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

**PRESENT:** HON. ARLENE P. BLUTH **PART** IAS MOTION 32

*Justice*

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ARTHUR H. ATKINS, INDIVIDUALLY AND AS SUCCESSOR TRUSTEE OF THE DORIS D. LAWRENCE LIVING TRUST, STEFANII E. RUTA-ATKINS, INDIVIDUALLY AND AS SUCCESSOR TRUSTEE OF THE DORIS D. LAWRENCE LIVING TRUST,

Plaintiffs,

- v -

OVATION RISK PLANNERS, INC. f/k/a M&R INSURANCE AGENCY, and RISK PLACEMENT SERVICES, INC.,

Defendants.

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**INDEX NO.** 161211/2017

**MOTION DATE** N/A

**MOTION SEQ. NO.** 003

**DECISION AND ORDER**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 32, 33, 34, 35, 36, 37

were read on this motion to/for DISMISSAL.

Defendant Ovation Risk Planners, Inc.'s ("Ovation") motion to dismiss plaintiffs' complaint and any cross-claims is denied. Plaintiffs' cross-motion to amend the complaint is granted.

**Background**

Plaintiff Arthur Atkins ("Atkins") and plaintiff Stefanii Ruta-Atkins are husband and wife who are successor trustees of a trust established by Atkins' mother. The trust is comprised of two adjacent properties; one is located at 1038 Eastern Parkway, Brooklyn and the other is at 1040 Eastern Parkway, Brooklyn. Atkins' mother lived at the 1038 property and Atkins lived on the 1040 property. Atkins' mother was the former trustee of the trust and died in 2012. Prior to her death, she had taken out homeowner's insurance policies for both properties through insurance

broker John W. Dolan Jr.'s insurance company ("Dolan"). The insurer was Castlepoint Insurance Company ("Castlepoint").

Upon the death of Atkins' mother, plaintiffs became successor trustees and renewed the insurance policies the mother had entered into through Dolan. Plaintiffs allege that they contacted Dolan in 2012 to request that the polices be changed to indicate that plaintiff "Arthur Atkins as Successor Trustee" be named as an insured. Plaintiffs claim that Dolan incorrectly listed the named insured as Arthur Atkins in an individual capacity as opposed to his capacity as successor trustee. Additionally, plaintiffs claim that Dolan failed to indicate on the insurance policy that plaintiffs lived in the 1040 Eastern Parkway property, not the 1038 Eastern Parkway property.

In February 2013 the principal of Dolan passed away and in or about 2014, insurance brokers M&R Insurance Company ("M&R") bought Dolan's book of business, thereby becoming plaintiffs' insurance broker. M&R did not take any action to correct the deficiencies Dolan purportedly made to plaintiffs' insurance policy.

In 2014, personal injuries occurred on the property located at 1038 when an individual fell due to the accumulation of snow on the property. Plaintiffs were sued for personal injuries. Castlepoint denied coverage for plaintiffs, claiming that plaintiffs were not named in the 2014 policy as "insureds," that Castlepoint did not even insure properties owned by trusts, and that at the time of the incident, 1038 was not plaintiffs' "residence premises." As a result, plaintiffs lacked insurance coverage.

In 2017, M&R entered into a Business Transition Installment Purchase Agreement with Ovation. In the agreement, Ovation agreed to purchase M&R's book of business, thereby taking over M&R's clients. The agreement obligated M&R to transfer all of its records related to

customers over to Ovation. Pursuant to this agreement, Ovation has the "exclusive right to solicit and offer customers insurance products" (NYSCEF Doc. No. 32, Exh F).

Plaintiffs are now suing M&R and Ovation for the purported mistakes made by M&R in failing to make the necessary changes to plaintiffs' insurance policy to make sure they had coverage for the 2014 accident. Plaintiffs allege that Ovation must be held responsible for M&R's negligence through the theory of successor liability. Ovation claims it cannot be liable for any negligence committed by M&R because Ovation is a corporation wholly unrelated to M&R. According to Ovation, the only dealings between the two companies is the 2017 transaction in which Ovation bought a client list from M&R.

**Discussion**

"On a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true. Further, on such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff" (*Alden Global Value Recovery Master Fund L.P. v Key Bank Natl. Assoc.*, 159 AD3d 618, 621-622, 74 NYS3d 559 [1st Dept 2018] [internal quotations and citations omitted]).

"A motion to dismiss based on documentary evidence "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]).

"It is the general rule that a corporation which acquires the assets of another is not liable for the torts of its predecessor. A corporation 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" (*Schumacher v Richards Shear Co.*, 59 NY2d 239, 245, 451 NE2d 195, 198 [1983]).

"The *de facto* merger doctrine creates an exception to the general principle that an acquiring corporation does not become responsible thereby for the pre-existing liabilities of the acquired corporation. This doctrine is applied when the acquiring corporation has not purchased another corporation merely for the purpose of holding it as a subsidiary, but rather has effectively merged with the acquired corporation. The hallmarks of a *de facto* merger include: 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. Not all of these elements are necessary to find a *de facto* merger" (*Fitzgerald v Fahnestock & Co.*, 730 NY2d 70, 71 [1st Dept 2001]).

The evidence indicates a possibility of *de facto* merger because Ovation purchased almost all of M&R's assets including those necessary for the uninterrupted continuation of M&R's business. The Business Transition Installment Purchase Agreement indicates that Ovation purchased the entirety of M&R's client list (NYSCEF Doc. No. 32 Exh F, page 1). The agreement also states, "Subject to the terms and conditions stated hereunder, Seller desires to sell, and Buyer desires to purchase, the good will of the business as a going concern, which included but is not limited to any and all transferable rights to all intellectual property..." (*id*). The intellectual property includes M&R's phone numbers, email addresses, and website. The agreement explicitly

states this was done "In an effort to maximize retention of renewing policies and maintain continuity for existing client base" (Exh F at ¶ 3). Furthermore, a screenshot of Ovation's website in 2018 shows that Ovation's homepage stated, "Welcome to Ovation Risk Planners, Inc. (formerly M&R Insurance)" (NYSCEF Doc. No. 22). Thus, the evidence suggests that Ovation could have been set up to be a continuation of M&R, which can constitute a *de facto* merger. This is enough to defeat the motion to dismiss.

Ovation contends that Ovation is separate from M&R because according to Ovation, M&R still existed as of January 2018, after the Transition Agreement was entered into. Ovation points to an email sent by plaintiffs to Mary Montemarano, one of the individuals who signed the Transition Agreement between Ovation and M&R (NYSCEF Doc. No. 32, Exh B). Ovation points to the fact that Ms. Montemarano's signature footer says "M&R Insurance Agency" which would tend to indicate that M&R was still in existence in 2018 and therefore was a separate entity from Ovation. However, this contention is not enough to grant the motion to dismiss. Furthermore, defendants do not submit a reply to plaintiffs' opposition to the motion, depriving the court of an opportunity to consider any counterarguments.

Plaintiffs' cross motion to amend the complaint is granted without opposition.

**Summary**

The evidence demonstrates that there is a possibility that Ovation and M&R were in fact merged and became one entity, thereby opening up Ovation to the possibility of liability. The terms of the Transition Agreement, the fact that Ovation's website at one point mentioned M&R on its homepage, and the act of taking on M&R's clients, is enough to suggest a possibility of de-facto merger. Because the complaint must be construed in a light most favorable to the plaintiff, the motion to dismiss is denied. Accordingly, it is hereby

ORDERED that the motion by defendants to dismiss the complaint is denied and it is further

ORDERED that plaintiff's cross motion to amend its complaint is granted.

ORDERED that plaintiff shall e-file the supplemental summons and amended complaint as a separate document on NYSCEF (it is now just annexed to the moving papers as Exhibit A); and it is further

ORDERED that the supplemental summons and amended shall be served upon the new party in this action (Montemarano & Schwartz Group Inc. d/b/a M&R Insurance Agency) in accordance with the CPLR within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that this action shall bear the following caption:

(caption on next page)

ARTHUR H. ATKINS, INDIVIDUALLY AND AS SUCCESSOR TRUSTEE OF THE DORIS D. LAWRENCE LIVING TRUST, STEFANII E. RUTA-ATKINS, INDIVIDUALLY AND AS SUCCESSOR TRUSTEE OF THE DORIS D. LAWRENCE LIVING TRUST,

Plaintiffs,

- v -

OVATION RISK PLANNERS, INC., MONTEMARANO & SCHWARTZ d/b/a M&R INSURANCE AGENCY, and RISK PLACEMENT SERVICES, INC.,

Defendants.

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and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being removed and added pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (ww.nycourts.gov/supctmanh)]; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 432 at 60 Centre Street on June 4, 2019.

3/27/19
DATE

ARLENE P. BLUTH, J.S.C.
HON. ARLENE P. BLUTH

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION

APPLICATION: [ ] GRANTED [X] DENIED [ ] GRANTED IN PART [X] OTHER
[ ] SETTLE ORDER [ ] SUBMIT ORDER

CHECK IF APPROPRIATE: [ ] INCLUDES TRANSFER/REASSIGN [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE