

Ring v Elizabeth Found. for the Arts

2014 NY Slip Op 33487(U)

November 12, 2014

Supreme Court, New York County

Docket Number: 113849/2011

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JOAN M. KENNEY
J.S.C. Justice

PART 8

Index Number : 113849/2011
RING, MICHAEL
vs.
ELIZABETH FOUNDATION
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. 113849/2011E
MOTION DATE 6/10/14
MOTION SEQ. NO. 1013

The following papers, numbered 1 to 50, were read on this motion to/for _____


Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-22
Answering Affidavits — Exhibits _____ | No(s). 23-32
Replying Affidavits _____ | No(s). 33-70

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

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

Dated: 11/13/14


_____, 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: PART 8

-----X

MICHAEL RING and FRANK RING, as
Tenants-in-Common,

Plaintiffs

-against-

Index No.: 113849/2011
DECISION & ORDER
Motion Seq. Nos.: 002, 003

THE ELIZABETH FOUNDATION FOR THE ARTS
and THE ROBERT BLACKBURN PRINTMAKING
WORKSHOP,

Defendants.

-----X

KENNEY, JOAN M., J.:

Motion sequence numbers 002 and 003 are consolidated for disposition.

In this action to enforce a judgment, defendants, The Elizabeth Foundation for the Arts (EFA) and the Robert Blackburn Printmaking Workshop (RBPW) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint (motion sequence 002).

By separate motion, plaintiffs Michael Ring and Frank Ring (collectively the Rings) move, pursuant to CPLR 3212, for summary judgment on the complaint (motion sequence 003).

BACKGROUND

In July 1997, The Printmaking Workshop, Inc. (PMW), a cooperative press run by Robert Blackburn which produced prints and artwork, entered into a seven-year lease agreement for commercial space in a building located at 19 West 24th Street in Manhattan. Plaintiffs were the owners of that building. It is undisputed that PMW had trouble paying its rent and that the Rings commenced an action against PMW to recover amounts due under the lease and to recover possession of the premises. The Rings obtained a judgment against PMW in the amount of \$34,631.05 for arrears on the lease through June 2001 and PMW was evicted from the premises.

Thereafter, on July 1, 2002, the Rings commenced an action to recover \$226,117.00, which

they claimed was the balance due under the lease from July 2001, when PMW was evicted from the building, through July 2004, the end of the lease term. In addition, they sought damages for additional rent, late fees, and costs and expenses; including attorneys' fees¹ (the Underlying Action).

On July 19, 2002, PMW and its owner, Robert Blackburn (Blackburn), entered into a letter agreement (the Agreement) with EFA, a foundation which supports the arts, "to create the Robert Blackburn Printmaking Workshop [RBPW], a new entity formed to carry on the traditions of PMW and operate as a program of EFA" (Ring aff, exhibit J). Pursuant to the agreement, EFA purchased, for the RBPW program's use, "the existing equipment and operating assets of PMW, the existing records of PMW and all of the prints in the PMW collection . . ." (*id.*). The agreement also provides that: a) upon execution of the agreement, PMW would cease to exist; b) "EFA has no legal obligation to pay past debts of PMW, but may elect to pay any vendors whose non-payment would provide obstacles to the operations of RBPW"; and c) "[t]his agreement . . . is not in effect and shall not go into effect until such time as the lawsuit[s] brought by Mr. Ring, former landlord of PMW, have been settled, or EFA deems that it [sic] this specific matter is satisfactorily resolved" (*id.*).

In addition, the Agreement states that RBPW was being formed to carry on the traditions of printmaking, that EFA would use the Blackburn name in connection with RBPW, and that Blackburn would be the artistic director.

Attachment F to the Agreement, titled "Agreement to Purchase the Operation of the Printmaking Workshop with the Elizabeth Foundation for the Arts" provides,

"As a program of EFA, RBPW will establish and draw upon the advice of a working Advisory Board in matters of operation and funding. The initial advisory board members shall include

¹*Ring v Printmaking Workshop*, Index # 602434/2002.

Robert Blackburn, Deborah Cullen, Will Barnett, Jane Stephenson, Guy S. Buckles, Virginia Myers, Townsend Wolfe, Helen Ramsaran, Tara Sabharwal, and Ademola Olugbefola.”

It is undisputed that, at the time the Agreement was signed, Blackburn was PMW’s sole member and Deborah Cullen and Will Barnett were its only directors.

Although EFA anticipated that the RBPW program would open in 2002, the evidence establishes that it did not begin operation until 2005.

Thereafter, in December 2011, plaintiffs obtained a judgment against PMW in the Underlying Action in the amount of \$812,066.45.²

Here, the Rings seek to hold EFA and RBPW liable for the \$812,066.45 judgment against PMW on the grounds that there is successor liability based on a de facto merger between PMW and RBPW and/or EFA (first cause of action) or, alternatively, that the RBPW program at EFA is a mere continuation of PMW (second cause of action).

FACTUAL CONTENTIONS

In support of their motion for summary judgment dismissing the complaint and in opposition to plaintiffs’ motion for summary judgment on the complaint, EFA argues that both the de facto merger and mere continuation causes of action must be dismissed because: 1) both EFA and PMW are not-for profit entities which do not have “owners” or shareholders and, therefore, there can be no continuity of ownership; 2) PMW has not been dissolved or discontinued; that it is registered as

² The Underlying Action was referred to a referee who recommended that plaintiffs be awarded damages (and interest) in the amount of \$663,876.90 and \$101,118.83 in attorneys’ fees and disbursements. That award was confirmed at a hearing on December 22, 2010, with interest thereon through the entry of judgment. After interests and costs were added, the Clerk of the Court entered judgment in the amount of \$812,066.45 against PMW.

an active not-for-profit corporation with the New York Department of State and that PMW continued its operations in a meaningful way when it defended itself in the Underlying Action; 3) there was a four year gap between PMW ceasing its ordinary business operations in 2001 and EFA's opening the RBPW program in 2005; 4) there was only one director who was on both PMW and EFA's board of directors, who, because of age, did not participate in running EFA; 5) there was no continuity of personnel, location, assets, or general business organization; and 6) EFA expressly contracted that it had no legal obligation to pay PMW's debts.

In opposition to EFA's motion for summary judgment dismissing the complaint and in support of their motion for judgment on the complaint, plaintiffs contend that: a) Robert Blackburn's appointment as artistic director of RBPW is sufficient to establish continuity of ownership; b) PMW has ceased to exist and is, at most, a mere shell, shorn of its assets; c) EFA assumed many significant liabilities on behalf of PMW; d) PMW transferred its manager, Robert Blackburn, to EFA and two of PMW's directors, Deborah Cullen and Will Barnett, became members of RBPW's initial advisory board and at least three other members of that advisory board had previously been affiliated with PMW; e) RBPW acquired PMW's goodwill by adopting Robert Blackburn's name; and f) RBPW acquired PMW's entire business operation without payment or consideration and it acquired all of its assets without payment or consideration.

In addition, plaintiffs argue that it would be inequitable to permit EFA to avoid payment of the judgment in the underlying action since they acquired PMW with full knowledge of plaintiff's pending litigation.

DISCUSSION

Summary Judgment

Summary judgment will be granted if it is clear that no triable issue of fact exists (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The burden is on the moving party to make a prima facie showing of entitlement to summary judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of a triable issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d at 562). Mere conclusions, unsubstantiated allegations or expressions of hope are insufficient to defeat a summary judgment motion (*Zuckerman v City of New York*, 49 NY2d at 562).

Successor Liability

Ordinarily, “a corporation that purchases the assets of another corporation is not responsible for the [liabilities] the seller corporation” (*Kretzmer v Firesafe Prods. Corp.*, 24 AD3d 158, 158 [1st Dept 2005]); *Matter of New York City Asbestos Litig.*, 15 AD3d 254, 255 [1st Dept 2005]).

There are, however, four exceptions to this rule. A successor corporation may be held liable where: (1) the purchaser expressly or implicitly assumes the predecessor’s liability; (2) there was a consolidation or merger of the seller and purchaser; (3) the purchasing corporation is a mere continuation of the selling corporation; or (4) the transaction was entered into to defraud the creditors

(*Schumacher v Richards Shear Co.*, 59 NY2d 239, 245 [1983]).³

De Facto Merger

As to the merger exception, a transaction structured as a purchase of assets may be deemed to fall within merger exception as a de facto merger if the following factors are present: “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” (*Fitzgerald v Fahnstock & Co.*, 286 AD2d 573, 574 [1st Dept 2001]).

“Not all of these elements are necessary to find a defacto 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” (*id.* at 574-575).

The concept of “de facto merger” is based on the idea “that a successor that effectively takes over a company in its entirety should carry the predecessor’s liabilities as a concomitant to the benefits it derives from the good will purchased” (*Grant-Howard Assoc. v General Housewares Corp.*, 63 NY2d 291, 296 [1984]). As a result, courts analyze the factors in a flexible manner to determine whether, in substance, the successor’s intent was to absorb and continue the operation of

³ Plaintiffs rely solely on the merger and mere continuation exceptions for successor liability.

its predecessor (*Matter of AT&S Transp., LLC v Odyssey Logistics & Tech. Corp.*, 22 AD3d 750, 752 [2d Dept 2005]). However, continuity of ownership has been deemed essential to a de facto merger finding, as ownership continuity is the essence of a merger (*Matter of New York City Asbestos Litig*, 15 AD3d at 258; *Cargo Partners AG v Albatrans, Inc.* 352 F3d 41, 47 [2d Cir 2003] [citing New York law]).

As discussed below, in this case there are questions of fact regarding whether, for the purposes of the de facto merger analysis, there was a continuity of ownership, dissolution of the selling corporation, and continuity of management. Accordingly, both motions seeking summary judgment on the de facto merger cause of action are denied.

a. Continuity of Ownership

The continuity of ownership prong of the de facto merger doctrine should be interpreted flexibly so that, even if a buyer does not pay for assets with buyer's stock, "other indicia of control over or continuing benefit from the sold assets might . . . be sufficient to satisfy the continuity of ownership factor" (*City of Syracuse v Loomis Armored US, LLC*, 900 F Supp 2d 274, 289 [ND NY 2012][internal quotation marks and citation omitted]).

In *Rogers-Duell v Ying-Jen Chen* (42 Misc 3d 1226[a], 2014 NY Slip Op 50203[U] at *4 [Sup Ct, Albany County 2014]), the court was faced with the questions of successor liability and continuity of ownership between two not-for-profit organizations. In that case, the court recognized that, because both entities were not-for-profits, they had no owners or shareholders. Therefore, it looked to other indicia of control instead of considering ownership, per se. That court turned its

attention to the boards of trustees of both organizations to determine whether any pre-agreement trustees later served on the board of the successor corporation. In that case, none of the people who had been on the predecessor board were on the successor board and, although some overlap did occur, it only happened some months or years after the transfer agreement was signed.

In this case there is a question of fact about whether Robert Blackburn's appointment as artistic director of RBPW, with decision making and veto power over aspects of RBPW's operation, coupled with the fact that two of PMW's board members served on RBPW's initial advisory board and one of PMW's board members also served on EFA's board of directors, rises to the level of continuity of ownership.

b. Dissolution of PMW

In considering whether a dissolution occurred for the purposes of the de facto merger doctrine, it is irrelevant whether the predecessor company has been legally dissolved. Rather, the courts will determine whether the predecessor entity has closed and, for all intents and purposes ceased to exist. In *Fitzgerald v Fahnestock* (286 AD2d at 575), the First Department stated that “[t]he IAS court erred in holding that there could be no de facto merger where the subsidiary is not legally dissolved. 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” (*see also Matter of New York City Asbestos Litig.*, 15 AD3d at 257).

In this case, there is a question of fact regarding whether PMW was essentially dissolved after the transaction with EFA, even though it was allegedly represented by counsel in the Underlying

Action and remains a registered not-for-profit corporation with the New York Department of State (see *id.*; *Buja v KCI Konecranes Intl. plc*, 12 Misc 3d 859, 864 [Sup Ct, Monroe County 2006] [predecessor corporation continued in existence in a meaningful way where, after the purchase of assets, it was involved in litigation, had a default judgment filed against it and was represented in ongoing litigation]).

c. Continuity of Assets, Management and/or Business Operations between PMW and the RBPW.

Here, there is also a question about whether there is a continuity of business operations because it is undisputed that there was a gap of over four years between PMW ceasing ordinary business operations and the commencement of EFA's RBPW program (Eustis aff, ¶¶ 6, 10, Cullen aff, ¶¶ 2, 10, 19). Moreover, although two former PMW directors were on RBPW's initial advisory board, only one of PMW's former directors, Will Barnett, was on EFA's board of directors in 2002. Whether two initial advisory board members and one overlapping member of the board of directors rises to the level of overlapping management is a question that cannot be decided on the papers before the court (Stephenson aff, ¶¶ 28, 29 and 32; Ezcurra affirmation, exhibit 14).

Accordingly, because there are questions of fact as to some of the essential indicia of de facto merger, both motions for summary judgment on the first cause of action alleging de facto merger are denied (see *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 40 Misc 3d 643, 662, 667, 671 [Sup Ct, NY County 2013])

"Mere Continuation"

The branch of defendants' motion for summary judgment that seeks to dismiss the second cause of action based on the "mere continuation" doctrine is granted and plaintiffs' demand for judgment on that claim is denied.

Under the mere continuation doctrine, as opposed to de facto merger, it is essential that the predecessor corporation ceases to exist.

In *Schumacher* (59 NY2d at 245), the Court of Appeals explained that "the [mere continuation] exception refers to corporate reorganization, . . . where only one corporation survives the transaction; the predecessor corporation **must** be extinguished" (emphasis added). "If the predecessor corporation continues to exist after the transaction, in however gossamer a form, the mere continuation exception is not applicable (*Diaz v South Bend Lathe Inc.*, 707 F Supp 97, 100 [ED NY 1989] [citing *Schumacher*]; *Marenyi v Packard Press Corp.*, 1994 WL 16000129 *9, 1994 US Dist LEXIS 14190, *29-*30 [SD NY 1994]).

Other factors considered to be indicative of the mere continuation exception are that the business of the successor is the same as the business of the predecessor, the business employs the same work force, and the successor has acquired the predecessor's location, management and goodwill (*see NTL Capital, LLC v Right Track Rec., LLC*, 73 AD3d 410, 411 [1st Dept 2010]).

a. Predecessor corporation⁴

In this case, EFA has submitted evidence that demonstrates that PMW continues to exist, in

⁴ The standard for dissolution of the predecessor corporation are different under the theories of de facto merger and mere continuation (*see, Schumacher* (59 NY2d at 245 [mere continuation]) as compared to *Fitzgerald* (286 AD2d at 575 [de facto merger]).

however gossamer a form, as an active not-for-profit corporation as recorded by the New York Department of State (Clark affirmation, exhibit D). Accordingly, because PMW continues to exist, the RBPW program at EFA cannot be a mere continuation of PMW (*see Matter of Seventh Jud. Dist. Asbestos Litig.*, 6 Misc 3d 749, 751-752 [Sup Ct, Ontario County 2005]; *Colon v Multi-Pak Corp.*, 477 F Supp 2d 620, 627 [SD NY 2007][where predecessor continued to exist as a separate entity for five years after agreement mere continuation doctrine does not apply]).

Moreover, the evidence demonstrates that there was no continuity of personnel (Stephenson aff, ¶¶ 33, 34) or physical location between the two entities (Stephenson aff, ¶ 36). Indeed PMW had no employees and, it is undisputed that before the agreement, it did business in a building located at 19 West 24th Street in Manhattan. EFA has been located at 323 West 39th Street in Manhattan since 1998.

Plaintiffs have failed to come forward with evidence to raise a material question of fact regarding PMW's continued existence and the lack of continuity of personnel or physical location. The fact that, after PMW was evicted in 2001, it rented storage space and stored some of its possessions at EFA, does not establish continuity of location because PMW was not conducting business operations at EFA during that time period (Ezcurra affirmation, Exhibit K at 42-43).

Accordingly, it is

ORDERED, that defendants The Elizabeth Foundation for the Arts and The Robert Blackburn Printmaking Workshop's motion for summary judgment to dismiss the complaint (motion sequence #002) is granted to the extent that the second cause of action alleging liability under a theory of continuation of the judgment debtor is dismissed; and it is further

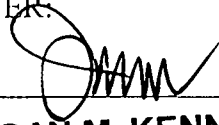
ORDERED that defendants' motion for summary judgment is otherwise denied; and it is further

ORDERED that plaintiffs Michael Ring and Frank Ring's motion for summary judgment on the complaint (motion sequence #003) is denied; and it is further

ORDERED that the action shall continue as to the first cause of action and the parties are directed to proceed to mediation/trial forthwith.

Dated: November 12, 2014

ENTER:



JOAN M. KENNEY
J.S.C.