

**CIT Tech. Fin. Servs., Inc. v Morelli Alters Ratner,
P.C.**

2013 NY Slip Op 32289(U)

September 20, 2013

Sup Ct, NY County

Docket Number: 650140/2013

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER
Justice

PART 15

CIT TECHNOLOGY FINANCING 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**

Defendants.

INDEX NO. 650140/2013

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. 001

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answer — Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2

3

**THIS AMENDED ORDER SUPERSEDES THE
COURT’S ORDER DATED JULY 19, 2013.**

This action was commenced to collect the sum of \$134,154.30 plus attorneys’ fees and interest in connection with the breach of two Equipment Lease Agreements entered between Plaintiff CIT Technology Financing Services, Inc. (“Plaintiff”) and “Morelli and Ratner, P.C.” The Complaint alleges that upon information and belief, Morelli Alters Ratner P.C. is “successor by merger and/or successor in interest of Morelli Ratner, P.C., d/b/a Morelli Ratner.”

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 first two causes of action for breach of contract and statement of account 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 in 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 that Morelli Alters Ratner is a separate and distinct professional services corporation formed on November 13, 2013. 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 Jacklyn E. Munoz and Howard Jaslow. Plaintiff contends that Defendant fails to provide an accurate depiction of the relevant facts and allege that Defendant's own website states in relevant part, "The South Florida Business Journal reported today that Morelli Ratner will merged with Miami's Alters Law Firm. The new combined firm, Morelli, Alters, Ratner, will be based in New York and Miami." Plaintiff contends that Defendant also announced the alleged merger in New York Magazine. Annexed to Munoz's affirmation are copies of the respective announcement and article. In his affirmation, Jaslow contends that he called Morelli Ratner at the number listed on their website on two 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 the aside from the change in the name of the law firm, the location and the employees had not changed.

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

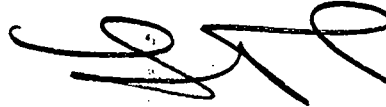
Wherefore it is hereby,

ORDERED that Defendant's motion to dismiss is denied.

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

Dated:

9/20/13



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

Check one: FINAL DISPOSITION

X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE