

**Lexington Ins. Co. v Physician's Choice
Ambulance Serv., Inc.**

2017 NY Slip Op 30164(U)

January 20, 2017

Supreme Court, New York County

Docket Number: 157834/2014

Judge: Ellen M. Coin

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

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LEXINGTON INSURANCE COMPANY,

Plaintiff,

Index No. 157834/2014

—against—

DECISION AND ORDER

PHYSICIAN’S CHOICE AMBULANCE SERVICE,
INC. D/B/A PHYSICIANS CHOICE AMBULANCE
SERVICE, INC., EMSSTAR, LLC D/B/A EMSTAR
AMBULANCE SERVICES, SAFECARE AMBULANCE
SEVICES, INC. D/B/A NETWORK AMBULANCE,
FOCUS VENTURES, LLC, MICHAEL GALLAGHER,

Defendants.

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ELLEN M. COIN, J.:

Defendant Focus Ventures, LLC (Focus) moves pursuant to CPLR 3212 (a) for summary judgment dismissing the complaint. Plaintiff Lexington Insurance Company cross-moves for an order compelling Focus to respond to outstanding discovery demands.

The complaint seeks to recover a total of \$12,500 for the deductible layer of insurance policies issued to defendants Physicians Choice Ambulance Service, Inc. (PCA), Emsstar, LLC, and Safecare Ambulance Services, Inc. (Safecare) (collectively, the Insured Companies). The complaint alleges that defendant Michael Gallagher is the principal and controlling shareholder of the three Insured Companies, and that Gallagher and Focus dominated these companies to such an extent that the companies are all but their alter egos. The complaint further alleges that Gallagher and Focus orchestrated a scheme to conceal the assets of the Insured Companies from their creditors. Finally, insofar as is relevant here, the complaint alleges that Focus manages and

diverts the assets of the Insured Companies, while representing to plaintiff and to others that the Insured Companies are defunct.

According to the evidence before the Court, in early 2007 PCA obtained financing from nonparty Northern Healthcare Capital, LLC (NHC) for the purchase of substantially all the assets of Safecare. In late 2010, PCA defaulted on its financing agreement with NHC, leading to a foreclosure action filed in the United States District Court for the Eastern District of Pennsylvania, naming, among other defendants, PCA and its owner, Gallagher. In 2011, the parties to that action entered into a settlement, embodied in two agreements: (1) a "Settlement Agreement and Power of Attorney," pursuant to which PCA transferred all of its assets to NHC; and (2) a "Transition Management and Administrative Services Agreement," pursuant to which nonparty PCA EMStar Holdings, LP (Holdings), a new entity formed by NHC and nonparty KZ Affiliates (KZ), would manage PCA's business until such time as Holdings obtained the necessary licences to provide ambulance service under its own name (*see* Affirmation of Joseph Zupnik, dated December 14, 2015, Exs. A and B; Affirmation of Stephen J. Cassels, Ex. E [Zupnik Deposition] at 33-34). NHC assigned the assets that it received from PCA to Holdings (Zupnik Deposition at 55). Joseph Zupnik, the chief executive officer of Focus, was also the chief executive officer of Holdings. He is also a member of KZ (the general partner of Holdings) and the chief executive officer of nonparty Empire State Ambulance Corp (Reply Affirmation of Joseph Zupnik, dated April 12, 2016, ¶¶ 2 and 12; Zupnik Deposition at 36, 44).

Zupnik testified at his deposition that Focus has no employees, owns no interest in KZ, and has not entered into any agreement with KZ. KZ, in turn, has no ownership interest in Focus. Focus never owned or managed Emstar Ambulance Services (the d/b/a of defendant EMSStar,

LLC), nor did it own any interest in Holdings. Zupnik further avers that Focus never represented that it would be responsible for the debts of the Insured Companies. In his initial affirmation, Zupnik adds that Focus never entered into any transaction or agreement with Gallagher, the Insured Companies, Holdings, NHC, or any person or entity related to Gallagher or those companies. Accordingly, Focus has made a prima facie showing that it is entitled to summary judgment.

In order to prevail on a theory of successor liability, a plaintiff must show that the defendant expressly or impliedly assumed the liabilities that are at issue, consolidated or merged with the debtor company, was a mere continuation of that company, or entered into a transaction with it in order to allow it to fraudulently escape its debts. *Broadway 26 Waterview, LLC v Bainton, McCarthy & Siegel, LLC*, 94 AD3d 506, 507 (1st Dept 2012); *Nationwide Mut. Fire Ins. Co. v Long Is. A.C., Inc.*, 78 AD3d 801, 801-802 (2d Dept 2010). Plaintiff has presented no evidence to support any of these theories of liability.

Plaintiff argues that Focus is liable to it as the successor-in-interest, or alter ego, of the Insured Companies. Plaintiff supports that argument by referring to a newspaper story and to the website of Focus, which lists “EMStar” as one of the “Focus Ventures Family of Companies” (Cassels Affirm., Ex. J). The newspaper story is inadmissible hearsay (*Chong Min Mun v Soung Eun Hong*, 109 AD3d 732, 732 [1st Dept 2013]; *P&N Tiffany Props. v Maron*, 16 AD3d 395, 396 [2d Dept 2005]), and is of no relevance here, as it states in relevant part only that the business of Focus is the operation of long-term care facilities and other services in and around New York City (Cassels Affirm., Ex. K at 1). Moreover, at his deposition, Zupnik testified that the statement in the article that he (not Focus) had purchased one of the Insured

Companies was erroneous. The listing of “EMStar” on the website of Focus is unremarkable, inasmuch as “EMSTAR Ambulance” is a trade name under which Empire State Ambulance Corp. does business in New York (*see* Zupnik Reply Affirm., Ex. A; *see also* Zupnik Deposition at 98-99). Plaintiff argues that “Mr. Zupnik was involved before, during, and after the purchase of the business of the [Insured Companies] by Focus . . .” (Plaintiff’s Memo. of Law at 15). Indeed, there is evidence that through KZ and Holdings, Mr. Zupnik gained partial control of the assets that NHC received from the Insured Companies. However, NHC, as a secured creditor, received those assets in foreclosure, free and clear of any competing claims. The subsequent transfers of those assets are not susceptible to claims of the Insured Companies’ creditors. Therefore, the fact that Holdings, KZ and Focus shared common ownership and control is of no significance: plaintiff has adduced no evidence that the foreclosure proceeding was merely a ruse to frustrate collection of plaintiff’s claim, which is dwarfed by the amount of debt owed to NHC.

Lastly, as to the cross-motion to compel discovery, plaintiff has not specified what withheld documents would alter the outcome. Accordingly, CPLR 3212(f) does not warrant denial of the motion.

Accordingly, it is hereby

ORDERED that the motion of defendant Focus Ventures, LLC for summary judgment is granted, and the cross-motion is denied; and it is further

ORDERED that the Clerk of Court is directed to sever and enter judgment dismissing the complaint as against defendant Focus Ventures, LLC, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the cross-motion of plaintiff Lexington Insurance Company is denied.

This constitutes the Decision and Order of the Court.

Dated: 1/20/17

ENTER:



Ellen M. Coin, A.J.S.C.