years following the execution of the APA. In this regard, Cemex points out that following the sale of its Robin Line in March of 1957, Seas Shipping amended its corporate charter twice, sold two additional vessels to an unrelated shipping line, and prosecuted its Tax Court case for years, including an appeal to the Second Circuit and the filing of a

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[5] Seas Shipping sold its remaining two Robin Line vessels to Isbrandtsen Company, Inc., also in 1957.

writ of certiorari to the United States Supreme Court. It did not dissolve until 1970.

However, the fact alone that Seas Shipping did not dissolve directly after the execution of the APA in 1957 is not a sufficient basis on which to discredit plaintiffs *de facto* merger claims. *See Fitzgerald, supra*, at 575 ("So long as the acquired corporation is shorn of its assets and has become, in essence, a shell, legal dissolution is not necessary before a finding of a de facto merger will be made.") Notably, under the terms of the APA, Seas Shipping was contractually barred from operating as a shipping company for ten years. There is nothing to suggest that it acted as anything more than an investment vehicle during such ten year period or that it returned to the shipping business after its non-compete agreement with Moore-McCormack expired. And while Seas Shipping amended its charter to allow it to borrow money for investment purposes and to increase the number of directors on its board, there is no evidence on this motion that it actually invested in or undertook new business opportunities. That it did not voluntarily dissolve until 1970 is not determinative. It is also unclear whether Seas Shipping would have even been in a position to dissolve before 1970 given the fact that its income tax dispute with the IRS continued until 1968. Under New York law, a corporation may not file a certificate of dissolution unless it has secured the consent of the New York State Department of Taxation and Finance. *See* Business Corporation Law § 1004(a).

The theory of successor liability is not a bright-line test. Instead, "the court is to make, on a case-by-case basis, an analysis of the weight and impact of a multitude of factors that relate to the corporate creation, succession, dissolution, and successorship." *Sweatland v Park Corp.*, 181 AD2d 243, 246 (4th Dept 1992) (citing *Santa Maria v Owens-Illinois Inc.*, 808 F2d 848, 861 [1st Cir. 1986]). In this case there are several significant indicia of a *de facto* merger between Seas Shipping

and Moore-McCormack. The fact that Seas Shipping did not dissolve until 1970, while not inconsequential, is not sufficient to warrant summary judgment.

Accordingly, it is hereby

ORDERED that Cemex's motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

DATED: 6.27.13

SHERRY KLEIN HEITLER
J.S.C.