Canon Fin. Serv., Inc. v Morelli Alters Ratner P.C.
2013 NY Slip Op 32286(U)
September 23, 2013
Sup Ct, NY County
Docket Number: 653469/2012
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER **PART 15**
Justice

CANON FINANCIAL SERVICES, INC.,

Plaintiff,

- v -

MORELLI ALTERS RATNER P.C. AS SUCCESSOR BY MERGER AND OR SUCCESSOR IN INTEREST TO MORELLI RATNER, P.C., DBA MORELLI RATNER AND BENEDICT P. MORELLI A/K/A BENEDICT MORELLI,

Defendants.

INDEX NO. 653469/12

MOTION DATE ______

MOTION SEQ. NO. ______

MOTION CAL. NO. 003

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answer — Affidavits — Exhibits	3, 4
Replying Affidavits	

Cross-Motion: ☐ **Yes** **X No**

This action was commenced on or about September 20, 2012, by service of a Summons and Complaint to recover funds allegedly owed in connection with the breach of Equipment Lease Agreements entered between Plaintiff Canon Financial Services, Inc. ("Plaintiff") and "Morelli and Ratner, P.C." Issue was joined on December 21, 2012 by service of a Verified Complaint. Plaintiff thereafter moved to amend the Summons and Complaint to identify the defendants as "Morelli Alters Ratner, P.C., as successor by merger and/or successor in interest to Morelli Ratner, P.C. d/b/a Morelli Ratner, P.C." That motion was granted by Order dated May 14, 2013.

Plaintiff's Amended Complaint alleges causes of action for breach of contract, statement of account, and replevin as against defendant Morelli Alter Ratner P.C., "as "successor by merger and/or successor in interest of Morelli Ratner, P.C., d/b/a Morelli Ratner, P.C."

[* 2]

Defendant Morelli Alters Ratner P.C., ("Morelli Alters Ratner" or "Movant") now moves for an Order pursuant to CPLR §§3211(a)(1) and (7) to dismiss Plaintiff's breach of contract and statement of account claims contained in the Amended Complaint on the basis that Plaintiff never entered into any agreements with Morelli Alters Ratner and Morelli Alters Ratner is not a successor of nor did it merge with Morelli Ratner P.C., the entity with which the agreements were entered into. Plaintiff opposes.

In support of its motion, Movant submits the attorney affirmation of Adam E. Deutsch and affirmation of Benedict Morelli. Benedict Morelli, President of both Morelli Ratner P.C. and Morelli Alters Ratner, avers that Morelli Alters Ratner did not enter into an agreement with Plaintiff for any goods or services, and is not in privity with Plaintiff. Benedict Morelli further states that Morelli Ratner P.C. is a professional services corporation that was founded on May 20, 2005, and still operates to date and Morelli Alters Ratner is a separate and distinct professional services corporation founded on November 13, 2013 which also still operates to date. Benedict Morelli avers that both corporations never merged or were consolidated, Morelli Alters Ratner is not a continuation of Morelli Ratner P.C., both entities remain active, and Morelli Alters Ratner P.C. has never expressly or impliedly assumed any of the liabilities of Morelli Ratner P.C.

In opposition, Plaintiff submits the affirmations of Daniel Fix and Howard Jaslow. Plaintiff contends that Movant's own website states in relevant part, "The South Florida Business Journal reported today that Morelli Ratner will merge with Miami's Alters Law Firm. The new combined firm, Morelli, Alters, Ratner, will be based in New York and Miami . . ." Plaintiff contends that Movant also announced the alleged merger in New York Magazine. Annexed to Fix's affirmation are copies of the respective announcement and article.

In his affirmation, Jaslow contends that in March 2013, he called Morelli Ratner at the number listed on their website on two separate occasions and that the receptionist advised him that Morelli Ratner no longer exists and the law firm was now known as "Morelli Alters Ratner." Jaslow avers that the receptionist further stated that aside from the change in the name of the law firm, all else remained the same, including the location of the law firm and the employees.

CPLR §3211 provides, in relevant part:

> (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> (1) a defense is founded upon documentary evidence; or
>
> (7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

On a motion to dismiss pursuant to CPLR §3211(a)(1) "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

The general rule "that a corporation which acquires the assets of another is not responsible for the liabilities of the predecessor" is subject to the following exceptions: "(1) it [the acquiring corporation] 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." *Shumacher v. Richards Shear Company, Inc.*, 59 N.Y. 3d 239, 245 [1983].

Successor liability may be based upon the doctrine of a de factor merger:

> A transaction structured as a purchase-of-assets may be deemed to fall within exception as a 'de facto' merger, even if the parties chose not to effect a formal merger, if the following factors are present: (1)

> continuity of ownership; (2) cessation of ordinary business operations and the dissolution of the selling corporation as soon as possible after the transaction; (3) the buyer's assumption of the liabilities ordinarily necessary for the uninterrupted continuation of the seller's business; and (4) continuity of management, personnel, physical location, assets and general business operation. *Matter of New York City Asbestos Litigation*, 15 A.D. 3d 254, 256 [1st Dept 2005].

Here, the four corners of the Complaint state a cause of action as against Morelli Alters Ratner for breach of contract and account stated as against the alleged "successor by merger and/or successor in interest of Morelli Ratner, P.C., d/b/a Morelli Ratner" and the documentary submissions submitted by Morelli Alters Ratner do not flatly contradict the legal conclusions and factual allegations of the Complaint.

Wherefore it is hereby,

ORDERED that defendant Morelli Alters Ratner P.C.'s motion to dismiss is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: 9/23/13

HON. EILEEN A. RAKOWER J.S.C.

Check one: FINAL DISPOSITION   X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE