SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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YAAKOV SIEGAL,

Plaintiff,

- against -

PEARL CAPITAL RIVIS VENTURES LLC, and CAPITAL Z PARTNERS,

Defendants.

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DECISION AND ORDER
Index No. 653069/2013
Mot. Seq. Nos.: 004

O. PETER SHERWOOD, J.:

In this action, plaintiff initially asserted claims solely against defendant Pearl Capital Rivis Ventures LLC ("Pearl Capital"). Plaintiff then amended the complaint to include defendant Capital Z Partners ("Capital Z") under a theory of successor liability, based on certain news articles stating that Capital Z had acquired Pearl Capital in 2015.

Under motion sequence 003, Capital Z had moved to dismiss the complaint as asserted against it, asserting that documentary evidence in the form of an asset purchase agreement established that Five Hole, LLC ("Five Hole"), not Capital Z, acquired Pearl Capital. However, the asset purchase agreement Capital Z had provided was so heavily redacted that this court was unable to confirm key details asserted in the motion to dismiss, such as who was the purchaser and who was the seller. Accordingly, this court denied the motion without prejudice to Capital Z bringing a renewed motion with a less redacted version of the asset purchase agreement. Pursuant to this court's instructions under the previous motion, Capital Z has now brought a renewed motion including a copy of the same asset purchase agreement with fewer redactions (*see* NYSCEF Doc. No. 67 [the "Asset Purchase Agreement"]).

To succeed on a motion to dismiss pursuant to CPLR 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a

defense as a matter of law" (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn*, 85 AD3d 987, 989 [2nd Dept 2011]).

CPLR 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a 'fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2nd Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,' " (*id.* at 84-85). Here, the Asset Purchase Agreement constitutes documentary evidence of the fact that Five Hole, and not Capital Z, purchased Pearl Capital in 2015.

Plaintiff's argument that the Asset Purchase Agreement is insufficient since it "continues to be redacted" is without merit (NYSCEF Doc. No. 73 [affirmation in opposition] ¶ 10). The Asset Purchase Agreement is "of undisputed authenticity," and, unlike the version previously provided, is "unambiguous" as to the dispositive issue of who, in fact, purchased Pearl Capital. Moreover, even if, as plaintiff suggests, the redacted portions of the Asset Purchase Agreement somehow demonstrated that Capital Z was the true purchaser, for the reasons discussed below, the Asset Purchase Agreement would still defeat plaintiff's claims as to successor liability.

Plaintiff also cross-moves to amend the complaint to add Five Hole and Horizon Business Funding LLC ("Horizon") as defendants under a theory of successor liability. Leave to amend a pleading pursuant to CPLR 3025 "shall be freely given," in the absence of prejudice or surprise (*see e.g. Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]; *Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 354 [1st Dept 2005]). In order to conserve judicial resources, however, examination of the underlying merit of the proposed amendment is also mandated (*Thompson*, 24 AD3d at 205; *Zaid*, 18 AD3d at 355). Leave will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law (*see Aerolineas Galapagos,*

S.A. v Sundowner Alexandria, 74 AD3d 652 [1st Dept 2010]; *Thompson*, 24 AD3d at 205). As the party seeking the amendment, plaintiff has the burden in the first instance to demonstrate his proposed claims' merits, but defendants, as the parties opposing the motion, "must overcome a presumption of validity in the moving party's favor, and demonstrate that the facts alleged in the moving papers are obviously unreliable or insufficient to support the amendment" (*Peach Parking Corp. v 346 W. 40th St. LLC*, 42 AD3d 82, 86 [1st Dept 2007]). With respect to Horizon, the proposed amended complaint asserts simply that Horizon "purchased Pearl Capital" and "assumed the debts and liabilities of Pearl Capital" (*see* NYSCEF Doc. No. 80 ["proposed amended complaint"] ¶¶ 11-12). For the reasons discussed above with respect to Capital Z's motion to dismiss, the amended complaint is "palpably insufficient" with respect to Horizon.

"In general, a corporation that acquires the assets of another is not liable for its predecessor's breaches of contract" (*Oorah, Inc. v Covista Communications, Inc.*, 139 AD3d 444, 445 [1st Dept 2016]). However, the successor may be liable where, "(1) it expressly or impliedly assumed the predecessor's . . . 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" (*Schumacher v Richards Shear Co., Inc.*, 59 NY2d 239, 245 [1983]). The Asset Purchase Agreement expressly excluded liabilities for outstanding advances, any pending actions relating to operations prior to February 10, 2015, and liabilities for any former or present employees associated with sale participation rights (*see* Asset Purchase Agreement at 9, § 2.04 [c], [d], [f]). Accordingly, there was neither an express nor implied assumption of Pearl Capital's liability.

Nevertheless, plaintiff argues it should be allowed to assert its claims against Five Hole as the above-mentioned exceptions to the general rule against liability "in this matter, remain unexplored" (NYSCEF Doc. No. 90 ¶ 4). The proposed amended complaint, however, contains no allegations that might serve as the basis for successor liability under any of these exceptions. Notably absent are any allegations that the transaction was entered into fraudulently to escape Pearl Capital's obligations, any factors indicating that Five Hole is a "mere continuation" (*see e.g. Kaur v Am. Tr. Ins. Co.*, 86 AD3d 455, 458 [1st Dept 2011] ["Relevant factors include transfer of management, personnel, physical location, good will and general business operation"]) or that there was any continuity of ownership, an essential element for a de facto merger. In fact, it appears that Five Hole purchased Pearl Capital's assets for cash (*see* Asset Purchase Agreement

at 10), which would defeat any claim of continuity of ownership (*Oorah, Inc.*, 139 AD3d at 445). In fact, as with Horizon, the only allegations asserted against Five Hole are that Five Hole "purchased Pearl Capital" and "assumed the debts and liabilities of Pearl Capital" (proposed amended complaint ¶¶ 14-15). Such allegations are "palpably insufficient" to allege successor liability against Five Hole, particularly when viewed in conjunction with the Asset Purchase Agreement.

The court has considered the remaining arguments and considers them to be without merit.

Accordingly, it is hereby

ORDERED that the motion to dismiss is GRANTED to the extent of dismissing all claims as asserted against Capital Z Partners; and it is further

ORDERED that the cross-motion for leave to amend is hereby DENIED; and it is further

ORDERED that counsel for the remaining parties shall appear for a status conference on February 27, 2018 at 9:30 am.

This constitutes the decision and order of the court.

DATED: February 13, 2018

E N T E R,

O. PETER SHERWOOD J.S.C.