| **Kolow v Laidlaw & Co. (UK) Ltd.** |
| --- |
| 2017 NY Slip Op 30554(U) |
| March 20, 2017 |
| Supreme Court, New York County |
| Docket Number: 651093/2015 |
| Judge: Jeffrey K. Oing |
|  |
|  |

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48
----------x

STEVEN KOLOW,

Plaintiff,

-against-

LAIDLAW & COMPANY (UK) LTD. d/b/a LAIDLAW & COMPANY, MATTHEW D. EITNER, ALEX SHTAYNBERGER, JOHN W. COOLONG, RONALD ALLAN FURST, LOUIS OTTIMO, ANTHONY OTTIMO, SR. and EKN FINANCIAL SERVICES, INC.,

Defendants.

----------x

**Index No.: 651093/2015**

**Mtn Seq. No. 002**

**DECISION AND ORDER**

**JEFFREY K. OING, J.:**

Defendants, Laidlaw & Company (UK) Ltd. d/b/a Laidlaw & Company ("Laidlaw"), Matthew D. Eitner, Alex Shtaynberger, John W. Coolong, and Ronald Allan Furst (collectively, the "Laidlaw defendants"), move, pursuant to CPLR 3211(a)[7], for an order dismissing the amended complaint as asserted against them.

This matter concerns plaintiff's attempt to recover a $1 million judgment from a Financial Industry Regulatory Authority ("FINRA") arbitration award plaintiff obtained in December 2013 against defendants EKN Financial Services, Inc. ("EKN") and Anthony Ottimo ("A. Ottimo"). In December 2014, plaintiff obtained an order confirming the arbitration award in Supreme Court, Suffolk County, and entered a judgment on January 30, 2015 (Amended Compl., Ex. Y).

This matter previously came before me on the Laidlaw defendants' motion to dismiss the complaint. At the oral

argument, held on May 6, 2016, I dismissed the entire complaint which included the following nine causes of action: successor liability; aiding and abetting breach of fiduciary duty; conversion and misappropriation; unjust enrichment; and fraudulent conveyance claims under Debtor and Creditor Law §§ 273-a, 274, 275 and 276, and for attorneys' fees under Debtor and Creditor Law 276-a. The relevant factual background of this action is provided in the transcript for the prior motion to dismiss (NYSCEF Doc. No. 51). Familiarity with the facts is presumed.

Plaintiff amended the complaint to add defendants Louis Ottimo ("L. Ottimo"), A. Ottimo, and EKN (NYSCEF Doc. No. 55). Plaintiff asserts only three causes of action in the amended complaint: successor liability, aiding and abetting breaches of fiduciary duty, and a breach of fiduciary duty claim (Id.). The claims for successor liability and aiding and abetting breaches of fiduciary duty are asserted against the Laidlaw defendants, which are at issue in the instant motion.

**Aiding and Abetting Breach of Fiduciary Duty**

That branch of the Laidlaw defendants' motion to dismiss the aiding and abetting breach of fiduciary duty claim is granted. This claim is contingent on the survival of plaintiff's breach of fiduciary cause of action against defendants L. Ottimo, A. Ottimo, and EKN.

**Index No.: 651093/2015**
**Mtn Seq. No. 002**

As the Laidlaw defendants correctly point out, plaintiff is a creditor of EKN and this action is essentially one to collect on a judgment against EKN and its principals. If EKN is solvent, then plaintiff, as a creditor of EKN, does not have standing to assert a direct claim for breach of fiduciary duty because EKN's fiduciary duties are to its shareholders, not its creditors (see North American Catholic Educational Programming Foundation, Inc. v Gheewalla, 930 A2d 92, 101 [Del. 2007]). On the other hand, if EKN is insolvent, plaintiff, as a creditor of EKN, has standing to assert only a derivative and not direct claim on behalf of EKN (Id. at 101-102). Plaintiff does not allege whether EKN is solvent or insolvent. Regardless of EKN's solvency status, given that plaintiff's breach of fiduciary duty claim is asserted as a direct claim, he does not have standing to assert it. Accordingly, absent a fiduciary duty claim, the aiding and abetting breach of fiduciary duty claim must be dismissed.

**Successor Liability**

Generally, the rule is that "a corporation which acquires the assets of another is not liable for the torts of its predecessor" (Schumacher v Richards Shear Company, Inc., 59 NY2d 239 [1983]). A corporation, however, "may be held liable for the torts of its predecessor if (1) it expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation

was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations" (Id.).

Plaintiff alleges the following in the successor liability cause of action in the amended complaint:

> The transfer of virtually all of EKN's assets, including its goodwill, to the [Laidlaw defendants] ... resulted in a de facto merger between EKN and Laidlaw, with Laidlaw remaining the surviving firm and becoming liable to EKN's creditors ... as EKN's successor company.
>
> The facts and circumstances set forth [in the amended complaint] resulted in a mere continuation of EKN's business under the name of Laidlaw, making Laidlaw liable to EKN's creditors, including Plaintiff, as EKN's successor company.
>
> The facts and circumstances set forth [in the amended complaint] were undertaken by Defendants with intent to defraud, hinder, interfere with and defeat the rights of EKN creditors, making Laidlaw liable to those creditors, including Plaintiff, as EKN's successor and/or surviving company after the de facto merger.

(Amended Compl. ¶¶ 117-119).

As an initial matter, plaintiff does not appear to rely on the first exception to the successor liability rule because there is nothing in the amended complaint or the record that indicates Laidlaw expressly or impliedly assumed EKN's liabilities. Instead, the amended complaint raises three of the four exceptions to successor liability rule -- de facto merger, mere continuation, and fraud.

As for the de facto merger exception, "[a] transaction ... may be deemed to fall within this exception ... if the following factors are present: (1) continuity of ownership; (2) cessation of ordinary business operations and the dissolution of the selling corporation as soon as possible after the transaction; (3) the buyer's assumption of the liabilities ordinarily necessary for the uninterrupted continuation of the seller's business; and (4) continuity of management, personnel, physical location, assets and general business operation" (Matter of New York City Asbestos Litig., 15 AD3d 254, 256 [1st Dept 2005]). Continuity of ownership "exists where the shareholders of the predecessor corporation become direct or indirect shareholders of the successor corporation," (Oorah, Inc. v Covista Communications, Inc., 139 AD3d 444 [1st Dept 2016], quoting (Matter of New York City Asbestos Litig., 15 AD3d 254), and it "is an essential element of de facto merger" (Id.).

Here, plaintiff does not allege that the owners or shareholders of EKN have become direct or indirect owners or shareholders in Laidlaw. Plaintiff, therefore, fails to allege that the de facto merger exception applies to this action.

The "mere continuation" exception also does not apply to this action because plaintiff does not allege that EKN no longer exists or has been extinguished (Schumacher v Richards Shear Co., Inc., 59 NY2d 239 [1983] ["The [mere continuation] exception

refers to corporate reorganization, however, where only one corporation survives the transaction; the predecessor corporation must be extinguished"]; Ring v The Elizabeth Foundation for the Arts, 136 AD3d 525 [1st Dept 2016] ["Since [predecessor corporation] was not 'extinguished' by the asset-purchase transaction, the mere continuation cause of action was correctly dismissed"]). In fact, the Laidlaw defendants point out that "[a] search of the New York Secretary of State lists EKN as an 'Active' foreign business corporation" (Mem. of Law, p. 14, fn 5). Plaintiff's opposition fails to address this argument, and plaintiff merely asserts that "EKN was expelled from FINRA membership" in the amended complaint (Amended Compl., ¶ 87).

Lastly, the fraud exception is not properly pleaded. Unlike the prior complaint, there is no fraudulent conveyance claim being asserted in the amended complaint. The fraud exception "is merely an application of the law of fraudulent conveyance" (Cargo Partners AG v Albatrans Inc., 207 F Supp 2d 86, 114 [SD NY 2002] [internal quotation marks omitted]). Here, because plaintiff does not assert a claim for fraudulent conveyance in the amended complaint, the fraud exception does not apply (cf. Eastern Concrete Materials, Inc. v DeRosa Tennis Contractors, Inc., 139 AD3d 510 [1st Dept 2016] ["[B]y raising issues of fact as to its claims under the Debtor and Creditor Law, plaintiff raised an

**Index No.: 651093/2015**
**Mtn Seq. No. 002**

issue of fact as to the fraud exception to successor liability"]).

Based on the foregoing, the non-successor liability exceptions do not apply, and the successor liability claim is dismissed.

Accordingly, it is hereby

ORDERED that the Laidlaw defendants' motion to dismiss the amended complaint against them is granted, and the amended complaint is dismissed; and it is further

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

ORDERED that the remaining claims against defendants Louis Ottimo, Anthony Ottimo, Sr. and EKN Financial Services, Inc. are severed and continued; and it is further

ORDERED that counsel shall appear in Part 48 (Room 242, 60 Centre Street) on April 11, 2017 at 11:30 a.m. for a status conference.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 3/20/17

HON. JEFFREY K. OING, J.S.C.
JEFFREY K. OING
J.S.C.