

Ring v Elizabeth Found.

2013 NY Slip Op 31668(U)

July 16, 2013

Supreme Court, New York County

Docket Number: 113849/11

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JOAN M. KENNEY
Justice

PART 8

Index Number : 113849/2011
RING, MICHAEL
vs.
ELIZABETH FOUNDATION
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. 113849/11
MOTION DATE _____
MOTION SEQ. NO. 001

The following papers, numbered 1 to 16, were read on this motion to dismiss action

Notice of Motion/Order to Show Cause — Affidavits — Exhibits	<u>+ memo of law</u>	No(s). <u>1-6</u>
Answering Affidavits — Exhibits	_____	No(s). <u>7-15</u>
Replying Affidavits	<u>Reply memo of law</u>	No(s). <u>16</u>

FILED

Upon the foregoing papers, it is ordered that this motion is

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MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

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

Dated: July 16, 2013

Joan M. Kenney, J.S.C.
JOAN M. KENNEY

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: IAS Part 8

-----X

Michael Ring and
Frank Ring, et al.,
as Tenants-In-Common

Plaintiff,

-against-

DECISION AND ORDER
Index Number: 113849/11
Motion Seq. No.: 001

The Elizabeth Foundation
for the Arts and The Robert
Blackburn Printmaking
Workshop,

Defendants.

-----X

KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a) of the papers considered in review of this motion to dismiss.

FILED

JUL 24 2013 Numbered

Papers

Notice of Motion, Affirmation, Exhibits,
and Memo of Law
Opposition Affirmation, Exhibits,
and Memo of Law
Reply Memo of Law

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1-6
7-14
15

In this action to enforce a judgment, defendants, The Elizabeth Foundation for the Arts, and The Robert Blackburn Printmaking Workshop, move for an Order, pursuant to CPLR 3211(a)(7), dismissing the complaint.

Factual Background

Printmaking Workshop, Inc. (Printmaking) was a cooperative press that produced and accumulated prints and artwork. Plaintiffs sued Printmaking for unpaid rent and damages on July 1, 2002.

(Underlying action¹).

On July 19, 2002, Printmaking and its owner, Robert Blackburn (Mr. Blackburn), entered into a letter agreement (the agreement) with The Elizabeth Foundation (Elizabeth). This agreement formed The Robert Blackburn Printmaking Workshop (RBPW), and transferred all of Printmaking's assets and operations to the RBPW. Printmaking's transferred assets and operations would (under the agreement) be controlled and operated by Elizabeth as "a program." The agreement further stated, in pertinent part that:

1. RBPW would be "formed to carry on the traditions of [Printmaking];"
2. Elizabeth would purchase all of the existing equipment and operating assets of Printmaking, the records of printmaking, and all prints of Printmaking;
3. Elizabeth "desire[d] to continue to use the Blackburn name in connection with [RBPW];"
4. Elizabeth was to operate and support the operation of a printmaking workshop; and
5. Printmaking would become an operating program of Elizabeth.

The agreement also stated that for all intents and purposes, Printmaking would be closed and cease to exist.

Once RBPW began operating, Mr. Blackburn was appointed as artistic director of RBPW. Additionally, 2 former directors of Printmaking were retained on RBPW's advisory board. (Plaintiff's Opposition Ex. 1, pg. 27). Plaintiff alleges that RBPW also used substantially the same employees as Printmaking had used, performed

¹*Ring v Printmaking Workshop*, 602434/2002. Both parties have failed to submit a copy of the pleadings to the underlying action.

substantially the same type of work for the same clients, and used the same equipment, furnishings, and property as Printmaking had.

On December 2, 2011, plaintiff's obtained a judgment in the underlying action against Printmaking in the amount of \$812,066.45. Plaintiffs now seek to hold Elizabeth liable for the judgment entered against Printmaking.

Arguments

Defendants contend that plaintiffs' causes of action asserting that there was a defacto merger must be dismissed because: (1) there was no "mere continuation" of Printmaking's business, and therefore no merger; (2) because NY Not-For-Profit Corporation Laws §§ 904, 905, 907, requires court approval of any merger of not-for-profit corporations and that was not the case here, so there was no merger; and (3) the within action based on a 2002 agreement is barred by a 6 year statute of limitations.

Plaintiffs assert that: (1) the elements of a de facto merger have been stated; (2) sufficient allegations have been pled to establish successor liability against defendants under the doctrine of mere continuation; (3) the NY Not-For-Profit Corporation Laws are not applicable because plaintiffs are not asserting that there was a formal merger; and (4) this action is governed by a 20 year statute of limitations period because this is an action to enforce a money judgment.

Discussion

When deciding whether or not a complaint should be dismissed pursuant to CPLR 3211(a)(7), the complaint must be construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true, limiting the inquiry to whether or not the complaint states, in some recognizable form, any cause of action known to our law. (See, *World Wide Adjustment Bureau et al., v Edward S. Gordon Company, Inc., et al.*, 111 AD2d 98 [1st Dept. 1985]). In assessing the sufficiency of the complaint, this court must also consider the allegations made in both the complaint and the accompanying affidavit, submitted in opposition to the motion, as true and resolve all inferences which reasonably flow therefrom, in favor of the plaintiff. (*Joel v Weber*, 166 AD2d 130 [1st Dept, 1991]). The sufficiency of a pleading to state a cause of action generally depends upon whether or not there is substantial compliance with CPLR 3013, which requires that statements in a pleading be sufficiently particular to give the court and parties notice of the transactions or occurrences intended to be proved and the material elements of each cause of action. Further, every pleading question should be approached in the light of CPLR 3026 requiring that pleadings shall be liberally construed and that defects shall be ignored if a substantial right of a party is not prejudiced. Thus, the burden is placed upon one who attacks a pleading for deficiencies in its allegations to show that he is

prejudiced.

"Hallmarks of a de facto merger, arising out of acquisition of corporation by another, include: (1) continuity of ownership, (2) cessation of ordinary business, (3) assumption by successor of liabilities ordinarily necessary for uninterrupted continuation of business of acquired corporation, and (4) continuity of management, personnel, physical location, assets and general business operation." (*Fitzgerald v Fahnestock & Co., Inc.*, 286 AD2d 573 [1st Dept. 2001]). Not all of those factors are necessary to find a de facto merger, and courts will look to whether the acquiring company sought to obtain intangible assets such as goodwill, trademarks, patents, customer lists, and the right to use the acquired company's name. (*Id.* at 575). In *City of NY v AAER Sprayed Insulations* the court found there was no de facto merger when there is a purchase of a company's assets only, and the company continues on as a viable business. (*City of NY v AAER Sprayed Insulations*, 281 AD2d 228 [1st Dept. 2001]). The dissolution criterion for a de facto merger may be satisfied if that entity is shorn of its assets and has become, in essence, a shell. (*Id.*)

Generally, a corporation is not liable for the torts of its predecessor unless: "(1) it expressly or impliedly assumed the predecessor's liability; (2) there was a consolidation or merger of the two corporations; (3) the second corporation was a mere continuation of the first." (*Hansen v Filtron Mfg. Co.*, 282 AD2d

433 [2nd Dept. 2001]).

Here, plaintiffs sufficiently pled that there was a de facto merger, as the complaint alleges that Printmaking ceased to exist and that Printmaking's management, personnel, all of their assets, and their general business operation was absorbed by RBPW. Elizabeth and RBPW stated in the agreement that they wished to use the name of Robert Blackburn, to carry on Printmaking's business operation. It is also alleged by plaintiffs that Printmaking thereafter became a "shell." (Defendants' Affidavit, Exhibit A, Pg. 3).

Plaintiffs also sufficiently plead the elements of a mere continuation doctrine, as the allegations give rise to the inference that the exact same business was being carried on with the same employees, and the same equipment to the same clients; but under a new name.

Defendants' assertion that plaintiffs fail to state a claim based on the NY not-for-profit merger laws is irrelevant, as plaintiffs make no such allegation in their complaint that any formal merger was completed.

CPLR 211(b) states that an action to recover a money judgment must be commenced within 20 years.

It is undisputed that this is an action to enforce a money judgment. In this case, the money judgment against Printmaking was obtained on December 2, 2011 (the judgment), and this action was

commenced on December 9, 2011, which is within the 20 year applicable statute of limitations period.

Further, at the time Elizabeth entered into the agreement with Printmaking, they were fully aware of the pending litigation between plaintiffs herein and Printmaking. The fact is specifically referenced in the agreement, stating, "This agreement and its several attachments is not in effect and shall not go into effect until such time as the lawsuit(s) brought by Mr. Ring, former landlord of [Printmaking] have been settled, or [Elizabeth] deems that it [sic] this specific matter is satisfactorily resolved." (The agreement, Pg. 3, ¶ 21). It is further noted that Elizabeth themselves answered for Printmaking in a Civil Court action also commenced by plaintiffs back in 2000. (Plaintiffs' Opposition Affirmation, Exhibit 6).

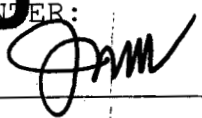
Finally, the Court would like to address the amount of the judgment, and the judgment itself. Initially, plaintiffs sought damages in the amount of \$226,117.00 for unpaid rent. On top of the unpaid rent they also sought additional rent, late fees, interest, and costs and expenses; including attorneys' fees. Special Referee Marilyn B. Dershowitz was assigned to hear the matter, and issued her report as follows: "Special Referee Dershowitz recommended that Plaintiffs be awarded damages in the total amount of \$663,876.90, including \$420,984.13 in default interest, leaving a non-interest damages amount of \$242,892.77...Special Referee Dershowitz also

recommended that Plaintiffs be awarded \$101,118.83 in attorneys' fees and disbursements." (Plaintiffs' Opposition Affirmation, Exhibit 7 [the judgment]). At a hearing on December 22, 2010, "the Honorable Ira Gammerman granted Plaintiffs' motion to confirm [the judgment] and ordered that Plaintiffs be awarded \$663,876.90 in damages, with interest thereon through entry of judgment, and \$101,118.83 in fees and disbursements, with interest thereon through entry of judgment." (*Id.*). After interests and costs were added on, the Clerk of the Court, Norman Goodman, on December 2, 2011, entered a judgment in the amount of \$812,066.45 against Printmaking. Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss the action, is denied, in its entirety; and it is further

ORDERED, that the parties are directed to appear for a preliminary conference on September 19, 2013 at 9:30 am in Room 304, located at 71, Thomas St., NYC 10013.

Dated: 7/16/13

FILED ENTER: 
 JUL 24 2013
 NEW YORK Joan M. Kenney, J.S.C.
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