

Ambac Assur. Corp. v Countrywide Home Loans

2015 NY Slip Op 32933(U)

October 22, 2015

Supreme Court, New York County

Docket Number: 651612/2010

Judge: Eileen Bransten

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

PRESENT: EILEEN BRANSTEN Justice

PART 3

AMBAC ASSURANCE CORP.

INDEX NO. 651612/2010

- v -

MOTION DATE 07/15/2015

COUNTRYWIDE HOME LOANS

MOTION SEQ. NO. 026

Table with 2 columns: Document type and No(s). Rows include Notice of Motion/Order to Show Cause - Affidavits - Exhibits (1), Answering Affidavits - Exhibits (2), Replying Affidavits (3), and Cross Motion (No).

Upon the foregoing papers, it is ordered that this motion is DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

DATED: 10/22/2015

Handwritten signature of Eileen Bransten, J.S.C.

- 1. CHECK ONE: [] CASE DISPOSED, [X] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: [] GRANTED, [X] DENIED, [] GRANTED IN PART, [] OTHER
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

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AMBAC ASSURANCE CORPORATION and
THE SEGREGATED ACCOUNT OF AMBAC
ASSURANCE CORPORATION,

Plaintiffs,

- *against* -

Index No.: 651612/2010
Motion Date: 07/15/2015
Motion Seq.: 026, 028

COUNTRYWIDE HOME LOANS, INC.,
COUNTRYWIDE SECURITIES CORP.,
COUNTRYWIDE FINANCIAL CORP., and
BANK OF AMERICA CORP.,

Defendants.

-----X

BRANSTEN, J.

This matter comes before the Court on Plaintiffs Ambac Assurance Corporation and The Segregated Account of Ambac Assurance Corporation (together, "Ambac") and Defendant Bank of America Corp.'s ("BAC") cross-motions for summary judgment on the issue of successor liability. Each motion is opposed. For the reasons stated below, BAC's motion for summary judgment as to the three successor liability theories asserted in the complaint is denied (motion sequence number 026), and Ambac's motion for partial summary judgment on the continuity of ownership hallmark of the de facto merger theory is granted (motion sequence number 028).

I. Background

Ambac alleges that Defendants Countrywide Home Loans, Inc. ("CHL"), Countrywide Securities Corp. ("CSC"), and Countrywide Financial Corp. ("CFC")

(collectively “Countrywide”) fraudulently induced Ambac to insure twelve residential mortgage-backed securities. Further, Ambac asserts that Countrywide breached representations and warranties in the securitization transaction documents regarding Countrywide’s underwriting practices by issuing mortgage loans to borrowers that comprised the securities.

Prior to 2008, CFC was a holding company whose subsidiaries were primarily engaged in mortgage origination and servicing, banking, capital markets, and insurance businesses. At that time, CFC’s direct and indirect subsidiaries included CHL and Countrywide Capital Markets, Inc., which in turn owned CSC.

Ambac alleges that BAC is liable under various theories for Countrywide’s debts arising from the transactions. These successor liability claims are premised on three transactions between BAC and Countrywide that occurred in 2008.

On January 11, 2008, BAC agreed to acquire CFC through a forward triangular merger, whereby CFC merged into BAC’s wholly-owned subsidiary, Red Oak Merger Corporation (the “Red Oak Merger”). The Red Oak Merger closed on July 1, 2008, and the Red Oak Merger Corporation was renamed Countrywide Financial Corporation. The new Countrywide Financial Corporation was a wholly-owned subsidiary of BAC. Legacy CFC shareholders became owners of BAC stock.

Immediately after the Red Oak Merger, the now wholly-owned indirect subsidiaries of BAC, CHL and CSC sold assets to non-Countrywide wholly-owned BAC subsidiaries (the “July 2008 Transaction”). These asset sales were part of BAC’s strategic

model for the residential mortgage business and were designed to provide efficiency in BAC's funding and liquidity plans. In November 2008, CFC and CHL sold substantially all of their remaining assets to BAC (the "November 2008 Transaction"). BAC also purchased from CFC its 100% equity ownership of Effinity Financial Corp.

Ambac contends that the Red Oak Merger, the July 2008 Transaction, and the November 2008 Transaction were part of BAC's plan to add the distinctiveness of Countrywide's mortgage business to its own. BAC disputes that the July 2008 and November 2008 transactions were part of any plan to integrate Countrywide into BAC. BAC argues that the three transactions should all be viewed separately.

Ambac filed suit against Countrywide on September 28, 2010, alleging fraud and breach of contract. Ambac also alleged that BAC was liable for Countrywide's fraud and breach of contract as its successor. BAC now moves for summary judgment dismissing Ambac's claims for successor liability. Ambac moves for partial summary judgment, seeking an order that there was a continuity of ownership between Countrywide's legacy shareholders and BAC.

The issues presented on these motions are nearly identical to those covered in a prior summary judgment decision in a similar case. *See MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 40 Misc.3d 643 (Sup. Ct. N.Y. Cnty. April 29, 2013) ("*MBIA*"). The successor liability motion in *MBIA* centered on the same transactions – the Red Oak Merger, the July 2008 Transaction, and the November 2008 Transaction – and the same issues of whether BAC should be deemed the successor of CHL, CSC, and CFC by de

facto merger and/or the implied assumption of liabilities. Moreover, BAC was the successor liability defendant in *MBIA*, just as it is here. In light of the *MBIA* decision, the motions are considered below.

II. Discussion

“It is the general rule that a corporation which acquires the assets of another is not liable for the torts of its predecessor.” *Schumacher v. Richards Shear Co.*, 59 N.Y.2d 239, 244 (1983). However, New York courts recognize four exceptions to this rule: “(1) [where the successor] expressly or impliedly assumed the predecessor’s tort liability, (2) [where] there was a consolidation or merger of seller and purchaser, (3) [where] the purchasing corporation was a mere continuation of the selling corporation, or (4) [where] the transaction is entered into fraudulently to escape such obligations.” *Id.* at 245.

Ambac asserts three theories of successor liability against BAC. First, Ambac contends that Countrywide effectively merged with BAC, thereby automatically assuming all of its liabilities – a basis for successor liability known as a “de facto merger.” Second, Ambac posits that BAC, through various statements and actions, impliedly assumed Countrywide’s liabilities. Finally Ambac contends that BAC, as the sole owner of Countrywide, so dominated and controlled Countrywide after the Red Oak merger that they were essentially alter egos, warranting piercing of Countrywide’s corporate veil.

1. Standard of Law on Motion for Summary Judgment

The standards for summary judgment are well-settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action “sufficiently to warrant the court as a matter of law in directing judgment.” CPLR 3212(b); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once such proof has been offered, to defeat summary judgment “the opposing party must show facts sufficient to require a trial of any issue of fact.” CPLR 3212(b); *Zuckerman*, 49 N.Y.2d at 562. When deciding a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-movant. *Branham v. Loews Orpheum Cinemas, Inc.*, 8 N.Y.3d 931, 932 (2007).

2. De Facto Merger

Ambac’s first theory of successor liability is “de facto merger.” Ambac contends that BAC is liable for Countrywide’s debts because Countrywide effectively merged with BAC, thereby automatically assuming all of its liabilities. The threshold issue here is choice of law.

A. *Choice of Law on De Facto Merger Claim*

BAC asserts that Delaware law governs Ambac's de facto merger claim. In *MBIA*, this Court performed the requisite choice-of-law interest analysis and concluded that North Carolina, as BAC's principal place of business, had the greatest interest in the transaction. *See MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 40 Misc.3d 643, 656 (Sup. Ct. N.Y. Cnty. April 29, 2013). Because BAC did not assert a conflict between New York and North Carolina law, this Court determined that New York law governed the de facto merger claim. *Id.* at 657. Based on *MBIA*, Ambac contends BAC is collaterally estopped from arguing that Ambac's de facto merger must be governed by Delaware law.

i. *Standard for Collateral Estoppel*

"Collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party." *Buechel v. Bain*, 97 N.Y.2d 295, 303 (2001). The party asserting collateral estoppel bears the burden to show that there is an identity of issue that was necessarily decided in the prior action. *Id.* at 304. The party opposing collateral estoppel then bears the burden to show that it did not have a full and fair opportunity to contest the prior decision. *Id.*

Here, BAC does not argue that it lacked a full and fair opportunity to argue for the application of Delaware law in *MBIA*. Therefore, the relevant issue to be decided here is

whether Ambac has carried its burden to show an identity of issue that was necessarily decided in the prior action.

ii. *Collateral Estoppel Regarding Choice of Law*

As noted above, this Court analyzed and decided the choice-of-law issue covering the de facto merger claim in *MBIA*. As in *MBIA*, BAC again asserts that Delaware law should apply in the instant action. See *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 40 Misc.3d 643, 650 (Sup. Ct. N.Y. Cnty. April 29, 2013) (“BAC asserts that Delaware law governs.”).

BAC nevertheless argues that collateral estoppel does not apply because the decision in *MBIA* was not a “final” order. In BAC’s view, a denial of summary judgment can never determine an issue for collateral estoppel purposes. BAC appears to be conflating *res judicata*, which requires, among other things, “a valid final judgment,” with collateral estoppel. See *Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 347 (1999). However, “[t]he doctrine of collateral estoppel [is] a narrower species of *res judicata*, preclud[ing] a party from relitigating . . . an issue clearly raised in a prior action . . . and decided against that party . . . , whether or not the tribunals or causes of action are the same.” *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500 (1984).

BAC contends that *Rudd v. Cornell*, 171 N.Y. 114, 127 (1902), prevents the application of collateral estoppel to “interlocutory” orders. However, in *Rudd*, a 1902 case dealing with *res judicata*, the Court of Appeals held that the “interlocutory” order in

the prior case did not deal with the same issue as the one the court was then considering and therefore declined to apply “res adjudicata,” as it was then known. *Id.*, 171 N.Y. at 129 (“the question involved in this case was not at issue or litigated in the former action”).

Although the Court of Appeals in *Rudd* stated that “it is only a final judgment upon the merits which is . . . conclusive in a subsequent action . . . and an interlocutory order is not such a judgment,” the decision did not discuss collateral estoppel, and the “interlocutory” order had been supplanted by a final judgment. *Rudd*, 171 N.Y. at 129. Indeed, it was not until 1969 that the Court of Appeals officially adopted the modern concept of collateral estoppel. See *Schwartz v. Pub. Adm’r of Bronx Cnty.*, 24 N.Y.2d 65, 71 (1969) (“Although we have not previously said so, it is now evident that New York has adopted the full and fair opportunity test in applying the doctrine of collateral estoppel. . . . New York Law has now reached the point where there are but two necessary requirements for the invocation of the doctrine of collateral estoppel.”)

BAC also cites *Franco v. Jay Cee of New York Corp.*, in which the First Department held that denial of a summary judgment motion did not have a binding effect, as law of the case, on a post-trial motion to set aside the verdict. *Franco v. Jay Cee of New York Corp.*, 36 A.D.3d 445, 447 (1st Dep’t 2007). In *Franco*, the underlying summary judgment decision concluded that a certain section of the Industrial Code applied to the case but held that factual issues precluded summary judgment. *Id.* at 446. The defendant then sought, unsuccessfully, to have the trial court instruct the jury that the

Industrial Code had been violated as a matter of law. *Id.* On appeal, the First Department rejected the defendants' argument that the summary judgment decision was binding on the trial court and that the trial court did not have to instruct the jury that the Industrial Code was violated as a matter of law. *Id.* at 447. The issue of whether the Industrial Code was actually violated was never determined and therefore could not support collateral estoppel. *Id.*

Similarly unavailing is BAC's reliance on *D.A.V. Chiropractic, P.C. v. Geico Indemnity Co.*, 21 Misc.3d 138(A), at *1 (N.Y. App. Term Nov. 7, 2008), in which the court declined to give preclusive effect to the denial of a summary judgment motion in a prior action. The court in the prior action denied summary judgment because it deemed that there were issues of fact as to whether an insurance policy had been obtained by fraud. *Id.* at 2. The court in *D.A.V. Chiropractic, P.C.* held that the prior court had not determined the issue of fraud and declined to apply collateral estoppel. *Id.*

In *Franco* and *D.A.V. Chiropractic, P.C.*, the parties sought collateral estoppel of issues that had not been determined because of issues of fact. Here, in contrast, the prior determination was clear. This Court in *MBIA* necessarily decided the choice-of-law issue after BAC had a full and fair opportunity to litigate it. The Court disagrees with BAC's contention that the *MBIA* summary judgment decision decided "no more than the existence of a triable issues of fact." In *MBIA*, the Court needed to address the threshold issue of choice of law before determining whether there were issues of fact regarding de facto merger. *MBIA* did not hold that there were issues of fact present concerning the

choice-of-law analysis. To the contrary, the Court determined that New York law governs the issue of whether the transactions at issue constituted a de facto merger, such that BAC would be deemed successor. *See MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 40 Misc.3d 643, 657 (Sup. Ct. N.Y. Cnty. April 29, 2013) (“New York law applies.”). Instead, *MBIA* held only that there were issues of fact concerning the application of New York law to the de facto merger claim and denied summary judgment on that basis.

Because BAC had a full and fair opportunity to litigate the choice-of-law issue in *MBIA*, and it was necessarily decided against BAC, BAC is collaterally estopped from re-litigating the identical issue here. *See Singleton Mgmt., Inc. v. Compere*, 243 A.D.2d 213, 217 (1st Dep’t 1998) (“Collateral estoppel effect will only be given to matters ‘actually litigated and determined’ in a prior action. Preclusive effect will not be given if the particular issue . . . was not ‘actually litigated, squarely addressed and specifically decided.’”). This case seems to be an ideal application of the doctrine of collateral estoppel because the issues are admittedly identical and BAC concedes that it had a full and fair opportunity in the prior action.

Accordingly, New York law applies to Ambac’s de facto merger claim.

B. *Standard on De Facto Merger under New York Law*

Under New York law, the four elements or “hallmarks” of a de facto merger claim between an asset seller and an asset buyer are (1) continuity of ownership; (2) cessation of ordinary business and dissolution of the acquired corporation as soon as possible; (3)

assumption by the successor of liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and (4) continuity of management, personnel, physical location, assets and general business operations. *See Fitzgerald v. Fahnestock & Co.*, 286 A.D.2d 573, 574 (1st Dep't 2001). In addition, BAC asserts that courts also consider whether an asset buyer paid "fair value" for the assets as a factor in the de facto merger analysis. The Court will consider BAC's fair value contention first, and then will turn to the four de facto merger "hallmarks" specified above.

i. *Fair Value is Irrelevant*

BAC contends that when considering a de facto merger claim, New York courts will consider whether there was unfairness to creditors, and that a showing that fair value was received for the assets defeats any claim of unfairness. BAC contends that CFC and CHL received fair value for their assets from BAC, and therefore Ambac's de facto merger claim fails.

BAC cites *TAP Holdings, LLC v. ORIX Fin. Corp.*, 2014 WL 5900923, at *11 (Sup. Ct. N.Y. Cnty. Nov. 7, 2014) (Ramos, J.), arguing that the *TAP* court considered fair value to be a factor in the de facto merger analysis. BAC is correct to note that *TAP* stated that unfairness to creditors and inadequate consideration were factors in a de facto merger analysis. However, to the extent *Tap* considered this as a "hallmark" of the de facto merger analysis, this Court respectfully disagrees.

In *TAP*, the trial court's summary judgment decision cited the First Department's prior *TAP* decision, made on a motion to dismiss, for the proposition that an "overall element of injustice or unfairness must always be present." See *TAP Holdings LLC*, 2014 WL 5900923 at *11. However, the First Department's statement was made in the context of discussing the theory of piercing the corporate veil and not de facto merger. See *Tap Holdings, LLC v. Orix Fin. Corp.*, 109 A.D.3d 167, 174-75 (1st Dep't 2013) ("on the theory of piercing the corporate veil . . . an overall element of injustice or unfairness must always be present . . . we find that Manager has asserted sufficient facts to state a cause of action based on piercing the corporate veil.").

In addition to citing the First Department's prior *TAP* decision, the *TAP* trial court also cites the First Department's holding in *Van Nocker v. A.W. Chesterton Co.*, 15 A.D.3d 254, 259 (1st Dep't 2005), for the proposition that courts consider whether a company "sold its assets for inadequate consideration, or that the transaction was somehow fraudulent . . ." See *TAP*, 2014 WL 5900923 at *12. However, this dicta in *Van Nocker* is not discussing de facto merger, but rather merely notes that other bases of liability are not present. The full passage states:

In sum, the record establishes, as a matter of law, that the first two of the four de facto merger factors are absent in this case. . . . Under these circumstances, we conclude that the record establishes, as a matter of law, that the subject transaction was not a de facto merger. We would add that plaintiff does not allege that Old H-T sold its assets for inadequate consideration, or that the transaction was somehow fraudulent as to those having claims against Old H-T.

Van Nocker, 15 A.D. 3d at 258-59. The *Van Nocker* court already had determined that de facto merger had not occurred, without considering whether unfairness was present or if fair value had been received.

This interpretation of *Van Nocker* is in accord with Judge Mukasey's holding in *Miller v. Forge Mench Partnership Ltd.*, 2005 WL 267551 (S.D.N.Y. Feb. 2, 2005), in which he noted that "no independent showing of fraud or injustice is required under the de facto merger doctrine." *Miller*, 2005 WL 267551 at *12. BAC contends that *Miller* is not persuasive on this point because it involves "a classic liquidation-reincorporation creditor-fraud." However, BAC does not address the fact that *Miller* explicitly stated that a showing of creditor fraud was not necessary in a de facto merger analysis. *Miller*, at *12.

Accordingly, to the extent that *TAP* asserts that unfairness to creditors is a "hallmark" of the de facto merger doctrine, this Court respectfully disagrees. See *Fitzgerald v. Fahnestock & Co.*, 286 A.D.2d 573, 574 (1st Dep't 2001) (listing four hallmarks of de facto merger and not including unfairness to creditors).

BAC further argues that the Second Circuit's decision in *Cargo Partner AG v. Albatrans, Inc.*, 352 F.3d 41, 45 (2d Cir. 2003), lends credence to BAC's supposition that de facto merger requires some unfairness or prejudice to creditors, and that such unfairness or prejudice can never be shown when fair value is paid for assets. BAC points to the *Cargo Partner* court's statement that "[s]o long as the buyer pays a bona fide, arms-length price for the assets, there is no unfairness to creditors." 352 F.3d at 45.

However, this statement was not discussing de facto merger, but rather was describing the different ways that asset sales may lead to successor liability:

Under New York law, there are at least three ways in which a corporation can acquire the business of another . . . In the first case, the purchaser does not become liable for the seller's debts unless the stringent requirements for piercing the corporate veil are met . . . Likewise, the purchaser of a corporation's assets does not, as a result of the purchase, ordinarily become liable for the seller's debts . . . So long as the buyer pays a bona fide, arms-length price for the assets, there is no unfairness to creditors in thus limiting recovery to the proceeds of the sale-cash . . . Only in the third case, when two corporations merge to become a single entity, is the successor corporation automatically liable for the debts.

Id. at 44-45.

As the court noted in *Miller v. Forge Mench Partnership Ltd.*, 2005 WL 267551 (S.D.N.Y. Feb. 2, 2005), "the Court in *Cargo Partner* explicitly carved out an exception to its 'windfall' principle for a de facto merger." *Miller*, 2005 WL 267551 at *13. As noted above, the Second Circuit held that "[o]nly in the third case, when two corporations merge to become a single entity, is the successor corporation automatically liable for the debts of both predecessors; it is both predecessors." *Cargo Partner*, 352 F.3d at 44-45.

BAC seeks to merge the elements for various theories of successor liability and graft an unfairness requirement onto the New York de facto merger analysis. However, no such element exists under New York law. For the reasons stated, this Court sees no grounds to disturb its holding in *MBIA* that fair value is irrelevant to a de facto merger analysis. See *MBIA Ins. Co. v. Countrywide Home Loans, Inc.*, 40 Misc.3d 643, 674 (Sup. Ct. N.Y. Cnty. April 29, 2013) ("BAC's argument that its payment of 'fair value' defeats MBIA's successor liability claim fails."). The four hallmarks of de facto merger, as stated

above, constitute the necessary elements to be considered, and will now be considered in turn.

C. *Continuity of Ownership*

The first hallmark of a de facto merger transaction, continuity of ownership, “describes a situation where the parties to the transaction ‘become owners together of what formerly belonged to each.’” See *Van Nocker v. A.W. Chesterton Co.*, 15 A.D.3d 254, 256 (1st Dep’t 2005). “[C]ontinuity of ownership is ‘the essence of a merger,’ [and] it is a necessary element of any de facto merger finding, although not sufficient to warrant such a finding by itself.” *Id.*

Here, Ambac seeks partial summary judgment solely on this specific issue, arguing that, viewing the Red Oak Merger, the July 2008 Transaction, and the November 2008 Transaction together as one, Countrywide and BAC “bec[a]me owners together of what formerly belonged to each.” *Van Nocker*, 15 A.D.3d at 256. In the Red Oak Merger, CFC shareholders became shareholders of BAC, and BAC came to wholly-own CFC. In the July 2008 Transaction, CFC subsidiaries, CHL and CSC, sold assets to BAC subsidiaries. In the November 2008 transaction, BAC purchased substantially all of CFC and CHL’s remaining assets.

BAC also seeks summary judgment on the continuity of ownership hallmark, arguing that there can be no continuity of ownership as a matter of law because each of those transactions cannot be considered together. Although BAC acknowledges that in

MBIA this Court held that the various transactions at issue could be considered together and support a continuity of ownership theory, BAC argues that the *MBIA* holding was a misapplication of New York law.

i. BAC's Motion on Continuity of Ownership

As in *MBIA*, BAC again contends that *Van Nocker* held that continuity of ownership can be shown only if the owners of the predecessor corporation become direct or indirect shareholders of the successor corporation *as the result of the successor's purchase of the predecessor's assets*. *Van Nocker*, 15 A.D.3d at 256 (emphasis added). According to BAC, a de facto merger can only occur if the stock-for-asset swap is accomplished in a single transaction. BAC argues that in *MBIA*, this Court incorrectly relied on *Fitzgerald* and *Arnold Graphics* to show that several transactions could be viewed together. BAC argues that this Court should not have considered a stock-for-asset sale as “just one example” of de facto merger, but as the only way that a de facto merger could occur.

For the reasons stated below, BAC's arguments are unavailing. The Court again will view the Red Oak Merger, the July 2008 transaction and the November 2008 transaction as one.

First, BAC argues that *Fitzgerald v. Fahnestock & Co.*, 286 A.D.2d 573 (1st Dep't 2001) presented a different procedural posture and therefore is inapt. BAC maintains that since the *Fitzgerald* court resolved a motion to dismiss, its decision provides no guidance

on a motion for summary judgment. This argument fails because whether the standards are different on a motion to dismiss and motion for summary judgment is not the issue. Relevant to the instant motions, *Fitzgerald* determined that a multi-step transaction, which began with a stock purchase, and not an asset purchase, would satisfy continuity of ownership if proven true. *Id.* at 574. Consistent with *Fitzgerald*, and contrary to BAC's contention on this motion, Ambac's claims do not merit dismissal as a matter of law simply because the continuity of ownership was achieved through multiple transactions.

Second, BAC argues that *Fitzgerald* and *Arnold Graphics* are distinguishable because they involve transfers without the payment of fair consideration. *See Arnold Graphics Indus., Inc. v. Indep. Agent Ctr., Inc.*, 775 F.2d 38, 42 (2d Cir. 1985); *Fitzgerald*, 286 A.D.2d at 574. This argument simply rehashes the "fair consideration" argument above and is not persuasive for the reasons already stated.

Finally, BAC contends that the two cases relied on by this Court predated *Van Nocker*, and that even if the rule was different pre-*Van Nocker*, *Van Nocker* changed it by requiring that de facto merger occur "as a result" of the successor's purchase of the predecessor assets. This argument fails for two reasons. First, *Van Nocker*'s holding was simply that "there is no continuity of ownership [because] . . . neither Old H-T nor any of its shareholders has become a shareholder of New H-T." *See Van Nocker v. A.W. Chesterton Co.*, 15 A.D.3d 254, 256 (1st Dep't 2005). The *Van Nocker* plaintiff did not allege that the asset seller or its shareholders became shareholders of the asset buyer in some manner other than "as a result" of the transaction because there was no allegation

that the asset seller or its shareholders became shareholders of the asset buyer at all, in any manner. *Id.* Therefore, the First Department in *Van Nocker* did not hold that continuity of ownership only can occur “as a result” of the asset sale transaction. The manner in which shareholders of the asset seller became shareholders of the asset buyer was not at issue in *Van Nocker*.

Second, BAC’s argument is unpersuasive because the “hallmark” of de facto merger is not a “stock-for-assets transaction,” but rather is “continuity of ownership,” in whatever form it may take. *See Van Nocker*, 15 A.D.3d at 256 (“continuity of ownership describes a situation where the parties to the transaction ‘become owners together of what formerly belonged to each.’”) (quoting *Cargo Partner AG v. Albatrans, Inc.*, 352 F.3d 41, 47 (2d Cir. 2003)). The First Department in *Van Nocker* did not hold that continuity of ownership requires a situation where the parties to the transaction swap stock for assets.

Accordingly, the Court cannot grant summary judgment to BAC based on BAC’s argument that there was not a single “stock-for-assets transaction.” BAC’s motion for summary judgment on this ground is denied.

ii. Ambac’s Motion on Continuity of Ownership

Beyond opposing BAC’s motion, Ambac moves for partial summary judgment only as to this one element of de facto merger, arguing that continuity of ownership exists here as a matter of law.

BAC first argues that Ambac's motion is inappropriate because the test to determine whether a de facto occurred is a holistic one. BAC contends that all the factors must be balanced and that there is no authority to grant summary judgment on any single factor. This argument is unavailing because CPLR 3212(e) permits courts to grant partial summary judgment on "one or more causes of action, or part thereof."

Further, the four hallmarks of de facto merger each call for independent legal and factual analysis. For example, in *Van Nocker*, the court considered each de facto merger criterion in turn and reached conclusions specific to each element. *See Van Nocker v. A.W. Chesterton Co.*, 15 A.D.3d 254, 257-59 (1st Dep't 2005). Accordingly, this Court may grant summary judgment on the sole factor of continuity of ownership.

Next, BAC rehashes its previous argument that courts only collapse multiple transactions, such as the Red Oak Merger, the July 2008 transaction, and the November 2008 transaction, when there was some unfairness to creditors. BAC acknowledges that this issue was broached in *MBIA* but contends *MBIA* was wrongly decided. In *MBIA*, this Court noted that BAC pointed to no New York authority requiring that these transactions be considered separately or precluding their joint consideration, although it contended that Delaware's doctrine of independent legal significance required the July 2008 Transactions and the November 2008 Transaction each to be viewed in isolation. However, as *MBIA* noted, BAC cites to no New York case law employing this Delaware doctrine for this or any purpose. This holds true again in the instant motions.

While BAC acknowledges that New York courts have not adopted the doctrine of independent legal significance, it nonetheless contends that New York courts only consider multiple transactions together when there was some unfairness to creditors. This is merely a recapitulation of BAC's earlier contention that courts should consider whether there was unfairness to creditors in the de facto merger setting. For the reasons stated above, the Court concludes that unfairness to creditors is not a requirement in the de facto merger setting.

BAC next contends that there can be no continuity of ownership where the asset seller receives only a de minimus ownership interest in the asset buyer. BAC argues that because the legacy Countrywide shareholders owned only 3% of BAC after the transactions, ownership continuity is precluded as a matter of law.

In support of this contention, BAC relies on *American Paper Recycling Corp. v. IHC Corp.*, 707 F. Supp. 2d 114, 121 (D. Mass. 2010), which held that there was no continuity of ownership where the asset sellers received only 3.2 percent ownership in the asset buyer. However, this decision, which is not based upon New York law, blends two separate hallmarks under New York law, namely continuity of ownership and continuity of management, personnel, physical location, assets and general business operations. See *Am. Paper Recycling Corp.*, 707 F. Supp. 2d at 122 ("Taking the four factors as a whole, and particularly the 'key requirement' of continuity of management, officers, directors, and shareholders, it is clear that no de facto merger occurred"). The District Court in *American Paper* court concluded that because "[n]o members of [the asset sellers]'s

board of directors or any of its officers h[e]ld a similar position with [the asset buyer] or were given individual shares of voting stock,” the continuity of ownership factor “weigh[ed] decidedly against a de facto merger.” *Id.* In New York, these continuity of ownership and continuity of management and operations are two separate factors that are considered independently. *See Van Nocker v. A.W. Chesterton Co.*, 15 A.D.3d 254, 257-59 (1st Dep’t 2005) (analyzing each de facto merger element separately).

Further, in finding a 3.2% percent stake insufficient, the *American Paper* court relied upon a misreading of *Devine & Devine Food Brokers, Inc. v. Wampler Foods, Inc.*, 313 F.3d 616, 619 (1st Cir. 2002). The *American Paper* court stated that *Devine* deemed a 10% ownership stake insufficient to satisfy the continuity of ownership hallmark. However, this is a misinterpretation of the *Devine* decision, which, in fact, held that even though the 10% ownership in the successor was sufficient to satisfy the continuity of ownership element, all the other elements were missing. *See Devine & Devine Food Brokers, Inc.*, 313 F.3d at 619 (“Although [the asset seller] acquired a 10% stock interest in [the asset buyer] and retained some of [the asset seller’s] managers and clients, [plaintiff] emphasizes form over substance in suggesting that these factors render the transaction a merger when all *other* circumstances support a contrary conclusion.”) (emphasis added). Therefore, the sole case cited by BAC to argue that a de minimus ownership stake in an asset buyer bars continuity of ownership is unpersuasive.

In this Court’s view, the better rule is that continuity of ownership is satisfied when “the parties to a transaction become owners together of what formerly belonged to

each.” See *Van Nocker v. A.W. Chesterton Co.*, 15 A.D.3d 254, 256 (1st Dep’t 2005).

Courts have deemed continuity satisfied with holdings ranging from 12.5% to 2.27%. See *Cargill, Inc. v. Beaver Coal & Oil Co.*, 424 Mass. 356, 361 (1997) (“Viano acquired a twelve and one-half per cent shareholder interest in Citizens . . . there is no requirement that there be complete shareholder identity between the seller and a buyer before corporate successor liability will attach.”); *T.H.S. Northstar Associates v. W.R. Grace & Co.-Conn.*, 840 F. Supp. 676, 677, 679 (D. Minn. Dec. 14, 1993) (“Zonolite shareholders held only 2.27 percent of Grace stock subsequent to the acquisition . . . This continuity of shareholders, rather than the percentage of ownership assumed, is significant to a finding of merger”).

Under BAC’s argument, simply by virtue of being a large corporation, BAC would escape liability from many de facto merger claims. This interpretation would render BAC immune to de facto merger claims when it acquires the assets of a company worth less than some arbitrary percentage of BAC, which, given BAC’s market capitalization, could include companies worth several billion dollars. Therefore, summary judgment on the hallmark of continuity of ownership cannot be denied because the former owners of Countrywide now own only 3% of BAC.

Next, BAC contends that “common ownership is not continuity of ownership.” According to BAC, the July 2008 and November 2008 asset sales cannot support continuity of ownership because, as a result of the Red Oak merger, BAC already indirectly owned the assets of Countrywide that it purchased in those transactions. The

buyer and seller must, according to BAC, “become owners of what *formerly* belonged to each.” See *Van Nocker*, 15 A.D.3d at 256 (emphasis added). This argument, however, simply recasts BAC’s previous argument that the three transactions must be viewed separately. Since the Court has already decided that it will view the three transactions as one, this position is moot.

Further, BAC’s argument is belied by the First Department’s holding in *Fitzgerald*, which allowed a de facto merger claim to proceed where there was an initial stock purchase followed by a merging of assets into the asset buyer. See *Fitzgerald*, 286 A.D.2d at 575 (Defendant “bought the stock . . . [and] then proceed[ed] to merge [seller’s] assets with its own”). Here, as in *Fitzgerald*, BAC acquired Countrywide’s stock and then proceeded to complete the asset purchase. Therefore, the existence of common ownership before the asset transaction and integration does not defeat a showing of continuity of ownership.

Finally, the case relied upon by BAC on this point is unpersuasive because it states only that there was no evidence showing continuity of ownership, not that it could not exist as a matter of law. See *TMS Entm’t Ltd. v. Madison Green Entm’t Sales, Inc.*, 2005 WL 476663, at *3 (S.D.N.Y. Feb. 28, 2005) (stating without analysis that “TMS has presented no evidence to support a finding that there has been a continuity of ownership between Entertainment and Studios.”).

In essence, BAC’s arguments all relate to the legal standards to be applied in determining whether there was a continuity of ownership. BAC does not raise any factual

disputes as to whether Countrywide's former shareholders became shareholders in BAC, and that BAC, directly or indirectly, came to own Countrywide's assets. *See Van Nocker*, 15 A.D.3d 254, 256 (1st Dep't 2005) (continuity of ownership "describes a situation where the parties to the transaction 'become owners together of what formerly belonged to each.'").

Therefore, Ambac has carried its burden to show that it is entitled to judgment solely on the continuity of ownership hallmark, and BAC has failed to demonstrate the existence of any material issue of fact requiring trial.¹ Accordingly, BAC's motion for summary judgment is denied, and Ambac's motion for partial summary judgment, as to continuity of ownership, is granted.

D. *Cessation of Ordinary Business and Dissolution of Prior Company*

The second de facto merger hallmark requires courts to consider whether there has been a cessation of ordinary business operations and the dissolution of the selling corporation as soon as possible after the transaction. *Van Nocker v. A.W. Chesterton Co.*, 15 A.D.3d 254, 257 (1st Dep't 2005). The dissolution hallmark may be satisfied "[s]o long as the acquired corporation is shorn of its assets and has become, in essence, a shell, legal dissolution is not necessary . . ." *Fitzgerald v. Fahnestock & Co.*, 286 A.D.2d 573, 575 (1st Dep't 2001). An asset seller may be considered "in essence, a shell" when it is "incapable of doing business except through [the asset buyer]." *Id.*

¹ Unlike here, MBIA did not seek partial summary judgment on this sole element, but rather sought summary judgment on its entire de facto merger claim.

There is no dispute that CFC, CHL, and CSC have not legally dissolved. The question to be determined, therefore, is whether they have been rendered “shell[s] . . . incapable of doing business except through [BAC].” *Fitzgerald*, 286 A.D.2d at 575. BAC argues that CFC, CHL and CSC cannot be considered “shells.” BAC contends that if a company maintains even a “minimal” post-asset-sale existence, an “empty shell” finding is precluded as a matter of law. However, the case cited by BAC for its contention that even “minimal” post-asset-sale existence is sufficient, *Van Nocker*, in fact held that “substantial assets[] and . . . contractual obligations” precluded finding that the asset seller was a mere shell. *See Van Nocker*, 15 A.D.3d at 257-58 (emphasis added).

In the same vein, the Court finds no reason to depart from its *MBIA* analysis regarding the impact of liabilities on the asset valuations. As in *MBIA*, BAC again argues that liabilities cannot be considered when determining if a company has “minimal” or “substantial” assets after an asset sale. Whether the assets remaining in Countrywide could be considered “substantial” is a disputed question of fact that cannot be resolved at the summary judgment stage.

Further, while some courts have considered defending litigation to defeat a showing of “shell” status, other courts have found that this merely creates an issue of fact. *Compare Buja v. KCI Konecranes Int’l Plc.*, 12 Misc. 3d 859, 864 (Sup. Ct. Monroe Cnty. April 12, 2006) (granting defendant summary judgment where “Shepard Niles has been involved in litigation”) with *Ring v. The Elizabeth Foundation for the Arts*, 2014 WL 5908429, at *5 (Sup. Ct. N.Y. Cnty. Nov. 12, 2014) (“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”).

Next, according to BAC, an asset buyer’s role in the successor’s ongoing operations is meaningless to an “empty shell” determination. However, this too is belied by the *Fitzgerald* court’s holding, which stated that a de facto merger can be found where the “defendant rendered [the asset seller] incapable of doing business except through defendant.” See *Fitzgerald v. Fahnestock & Co.*, 286 A.D.2d 573, 575 (1st Dep’t 2001). This inquiry requires an analysis of whether Countrywide conducted business independently of BAC, or whether the Countrywide’s independent existence had ceased in all but name only. Both sides make competing allegations of fact, precluding summary judgment on this issue.

BAC next argues that Countrywide cannot “do business” through BAC because BAC is only a holding company, with no actual operations of its own. In arguing that Countrywide cannot “do business” through BAC, BAC improperly elevates form over substance, as BAC’s wholly-owned subsidiaries allegedly operate Countrywide’s former businesses. See *AT&S Trans. LLC v. Odyssey Logistics & Tech. Corp.*, 22 A.D.3d 750, 752 (2d Dep’t 2005) (courts “disregard[] mere questions of form and ask[] whether, in substance, it was the intent of the successor to absorb and continue the operation of the predecessor.”). Therefore, there are issues of fact that exist regarding whether Countrywide has been rendered an empty shell, and summary judgment must be denied.

Moreover, “[n]ot all of [the] elements are necessary to find a de facto merger.” *Fitzgerald v. Fahnestock & Co.*, 286 A.D.2d 573, 574-75 (1st Dep’t 2001). Whether or not there is an issue of fact as to dissolution, BAC is not entitled to summary judgment on the issue of de facto merger.

E. ***Remaining “Hallmarks” of De Facto Merger***

i. *Assumption of Operational Liabilities*

The third hallmark of a de facto merger is the “assumption by the successor of liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation.” *Fitzgerald v. Fahnestock & Co.*, 286 A.D.2d 573, 574 (1st Dep’t 2001). BAC does not deny that it “assumed the liabilities necessary to run Countrywide’s business.” See BAC’s Br. at 21 n.64. Instead, BAC asserts that this factor is of minor importance.

ii. *Continuity of Management and Operations*

The fourth hallmark of a de facto merger transaction is the “continuity of management, personnel, physical location, assets and general business operations.” See *Fitzgerald v. Fahnestock & Co.*, 286 A.D.2d 573, 574 (1st Dep’t 2001).

BAC rehashes the identical argument that it made in *MBIA*, arguing that because BANA, a wholly-owned subsidiary of BAC, actually operates the continued business, BAC cannot be held to have de facto merged with Countrywide. As in *MBIA*, disputes

issues of fact remain regarding BAC's role in the transactions and its intent with regard to "integrating" the Countrywide Defendants through the July and November 2008 transactions. *See AT&S Trans. LLC v. Odyssey Logistics & Tech. Corp.*, 22 A.D.3d 750, 752 (2d Dep't 2005) (courts "disregard[] mere questions of form and ask[] whether, in substance, it was the intent of the successor to absorb and continue the operation of the predecessor."). Accordingly, the Court cannot hold as a matter of law on summary judgment that BAC's decision to transfer certain assets to BANA in and of itself precludes management continuity.

For the reasons stated above, BAC's motion as to de facto merger is denied, and Ambac's motion for partial summary judgment as to the continuity of ownership hallmark of de facto merger is granted. Additionally, although this Court is granted partial summary judgment to Ambac on the continuity of ownership and BAC does not contest that it assumed Countrywide's operational liabilities, these are merely two of the four hallmarks that courts consider when conducting a de facto merger analysis. There are issues of fact regarding the remaining two hallmarks of de facto merger that must be resolved at trial before a finding of de facto merger can be made.

The Court will now consider Ambac's remaining theories of successor liability, beginning with a consideration of whether BAC impliedly assumed Countrywide's liabilities.

3. Implied Assumption of Liabilities

In addition to alleging BAC's de facto merger with Countrywide, Ambac also alleges that BAC impliedly agreed to assume Countrywide's liabilities. A corporation may be held liable where it expressly or impliedly agreed to assume its predecessor's liabilities. See *Schumacher v. Richards Shear Co., Inc.*, 59 N.Y.2d 239, 244–45 (1983). “While no precise rule governs the finding of implied liability, the authorities suggest that the conduct or representations relied upon by the party asserting liability must indicate an intention on the part of the buyer to pay the debts of the seller.” *Ladjevardian v. Laidlaw–Coggeshall, Inc.*, 431 F. Supp. 834, 839 (S.D.N.Y. May 12, 1977).

Although BAC expressly disclaimed any liabilities that it was not accepted in the November 2008 Transaction documents, express disclaimers do not necessarily bar a finding of an implied assumption of liabilities. See *Marenyi v. Packard Press Corp.*, 1994 WL 16000129, at *6 (S.D.N.Y. June 9, 1994) (“An express disclaimer is not enough . . . to preclude the imposition of liability on the purchaser of corporate assets if other facts and circumstances . . . demonstrate an intention on the part of the buyer to pay the debts of the seller.”). According to the *Marenyi* court, a plaintiff can show an asset purchaser's intent to assume liabilities through “admissions of liability by officers or other spokesmen of the buyer, and the effect of the transfer upon creditors of the seller corporation.” *Id.*

In addition to showing the intent of the buyer to assume liabilities, BAC argues that Ambac also must show that it relied on BAC's assumption of liabilities to its

detriment. The Court finds that detrimental reliance is not required for a showing of implied assumption of liabilities.

A. *No Need to Show Detrimental Reliance*

BAC cites to *Goldmark v. Magnolia Anti-Friction Metal Co.*, 30 A.D.580, 580-81 (1st Dep't 1898) for the proposition that implied assumption of liabilities is akin to promissory estoppel, which requires a showing of detrimental reliance. Ambac argues that *Goldmark* is not on point, dealing only with whether two causes of action against two defendants could be united in a single complaint under a now defunct civil procedure law.

Notably, *Goldmark* does not actually address an implied assumption of liabilities, nor does it refer to detrimental reliance or promissory estoppel. As this Court held in *MBIA*, the implied assumption basis for liability hinges on the conduct of the asset seller and asset buyer, not on the conduct of the third-party asserting the successor liability claim. See *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 40 Misc.3d 643, 677 (Sup. Ct. N.Y. Cnty. April 29, 2013). The focus of the implied assumption inquiry on the relationship between asset buyer and seller and the buyer's post-acquisition conduct with respect to the assets. *Id.* Under BAC's theory of implied assumption liability, a court first would have to find an implied assumption of liabilities and then consider whether the plaintiff had relied on the assumption to its detriment.

Other courts applying New York law analyzing implied assumptions of liability have not considered detrimental reliance. For example, in *Hoche Productions, S.A.*, the court found an implied assumption of liabilities without considering the plaintiff's conduct. See *Hoche Productions, S.A. v. Jayark Films Corp.*, 256 F. Supp. 291, 296 (S.D.N.Y. May 26, 1966). BAC attempts to distinguish *Hoche* by arguing that the corporate representatives had "admitted that the buyer had assumed the seller's liabilities, obviating the need to address detrimental reliance." See BAC's Br. at 15. Contrary to BAC's assertion, the admission of assumption in *Hoche*, in fact, demonstrates that there is no need to show detrimental reliance. If detrimental reliance had been a necessary element for an implied assumption, the initial admission of assumption of liabilities would only be the first step of the analysis.

In any event, Ambac contends that BAC's executives have admitted assuming Countrywide's liabilities, as in *Hoche*, which BAC denies. BAC argues that the statements identified by Ambac do not show BAC's intent to assume Countrywide's liabilities; however, the intent revealed by these statements, as well as the meaning and import of the various presentations, emails and conduct identified by both parties, raises material issues of fact that cannot be decided on summary judgment.

BAC also argues that Ambac must, but cannot, show that Countrywide was solvent before the assumption of liabilities. As noted above, the parties dispute, factually, whether Countrywide was rendered a "mere shell," rendering a determination on this issue inappropriate for summary judgment. *Id.*

Therefore, given the factual issues in dispute, BAC's motion for summary judgment on the implied assumption of liabilities claim must be denied.

4. Alter Ego / Piercing the Corporate Veil

The final theory of successor liability posited by Ambac is that Countrywide was essentially the alter ego of BAC, such that this Court is warranted in disregarding the independent corporate identities of the Countrywide Defendants and imposing their liabilities on their sole ultimate shareholder, BAC. To state a claim for alter ego liability, also known as piercing the corporate veil, a plaintiff must show that "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." *Morris v. New York State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 141 (1993).

A. *Domination and Control*

BAC argues that Ambac cannot show complete domination and control solely because Countrywide respected the "paraphernalia of incorporation," by maintaining separate boards and financial statements. In particular, BAC argues that the Court of Appeals held in *Port Chester Electric Construction Co. v. Atlas*, 40 N.Y.2d 652, 657 (1976) that an alter ego claim could be defeated by showing that "the external indicia of separate corporate identities were at all times maintained." (BAC Moving Br. at 28.)

In *Port Chester*, the Court of Appeals determined based on the facts of that case that “[s]ince Atlas himself carefully respected the separate identities of the corporations, and each corporation was pursuing its separate corporate business, rather than the purely personal business of Atlas, we conclude that the corporate veils of the defendant corporations should not be ‘pierced’.” *Id.* Nonetheless, the Court of Appeals also stated that “[t]he determinative factor is whether ‘the corporation is a ‘dummy’ for its individual stockholders who are in reality carrying on the business in their personal capacities for purely personal rather than corporate ends.” *Id.*

Indeed, BAC’s argument is directly contrary to the First Department’s statement in *TNS Holdings v. MKI Securities Corp.*, 243 A.D.2d 297, 300 (1st Dep’t 1997). In *TNS Holdings*, the First Department held that “[i]n determining the question of control, courts have considered factors such as the disregard of corporate formalities; inadequate capitalization; intermingling of funds; overlap in ownership, officers, directors and personnel; common office space or telephone numbers; the degree of discretion demonstrated by the alleged dominated corporation; whether the corporations are treated as independent profit centers; and the payment or guarantee of the corporation’s debts by the dominating entity [n]o one factor is dispositive.” *Id.* (emphasis added).

Here, Ambac asserts that various facts in the record demonstrate that Countrywide became a dummy corporation acting solely for BAC’s interests, as noted in the de facto merger discussion above. Further, Ambac argues that several other record facts show BAC’s domination and control over CFC and CHL, such as Countrywide’s minimal

independent business discretion, BAC guarantee of Countrywide's debts, Countrywide's undercapitalization, and a lack of arm's length dealing. These are all factual issues disputed by BAC. Therefore, on this "fact-laden claim to pierce the corporate veil [that] is particularly unsuited for resolution on summary judgment," BAC cannot demonstrate as a matter of law that it did not dominate and control Countrywide with respect to the transactions at issue. *See Ledy v. Wilson*, 38 A.D.3d 214, 215 (1st Dep't 2007) (quoting *Forum Ins. Co. v. Texarkoma Transp. Co.*, 229 A.D.2d 341, 342 (1st Dep't 1996)).

B. *Domination and Control Causing Harm*

Finally, BAC argues that Ambac cannot show that BAC's alleged domination and control harmed Ambac. Ambac asserts that the domination and control wrongfully harmed it in two ways: (i) BAC caused Countrywide to transfer valuable assets to BAC subsidiaries, rendering Countrywide a shell; and (ii) BAC interfered with the repurchase request process.

Regarding asset transfers, the parties do not dispute that "[t]he stripping of corporate assets by shareholders to render the corporation judgment proof constitutes a fraud or wrong justifying piercing the corporate veil." *Godwin Realty Assoc. v. CATV Enter., Inc.*, 275 A.D.2d 269, 270 (1st Dep't 2000). However, BAC contends that any asset transfer from Countrywide to BAC was, according to its expert witness, for fair value and actually helped creditors, precluding a finding of harm to Ambac. Ambac counters that, based on the analysis performed by its expert witness, the asset transfers

rendered Countrywide a mere shell. As noted above under the de facto merger analysis, the parties raise competing factual assertions regarding the residual value of Countrywide after the asset transfers. Accordingly, this issue is not amenable to a summary judgment determination.

BAC also argues that there is simply no factual support in the record for the allegation that BAC dominated Countrywide such that Countrywide improperly denied Ambac's repurchase requests. Ambac contends that the evidence shows that BAC officers had to approve Countrywide's repurchase decisions, causing Countrywide to breach its contracts with Ambac for the benefit of BAC's profits. As the First Department has stated, "[t]o use domination and control to cause another entity to breach a contractual obligation for personal gain is certainly misuse of the corporate form to commit a wrong." *See Cobalt Partners, L.P. v. GSC Capital Corp.*, 97 A.D.3d 35, 41 (1st Dep't 2012). Therefore, as this issue rests upon disputed factual assertions, summary judgment must be denied.

III. Conclusion

Accordingly, it is hereby

ORDERED that Bank of America's motion for summary judgment is denied


(motion sequence 026); and it is further

ORDERED that Ambac's motion to for partial summary judgment, as to continuity of ownership, is granted (motion sequence 028); and it is further

This constitutes the decision and order of the Court.

Dated: New York, New York
October 22, 2015

ENTER:



Hon. Eileen Bransten, J.S.C.