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SHORT FORM ORDER

INDEX No. 33473/11

SUPREME COURT - STATE OF NEW YORK
I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 8/9/13 (#002)
MOTION DATE 8/27/13 (#003)
ADJ. DATES 9/20/13
Mot. Seq. # 002 - MD
Mot. Seq. # 003 - MG
CDISP YES ✔

CREMOSA FOOD COMPANY, LLC, Plaintiff, -against- ELWOOD CATERING, LLC d/b/a "TORCELLO'S RESTAURANT," Defendant.	GLENN H. RIPA, ESQ. Atty. For Plaintiff 225 Broadway New York, NY 10007 WEINSTEIN GROUP, PC Attys. For Defendant 3 Crossways Park West Woodbury, NY 11797

Upon the following papers numbered 1 to 12 read on this motion by plaintiff to compel and the separate motion by defendant to dismiss; Notices of Motion and supporting papers 1-3; 4-6; Answering Affidavits and supporting papers 7-8; 9-12; Reply papers ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#003) by the defendant to dismiss the complaint pursuant to CPLR 3211(a) is considered thereunder and is granted; and it is further .

ORDERED that the separate motion (#002) by the plaintiff for an order compelling the defendant to furnish documents is denied as academic.

The plaintiff is a supplier of food provisions to restaurants and other outlets. In November of 2009, the plaintiff allegedly entered into a contract with Marc Tolkin, on behalf of Tolkin Foods, Inc., which operated a restaurant under the trade name Torcello's Restaurant. Marc Tolkin personally guaranteed the obligations of Tolkin Foods, Inc. under the terms of the credit contract with the plaintiff. The terms of such contract were embodied in a credit agreement executed by Marc Tolkin, on behalf of Tolkin Foods, Inc. in favor of the plaintiff. The plaintiff invoiced Torcello's Restaurant as the recipient of the provisions and its credit account with Tolkin Foods, Inc. was allegedly maintained under the d/b/a, trade name "Torcello's Restaurant". Monies due for certain provisions billed and delivered to Torcello's Restaurant by the plaintiff from November of 2009 through April of 2010 remained unpaid by the corporate and individual Tolkins. Claims to collect these amounts from the Tolkins were the subject of a prior commenced action by the plaintiff under Index No. 22000/10. That action resulted in an award of

judgment, after inquest, in favor of the plaintiff against the Tolkin defendants for all amounts sued upon (*see* order [Whelan, J.], dated June 3, 2013).

In this action, the plaintiff claims that the defendant, Elwood Caterin g, LLC [hereinafter "Elwood"], is the successor-in-interest to the ownership interest Tolkin Foods, Inc. had in Torcello's Restaurant and that Elwood had a contractual relationship with Cremosa to pay for the provisions it delivered to Torcello's from November of 2009 through April of 2010 (*see* Complaint ¶¶ 2;8). The plaintiff claims that a private lender, Joseph Amella, who is the owner of Elwood, loaned large sums of money to Tolkin Foods, Inc. in 2008 when Torcello's began to experience financial difficulties and that Marc Tolkin personally guaranteed these loans. As additional security for the loans, the stock of Tolkin Foods, Inc. was pledged as collateral. Not disputed is that Tolkin Foods, Inc. defaulted on one or more of these loans shortly after the making thereof. In November of 2009, Amella cured all rent delinquencies owing by Tolkin Foods Inc. to its landlord. Immediately thereafter, Marc Tolkin terminated Tolkin Foods, Inc.'s lease with the landlord of the premises and the premises were allegedly rented by Elwood.

The plaintiff claims that Amella, through Elwood, "took control" over Torcello's Restaurant in October of 2009 although it retained Marc Tolkin as manager. He remained so employed in such capacity until November of 2012 when he had a falling out with Amella (*see* Complaint ¶ 7; ¶ 10 of the affidavit of John Albanese in opposition and ¶¶ 6-7 of the affidavit of Marc Tolkin in opposition to the plaintiff's motion). The plaintiff further claims that from 2008 through 2010, "Marc Tolkin's restaurant 'Torcello's' was held under the corporate name of Tolkin Foods Inc." (*see* Complaint ¶ 7). The plaintiff also alleges that Mark Tolkin "changed the corporate entity holding the interest in Torcello's Restaurant from Tolkin Foods, Inc. to Elwood Catering LLC" and that "Marc Tolkin transferred all of the assets of Tolkin Foods, Inc. to Elwood Catering LLC without any consideration" (*see* Complaint ¶ 7), although such transfer is later alleged to have been "in form only not in substance" (*see* Complaint ¶ 8).

Defendant Elwood is alleged to be responsible for payment of the provisions delivered on credit to Torcello's under an agreement between Elwood and the plaintiff, the terms of which are not stated (*see* Complaint ¶ 3). The provisions so delivered are the very same provisions that were the subject of the credit agreement between the Tolkin Foods, Inc. and the plaintiff. Marc Tolkin's alleged transfer of the assets of Tolkin Foods, Inc. to Elwood is alleged to render Elwood the successor in interest to Tolkin Foods, Inc. d/b/a Torcello's Restaurant, and, as such, liable for the Tolkins' unpaid monetary obligations to the plaintiff (*see* Complaint ¶ 2). The plaintiff further alleges that such transfer constitutes an actionable fraudulent conveyance (*see* Complaint ¶ 9). Each of these theories are advanced separately in the three causes of action set forth in the complaint, for which, recovery of the value of the provisions billed and delivered to Torcello's Restaurant is demanded by the plaintiff. Following service of the complaint, issue was joined by Elwood's service of a verified answer dated December 19, 2011.

By the instant motion, the plaintiff seeks to compel the defendant to disclose documents and other materials demanded by it following the deposition of Joseph Amella, the principal of defendant Elwood Catering, LLC pursuant to CPLR 3124. The defendant opposes the plaintiff's motion and separately moves for dismissal of the complaint pursuant to CPLR 3211(a)(7) due to legal insufficiency and under CPLR 3211(a)(5) on res judicata and/or collateral estoppel grounds. It relies upon the deposition testimony of the plaintiff's principal, John Albanese, and other documentary material. The defendant's opposition rests heavily upon the affidavit of its principal, John Albanese, and an affidavit of Marc Tolkin.

First considered is the defendant's post answer motion (#003) for dismissal of the complaint pursuant to CPLR 3211, since determination thereof may render the plaintiff's separate motion (#002) academic. Rejected as untimely are the demands for dismissal that are premised upon res judicata/collateral estoppel grounds which are within the ambit of CPLR 3211(a)(5). It is now well settled that motions under CPLR 3211(a) are to be made at any time before service of the responsive pleading (*see* CPLR 3211[e]; ***Hendrickson v Philbor Motors, Inc.***, 102 AD3d 251, 955 NYS2d 384 [2d Dept 2012]). There are, however, three statutory exceptions to this rule: 1) motions made pursuant to 3211(a)(2) [subject matter jurisdiction]; 2) motions made pursuant to (a)(7) [failure to state a cause of action]; and 3) motions pursuant to (a)(10) [nonjoinder of a necessary party] (*see* CPLR 3211[e]; ***Hendrickson v Philbor Motors, Inc.***, 102 AD3d 251, *supra*). Here, the defendant's post-answer demand for dismissal of the complaint, to the extent it is premised upon the res judicata/collateral estoppel grounds embraced by CPLR 3211(a)(5), is untimely and will thus not be considered as an independent basis for dismissal.

In contrast, the defendant's demand for dismissal of the complaint pursuant to CPLR 3211(a)(7) on the ground of legal insufficiency is timely under CPLR 3211(e). The legal standard to be applied in evaluating a motion to dismiss pursuant to CPLR 3211(a)(7) is whether "the pleading states a cause of action, not whether the proponent of the pleading has a cause of action" (***Marist College v Chazen Envtl. Serv.***, 84 AD3d 1181, 923 NYS2d 695 [2d Dept 2011], *quoting* ***Sokol v Leader***, 74 AD3d 1180, 1180–1181, 904 NYS2d 153 [2d Dept 2010]). On such a motion to dismiss, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see* ***Goshen v Mutual Life Ins. Co. of N.Y.,*** 98 NY2d at 314, 326, 746 NYS2d 858 [2002]; ***Leon v Martinez***, 84 NY2d 83, 87, 614 NYS2d 972 [1994]). However, bare legal conclusions and factual averments flatly contradicted by the record are not presumed to be true (*see* ***Simkin v Blank***, 19 NY3d 46, 945 NYS2d 222 [2012]); ***Khan v MMCA Lease, Ltd.***, 100 AD3d 833, 954 NYS2d 595 [2d Dept 2012]; ***U.S. Fire Ins. Co. v Raia***, 94 AD3d 749, 942 NYS2d 543 [2d Dept 2012]; ***Parola, Gross & Marino, P.C. v Susskind***, 43 AD3d 1020 [2d Dept 2007]).

The test to be applied is thus "whether the complaint gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments" (***Treeline 990 Stewart Partners, LLC v RAIT Atria, LLC***, 107 AD3d 788, 967 NYS2d 119 [2d Dept 2013]; ***JP Morgan Chase v J.H. Elec. of N.Y., Inc.***, 69 AD3d 802, 803, 893 NYS2d 237 [2d Dept 2010]). In making such determination, the court must consider whether the complaint contains factual allegations as to each of the material elements of any cognizable claim and whether such allegations satisfy any express, specificity requirements imposed upon the pleading of that particular claim by applicable statutes or rules (*see* ***East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.***, 66 AD3d 122, 884 NYS2d 94 [2d Dept 2009], *aff'd* 16 NY3D 775, 919 NYS2d 496 [2011]).

Where a party offers evidentiary proof on a motion pursuant to CPLR 3211(a)(7) and such proof is considered but the motion has not been converted to one for summary judgment, "the criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it ... dismissal should not eventuate" (***Guggenheimer v Ginzburg***, 43 NY2d 268, 275, 401 NYS2d 182 [1997]; *see* ***Bua v Purcell & Ingrao, P.C.,*** 99 AD3d 843, 952 NYS2d 592 [2d Dept 2012]; ***Jannetti v Whelan***, 97 AD3d 797, 949 NYS2d 129 [2d Dept 2012]; ***Bokhour v GTI Retail Holdings, Inc.***, 94 AD3d 682, 941 NYS2d 675 [2d Dept 2012]).

Accordingly, where the courts considers evidentiary material, a motion to dismiss pursuant to CPLR 3211(a)(7) should be granted only when: (1) it has been shown that a material fact alleged in the complaint is not a fact at all; and (2) there is no significant dispute regarding it (*see* ***Weill v East Sunset Park Realty, LLC***, 101 AD3d 859, 955 NYS2d 402 [2d Dept 2012]; ***Cucco v Chabau Café Corp***., 99 AD3d 965, 952 NYS2d 463 [2d Dept 2012]; ***Norment v Interfaith Ctr. of New York***, 98 AD3d 955, 951 NYS2d 531 [2d Dept 2012]; ***Basile v Wiggs***, 98 AD3d 640, 950 NYS2d 148 [2d Dept 2012]).

The plaintiff's First cause of action sounds in a breach of a purported agreement on the part of defendant Elwood to pay for the provisions supplied by the plaintiff to Torcello's Restaurant from November of 2009 through April of 2010. The defendant characterizes such cause of action as legally insufficient and it relies upon the pleadings and the deposition testimony of the plaintiff to support its position as well as the materials submitted by the plaintiff in opposition. For the reasons stated below, the court agrees and finds that First cause of action sounding in breach of contract is subject to dismissal under CPLR 3211(a)(7).

The elements of claim for breach of contract are: the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages (*see* ***Elisa Dreier Reporting Corp. v Global NAPs Networks,*** 84 AD3d 122, 921 NYS2d 329 [2d Dept 2011]; ***JP Morgan Chase v J.H. Elec. of N.Y., Inc***., 69 AD3d 802, 893 NYS2d 237 [2d Dept 2010]; ***Palmetto Partners, LP v AJW Qualified Partners***, 83 AD3d3d 804, 921 NYS2d 260 [2d Dept 2011]). In its deposition testimony, the plaintiff admits to having no credit agreement in place with defendant Elwood and that the credit agreement between it and Tolkin Foods, Inc. was the basis for the billing and delivery of the plaintiff's food provisions to Torcello's Restaurant during the period at issue herein. Neither the existence nor terms of any contract or agreement by which defendant Elwood allegedly obligated itself to pay for the provisions delivered by the plaintiff are alleged in the complaint and none are discernable from the record. Nor are there any allegations that damages resulted from any failure on the part of Elwood to pay for the goods. The requisite elements of a claim for breach of contract have thus been shown, in the first instance, to be absent here. These circumstances support a finding that there was no contract between defendant Elwood because the plaintiff's factual allegation that such an agreement exists is not a fact at all (*see* ***Weill v East Sunset Park Realty, LLC***, 101 AD3d 859, *supra*).

In their opposing papers, the plaintiff submits affidavits by its principal, John Albanese, Marc Tolkin and an affirmation by plaintiff's counsel. Advanced therein is a claim that each invoice for delivered provisions constituted a new contract with Elwood rather than with Torcello's Restaurant or Tolkin Foods, Inc. d/b/a Torcello's Restaurant. Such claim is, however, interdicted by the admitted existence of the credit contract between the plaintiff and Tolkin Foods, Inc. covering the same subject matter as the alleged contract between the plaintiff and Elwood and the absence of any dispute that the invoices issued to Torcello's were the subject of that existing credit agreement. In this regard, Marc Tolkin, the guarantor of the corporate Tolkin's contractual obligations to the plaintiff admits "responsibility" for amounts owing to the plaintiff as well as his consent to entry of a money judgment in favor of the plaintiff in the prior commenced action (*see* ¶ 16 of Marc Tolkin's affidavit submitted in opposition to plaintiff's motion). While Mr. Tolkin avers that such liability and his consent to the entry of that money judgment stems from his conduct in "partnering" with Joe Amella and working for Elwood as manager of Torcello's from November 2009 through November of 2010 (*see id.*), such claims are belied by the record. The default money judgment issued against the corporate Tolkin and its guarantor, Marc Tolkin, in the prior commenced action conclusively established the existence of the credit agreement

between the plaintiff and Tolkin Foods, Inc. and its liability and the liability of its guarantor for the deliveries of the provisions that are the subject of this action. The plaintiff's First cause of action sounding in breach of contract is thus dismissed for legal insufficiency pursuant to CPLR 3211(a)(7).

The plaintiff's second cause of action is also legally insufficient. The allegations of fact advanced therein purport to charge defendant Elwood with liability for the obligations owing from Tolkin Foods, Inc. and Mark Tolkin under their written agreements with the plaintiff because defendant Elwood allegedly succeeded to the interests of Tolkin Food, Inc. in Torcello's Restaurant while the plaintiff was delivering provisions to it. The allegations advanced in the complaint do not, however, state claims for successor corporate liability on the part of defendant Elwood. The allegations advanced in the opposing submissions of the plaintiff are limited to Elwood's "take over" of Torcello's Restaurant (*see* Complaint ¶¶ 8; 10; and 11 of the Affidavit of John Albanese submitted in opposition to the defendant's motion). However, Torcello's Restaruant has no corporate or other independent legal form, as it is merely a trade name asset of its corporate owner, Tolkin Foods, Inc. Tolkin Foods, Inc. is not alleged to have ceased its operations but instead is alleged to have continued its operation of Torcello's Restaurant during the period at issue by among other things, continuing to serve as the entity to whom the New York State Liquor license was issued under which Torcello's Restaurant served alcoholic beverages until April of 2010 (*see* ¶¶ 11; 12; and 18 of John Albanese's affidavit in opposition). These asserted facts negate the factual allegation contained in ¶ 2 of the complaint that "Elwood Catering LLC is a successor-in-interest to Tolkin Foods, Inc" thereby rendering such facts not facts at all about which there is no dispute (*see* ***Weill v East Sunset Park Realty, LLC***, 101 AD3d 859, *supra*).

In any event, it is well established that the purchaser or other transferee by merger or otherwise of a corporation's assets ordinarily does not become liable for the debts of its predecessor (*see* ***AT & S Transp., LLC v Odyssey Logistics & Tech. Corp.***, 22 AD3d 750, 803 NYS2d 118 [2d Dept 2005]). While there are well noted exceptions, such exceptions, where applicable, give rise only to liability in tort under limited theories thereof such as products liability (*see* ***Schumacher v Richards Shear Co.***, 59 NY2d 239, 244–245, 464 NYS2d 437 [1983]; ***Martorano v Herman Miller, Inc.***, 255 AD2d 367, 680 NYS2d 20 [2d Dept 1998]; ***Symbax, Inc. v Bingaman***, 219 AD2d 552, 631 NYS2d 829 [1st Dept 1995 *"the doctrine of successor corporation tort liability * * * * is an extension of products liability and torts law and is not applicable in an action to collect on a promissory note* [citations omitted]; *see also* ***National Loan Inv., L.P. v First Equities Corp.***, 261 AD2d 518, 690 NYS2d 646 [2d Dept 1999]). The plaintiff's Second cause of action is thus dismissed as legally insufficient.

The plaintiff's Third cause of action which, when credited with a liberal reading loosely sounds in a claim of a fraudulent conveyance under Debtor and Creditor Law § 276, is similarly insufficient. The elements of a claim thereunder are a conveyance made or obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors (*see* Debtor and Creditor Law § 276). The plaintiff's very own submissions established the legal insufficiency of this claim as they include: 1) an admission by Marc Tolkin of his liability for payment of the provisions delivered to the plaintiff and that he willingly partnered with Joseph Amella, owner of the defendant Elwood, in an attempt to keep Torcello's Restaurant in business; 2) an admission by the plaintiff that the legal ownership of Torcello's was continually owned and operated by Tolkin Foods, Inc. during the period in question; and 3) the plaintiff's assertion of the undisputed fact that Joseph Amella was a secured creditor of Tolkin Foods, Inc. well before the purported

"take over" by Elwood of Torcello's Restaurant due to the pledge of its stock as collateral for loans owing to Amella and that Tolkin Foods Inc. was in default in the payment of such loans. The pleaded allegation that there was a transfer of the assets of Tolkin Foods, Inc. for no consideration and for purposes of defrauding creditors is thus not a fact at all and no dispute with respect thereto exists. In addition, the alleged "take over" of Torcello's Restaurant by Elwood does not constitute a conveyance or obligation within the contemplation of § 276 of the Debtor and Creditor Law. Even if it were otherwise, the existence of the element of "fraudulent intent" in the making of a conveyance or transfer by Tolkin Foods, Inc, of any of its assets to Elwood is absent from the record in light of the undisputed fact that Amella was a secured creditor of Tolkin Foods, Inc. and Marc Tolkin's admission that he "partnered" with Joseph Amella with respect to all transactions during the period in question. Nor is there a viable claim for relief pursuant § 273 of the Debtor and Creditor Law due to the absence of a qualifying conveyance or other transfer and insolvency. The court thus finds that the plaintiff neither states nor possesses legally sufficient claims sounding in fraudulent transfers under § 276 of the Debtor/Creditor Law or any other provision thereof (*see* ***Zanani v. Meisels***, 78 AD3d 823, 910 NYS2d 533 [2d Dept 2010]).

In view of the foregoing, the court grants the defendant's motion (#003) for dismissal of the complaint pursuant to CPLR 3211(a)(7). Denied as academic is the separate motion (#002) by the plaintiff to compel the production of documents by the defendant.

DATED: 10/7/13

THOMAS F. WHELAN, J.S.C.