

<b>MRC 56 Corp. v Weeks-Lerman Group, LLC</b>
2019 NY Slip Op 32081(U)
July 3, 2019
Supreme Court, New York County
Docket Number: 650201/2018
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 36

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MRC 56 CORP.

Plaintiff,

-against-

Index No. 650201/2018

THE WEEKS-LERMAN GROUP, LLC,

Motion Seq. No.: 001

Defendant.

-----X  
**DORIS LING-COHAN, J.:**

Plaintiff MRC 56 Corp. (MRC) moves for an order, pursuant to CPLR 3212, granting it summary judgment on its first cause of action for breach of contract and dismissing the counterclaims of defendant The Weeks-Lerman Group, LLC (WLG). In the alternative MRC moves, pursuant to CPLR 3124, for an order directing WLG to provide complete answers to interrogatories served by MRC and provide documents responsive to MRC's document request.

WLG cross-moves, pursuant to CPLR 3212, for an order granting it summary judgment on its first and second counterclaims for breach of contract.

BACKGROUND

In or about August 2010, MRC, then known as Complete Office Supply Warehouse Corp., entered into an Asset Purchase Agreement (APA) as the Seller, with WLG, as the Purchaser. Under the APA, WLG purchased certain customer accounts, contracts and refreshment equipment from MRC.

The APA provided that, at the closing, MRC, as the Seller, would sell to WLG, as the Purchaser:

"a) Seller Accounts. All customer accounts, customer lists and other customer information of the Seller, and all rights of the Seller with respect to such customer accounts, lists and information (collectively, the '**Seller Accounts**').

"b) Customer Contracts. All rights of the Seller under any agreements with respect to customers of the Seller, including without limitation, all customer leases for equipment owned or used by the Seller in the Seller's Business (collectively, the '**Customer Contracts**').

"c) Equipment. All rights of the Seller in all refreshment equipment owned or used by the Seller in the Seller's Business which are located at the premises of any Seller Customer (as defined in Section 5.1(e)(ii) hereto (collectively, the '**Equipment**').

"d) Intangible Property. All rights of the Seller in the names "Complete Office Supply Warehouse Corp.", "International Coffee Systems" and all other trade names, trademarks, service marks, web sites, domain names and web addresses used in connection with the Seller's operation of the Seller's Business (collectively, the '**Intangible Property**').

"e) Licenses. All rights of the Seller in all licenses and permits used or useful in connection with the Seller Accounts, Customer Contracts, Equipment and Intangible Property (collectively, the '**Licenses**'), to the extent such Licenses are assignable.

"f) Books and Records. All of the Seller's books, records, ledgers, documents, correspondence and financial statements relating to the Seller Accounts, Customer Contracts and the Equipment (collectively, the '**Books and Records**')."

Motion for Judgment, Exhibit A (APA), ¶ 1.2.

The APA also provides for the exclusion and assumption of liabilities between Seller and Purchaser:

"Excluded Liabilities and Assumed Liabilities. The Seller shall not sell or assign to the Purchaser, but shall retain, and the Purchaser shall not assume or

be responsible for any liabilities of the Seller, except that the Purchaser will assume and be liable for, and will pay, perform and discharge as and when due, those liabilities and obligations arising pursuant to the provisions of the Customer Contracts (if any) and only if (a) such Customer Contract is validly assigned to the Purchaser and (b) to the extent any such liability with respect to the Customer Contracts is attributable to an event which arises on or after, and relates to the time period subsequent to, the Closing Date (collectively, the **'Assumed Liabilities'**). Notwithstanding anything herein to the contrary, any liabilities or obligations of the Seller which are not Assumed Liabilities shall be retained by the Seller and paid and discharged by the Seller as and when due, including without limitation, all debts and obligations of the Seller of any kind or nature whatsoever arising out of, relating to, resulting from or caused by any transaction, status, event, condition, occurrence or situation relating to, arising out of or in connection with the business of the Seller existing, arising or occurring prior to the Closing Date, including, without limitation, all payroll and payroll-related accruals including accrued and unpaid employee salaries and other benefits, accrued and unpaid vacation bonuses, overtime and sick pay, all accrued payroll, sales, income and other taxes owed by the Seller, and all workers' compensation claims arising from events or conditions which occurred prior to the Closing Date (collectively, the **'Excluded Liabilities'**)."

*Id.*, ¶ 1.4, at 4.

Finally, with respect to compliance with applicable laws and taxes, and undisclosed liabilities, the APA provides:

"Compliance with Applicable Laws. To the Seller's knowledge, the Seller is, and has been, in compliance with all federal, state and local laws in connection with the conduct, ownership, use, occupancy or operation of the Seller's Business and the Property, and the Seller has not received written notice within the last two (2) years of any violation of any federal, state or local law in connection with the conduct, ownership, use, occupancy or operation of the Seller's Business or the Property."

Id., ¶ 3.10.

"Taxes. Except for current income taxes which are not yet due and payable, the Seller has no tax liabilities of any nature in connection with the Seller's Business which are due and payable and have not been paid, including, but not limited to, any applicable federal or state income taxes or state or local sales tax owing by the Seller."

Id., ¶ 3.13.

"Absence of Undisclosed Liabilities. The Seller does not have any debts, liabilities or obligations of any nature not reflected in the December 31, 2009 Financial Statements, except (a) for liabilities and obligations incurred in the ordinary and regular course of the Seller's Business after December 31, 2009 consistent with the custom and practice and which are not of unusual size or duration (b) as set forth on Schedule 3.20."

Id., ¶ 3.20

With respect to employees of MRC, the APA provides as follows:

"6.3 Employment Issues

a) Termination by Seller. Effective as of the Closing Date, the Seller shall terminate the employment of all employees who are engaged in the full or part-time performance of duties in connection with the Seller Accounts and Customer Contracts (the '**Former Seller Employees**'). The seller will pay all amounts which the Seller is required to pay to the Former Seller Employees in accordance with applicable law with respect to wages, salaries, commissions, bonuses, vacation pay or other compensation for any services performed which are owed, accrued or otherwise are required to be paid to the Former Seller Employees as of the Closing Date, and shall pay all employment taxes, withholding taxes and any other taxes and liabilities attributable to employment of the Former Seller Employees, including, without limitation, any applicable union dues, payments, taxes, contributions or benefits.

b) Purchaser's Right to Hire. Subsequent to the Closing, the Purchaser may hire as employees, independent contractors or otherwise some or all of the Former Seller Employees on such terms and conditions as it may determine in its sole discretion. The Seller shall remain solely responsible for all employee matters arising prior to the Closing and for all employee matters for those Former Seller Employees who are not hired by Purchaser, including but not limited to, salaries, wages, benefits (including, without limitation, benefits paid under any Employee Plan and health benefits mandated by COBRA, severance arrangements, worker's compensation claims, unemployment claims or withholding tax obligations and vacation and all the terms of employment for all of the Former Seller Employees and for Seller's other employees.

c) No Offer of Employment. Nothing in this Agreement shall be construed as an offer of employment by the Purchaser to any employee of the Seller. All parties understand that should the Purchaser make an offer of employment to any employee of the Seller, such offer will be strictly based on at 'at-will' employment relationship between the Purchaser and Seller's employee and is expressly subject to Purchaser's employment, termination, disciplinary, hiring, compensation and benefits policies, as each may be amended from time to time."

*Id.*, ¶ 6.3, at 23-24,

With respect to the payment of taxes the APA provides:

"6.4 Payment of Taxes. The Seller agrees to pay all taxes and file all reports and returns required to be filed regarding all taxes levied or assessed against the Seller in connection with the Seller's Business (including without limitation, any tax liabilities resulting from the transactions contemplated by this Agreement) or which the Seller will have had the legal obligation to collect, withhold or pay with respect to all tax periods prior to and including the Closing Date."

*Id.*, ¶ 6.4, at 24.

Finally, the APA provides for indemnification by the Seller

under the following circumstances:

"Indemnification by Seller. Subject to the provisions of this Agreement, from and after the Closing Date the Seller [sic] defend and indemnify the Purchaser, . . . against and hold harmless each Purchaser Indemnified Party for any Purchaser Damages incurred by such Purchaser Indemnified Party pursuant to any claim, action or demand. For purposes of this Agreement, '**Purchaser Damages**' means any losses, cost, expenses, liabilities or penalties (including, without limitation, reasonable attorneys' fees) suffered, sustained or incurred by any Purchaser Indemnified Party arising from or relating to any of the following: (a) any inaccuracy in or breach of a representation or warranty (or any allegation of fact which would result in any inaccuracy in or breach of a representation of warranty) made by the Seller contained in this Agreement or any of the other Transaction Documents; (b) any default by the Seller of any of the covenants and agreements to be performed hereunder or under any of the Transaction Documents; (c) failure of the Seller to discharge, when due, any of the Excluded Liabilities; and (d) any environmental, health or safety condition, situation or incident concerning any of the Property. Notwithstanding anything herein to the contrary, Purchaser Damages shall not include any lost profits, punitive or special damages claimed by a Purchaser Indemnified Party."

*Id.*, ¶ 8.3, at 28.

The APA further provides that the Purchaser would pay the Seller by means of an initial payment at Closing, followed by 36 equal monthly installment payments. *Id.*, ¶ 1.6 (a) and (b).

On December 19, 2014, the Seller and the Buyer executed the Closing Bill of Sale, Assignment and Assumption Agreement (Closing Contract) as contemplated by the APA. Aff of David P. Gillett in Opposition, Exhibit F.

Several months after the Closing Agreement was executed, WLG

received a letter, dated June 19, 2015, from Laura Webster, Senior ES Clerk, U.I. Registration, of the New York State Department of Labor, stating: "On the basis of information received, we have combined the employment and unemployment experience of MRC 56 Corp., employer registration number 39-61351, with yours for experience rating purposes. We will inform you if this results in any change in your [unemployment insurance (UI)] contribution rate." Aff of David P. Gillett in Opposition, Exhibit Q. On July 16, 2015, Mark Cordovi (Cordovi), President of MRC wrote to the Department of Labor stating:

"In reference to the document in your file dated May 28, 2015, please be advised that the transaction at issue was described as a business transfer in error; the transaction was an asset transfer. Accordingly, the employer account for MRC 56 Corp. should not be closed, and The Weeks-Lerman Group LLC should not be designated a successor to MRC 56 Corp. Please contact me if you require any further information."

Id., Exhibit R.

There is no indication in the record that the Department of Labor responded to Cordovi's letter; however on December 5, 2016, the Department of Labor again wrote to WLG stating:

"As a result of the total transfer of experience from MRC 56 CORP, employer registration number 39-61351, effective December 19, 2014 your UI rate and/or your experience rating account balance has been revised as shown on the attached Notice of UI Rate. This is in keeping with the provisions of the New York State Unemployment Insurance Law which provides for the transfer of employment and unemployment experience when one employer acquires, in whole or in part, the business of another.

"This WILL BECOME FINAL AND IRREVOCABLE AFTER THIRTY DAYS from the date of this notice unless you apply for a hearing in writing within such 30 days. The request for [a] hearing should be sent to the Liability and Determination Section at the address shown above."

*Id.*, Exhibit S.

The notice further indicated that as a result of the determination, WLG's account was currently underpaid by \$147,787.04 plus interest and its unemployment insurance rate was increased for the years 2014, 2015 and 2016.

There is no indication in the record that WLG responded to the December 5, 2016 letter. It appears that, rather than availing itself of the Department of Labor's hearing procedures to challenge the decision to transfer the unemployment insurance experience of the Seller to the account of the Purchaser, and/or the manner in which MRC's experience rating was applied to WLG,<sup>1</sup> WLG chose to withhold installment payments otherwise due to the Seller.

Plaintiff's first cause of action alleges that MRC has fulfilled all of its obligations under the APA, and although WLG paid many of the installment payments due under the APA, it

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<sup>1</sup> For example, it appears that WLG did not raise the question of whether a total or partial business transfer had occurred, and, therefore, whether the Department of Labor should have effected a total or partial transfer of experience rating to WLG, pursuant to Labor Law § 581 (4). See *Matter of Allegheny Airlines, Inc. v New York State Dept. of Labor*, 52 AD2d 281, 284 (3<sup>rd</sup> Dept 1976).

failed to continue to make payments which were due and owing, thereby breaching the APA. MRC contends that it is entitled to recover \$230,778.54 from defendant. MRC further contends that there are no material facts in dispute, and it is, therefore, entitled to summary judgment on its first cause of action.<sup>2</sup>

On March 16, 2018, WLG answered the complaint and asserted six affirmative defenses. Then, on April 4, 2018, WLG filed an amended answer, asserting a counterclaim alleging that MRC breached the APA entered into between the parties on August 2010, and that WLG is entitled to recover damages in an amount to be determined at trial. Finally, on May 16, 2018, WLG filed a second amended answer and amended counterclaims adding a second counterclaim alleging breach of the Closing Contract, and a third and fourth counterclaim for fraudulent inducement, alleging that MRC's representations in sections 3.10 and 3.20 of the APA were false and were known by MRC to be false when made, and were made for the purpose of inducing WLG to enter into the APA and the Closing Contract based upon false terms and conditions. MRC filed a rejection of the second amended answer, contending that it could not be filed as of right and that it had been filed without consent of the plaintiff or leave of the court.

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<sup>2</sup> In support of its cross motion for summary judgment on its first and second counterclaims asserting that it is MRC that has breached the APA and the Closing Contract, WLG also contends that there are no material facts in dispute.

In opposition to MRC's motion for summary judgment on its first cause of action for breach of contract and in support of its own counterclaims, WLG contends that MRC had an undisclosed history of chronic unemployment insurance liability, which manifested itself in negative balances (money owed to the Department of Labor for the unemployment insurance fund) from the years 2008 through 2013. As a result of those negative balances MRC was charged the maximum unemployment insurance rate for the years 2012, 2013, 2014, 2015 and 2016. WLG asserts that, in contrast with MRC, it did not have a negative balance, and was charged the normal unemployment insurance rate in 2015 and 2016. In December 2016, however, WLG was notified by the Department of Labor that as a result of the "total transfer of experience from MRC 56 CORP" not only was WLG's rate being increased, its account for 2015 and 2016 was deemed underpaid in the amount of \$166,026.23 with \$48.77 in interest accruing daily.

WLG contends that it paid \$180,907.09 owed by MRC to the Department of Labor as a result of MRC's negative balance and that it deducted that amount, plus \$50,219.73 from the money it would otherwise have owed to MRC under the APA and Closing Agreement.

Quoting *Matter of Tad Tech. Servs. Corp. (Hudacs)* (195 AD2d 675, 676 [3d Dept 1993]), WLG argues that a negative employer account under Labor Law § 581 constitutes a liability and a debt

obligation of MRC. *Id.*, quoting *Matter of Cat's Pajamas [Roberts]*, 89 AD2d 1029, 1209 (3<sup>d</sup> Dept 1982) ("`[I]f the statute did not inflict the burden of a negative account balance on the transferee, this liability would be debited to the State's general account, and would in effect be charged to the State's other employers'").

WLG contends that MRC's obligations relating to the unemployment insurance employer account constitute Excluded Liabilities, pursuant to section 1.4 of the APA and are, thus, solely the responsibility of MRC. WLG further argues that MRC's failure to disclose or to pay the negative balance in its employer account constitutes a breach of: (1) section 3.10 of the APA stating that the Seller was in compliance with federal, state and local laws in connection with the conduct, ownership, use, occupancy or operation of the Seller's business; (2) the warranty in section 3.20 that MRC did not have any debts, liabilities or obligations of any nature not reflected in the December 31, 2009 Financial Statements; and (3) the Seller's obligation under section 6.3(a) to "pay all employment taxes, withholding taxes and any other taxes and liabilities attributable to employment of the Former Seller Employees, including without limitation, any applicable union dues, payments, taxes, contributions or benefits." APA, ¶ 6.3(a).

For the purpose of this motion and cross motion, MRC does

not dispute that WLG's unemployment insurance rate and account balance changed as a result of the fact that MRC's "employer's account" was transferred to WLG by the Department of Labor, but contends that the transfer and its consequences occurred by operation of law, rather than by any breach of the APA by MRC.

MRC contends that the negative balance in its employer's account and its concomitant unemployment insurance rate were unrelated to the sections of the APA which WLG claims were violated. MRC argues that section 3.20 which requires the Seller to warrant that it does not have any undisclosed debts, liabilities or obligations not disclosed in its December 31, 2009 Financial Statement is unrelated, because the negative balance does not constitute a debt, liability or obligation. MRC contends that the Labor Law nowhere states that an employer "owes" anything to the Department of Labor as a result of its negative balance, but, rather, that the negative balance is nothing more than a concept reflecting the employer's experience with respect to contributions and payments to the unemployment fund. Furthermore, MRC argues that when its employer experience was transferred to WLG, the transferee was not required by the Department of Labor to pay a "debt" of MRC, but rather it was obliged to pay what was now WLG's own obligation with respect to its current payroll.

With respect to section 1.4 of the APA which defines

excluded and assumed liabilities and obligations, once again, MRC argues that it was never required to pay the State of New York for its negative balance, and, therefore, it did not have any liability or obligation to the State of New York that it failed to disclose.

With respect to section 6.3 (a) of the APA which requires the Seller to pay all of the employment taxes, withholding taxes and any other taxes or liabilities "attributable to the employment" of its former employees, MRC argues that an employer's experience rating for the purpose of unemployment insurance rates is attributable to the termination of employees, rather than the employment of employees, and that, in any case, the phrase "attributable to employment of the Former Seller Employees" is limited in the APA by the examples specified in the document, "union dues, payments, taxes, contributions or benefits," which are payments typically due from a current, not a former employer. In any case, citing *Matter of Cat's Pajamas [Roberts]* (89 AD2d at 1029), MRC asserts that WLG could have addressed the consequences of the transfer of MRC's employer experience by negotiating a different purchase price, but failed to do so. *Id.* at 1029 ("[A] new owner is at liberty to negotiate a purchase price which contemplates future liability").

#### Statutory Framework

Labor Law § 581 governs the "experience" of an employer with

respect to unemployment insurance of its employees, the impact of that experience for the purpose of establishing the unemployment insurance contribution rate that will be charged to the employer, and the manner in which that experience is treated when the employer's business is transferred, either partially or completely, or merged with another business. Pursuant to section 581, each employer maintains an account in the unemployment insurance fund that "reflects his or her experience with respect to unemployment [insurance]." Labor Law § 581 (1) (c).

As the Appellate Division, Third Department has explained,

"Labor Law § 581 provides for an experience-rating system which allows for variations in the unemployment insurance contribution rates from the standard rate of qualified employers. Thus, an employer with a good employment history will have a tax rate lower than the standard rate. On the other hand, if an employer's account registers a negative balance in excess of 2% of the employer's payroll, this amount is transferred as a charge to the general account (Labor Law § 581[1][e]); if such a transfer and charge to the general account occurs within three payroll years preceding the computation date, the law requires that the employer's tax rate not be less than the standard rate of 5.4% (Labor Law § 581[2][a])."

*Matter of Tri-State Newspaper Serv. (Sweeny)*, 213 AD2d 813, 813 (3d Dept 1995). Under Labor Law § 581(1)(d), the employer "can make voluntary payments at any time" in order to avoid the consequences of a negative balance on its rate of unemployment insurance. *Id.* at 814.

When a company is partially or totally transferred to, or merges with, another company or companies, the experience rating

of the transferor company may be transferred, in whole or in part, to the transferee company. Labor Law § 581 (4) (a).<sup>3</sup>

Numerous cases exist in which a transferee company has contested the action of the Department of Labor transferring to it the employment experience of the transferor company, thereby increasing the transferee's negative balance and consequently increasing its unemployment insurance rate. See e.g. *Matter of Tri-State Newspaper Serv.*, (Sweeny), 213 AD2d at 813; *Matter of Tad Tech. Servs. Corp. (Hudacs)*, 195 AD2d 675; *Matter of Cat's Pajamas (Roberts)*, 89 AD2d 1029; *Matter of Allegheny Airlines v New York State Dept. of Labor*, 52 AD2d 281, 284 (3<sup>rd</sup> Dept 1976); *Matter of Ward Foods (Catherwood)*, 26 AD2d 968 (3<sup>rd</sup> Dept 1966); *Matter of Welch-Allyn, Inc. (Catherwood)*, 13 AD2d 594 (3<sup>rd</sup> Dept 1961), decision amended 14 AD2d 459 (3<sup>rd</sup> Dept 1961). However, none of those cases deal directly with the questions before this court, that is, whether a negative balance in an employer's

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<sup>3</sup> "Transfers of accounts. (a) Where an employer subsequent to July first, nineteen hundred fifty-one, transfers his or its organization, trade or business in whole or in part, the transferee shall take over and continue the employer's account, including its balance and all other aspects of its experience under this article, in proportion to the payroll or employees assignable to the transferred organization, trade or business determined for the purpose of this article by the commissioner. The account taken over by the transferee shall remain chargeable with respect to benefits based on employment in the transferred organization, trade or business, and all such employment shall be deemed employment performed for the transferee." Labor Law § 581 (4) (a).

insurance account constitutes a liability for the purposes of an asset purchase agreement such as here, and whether the failure to disclose that negative balance, or to make a voluntary contribution to the unemployment insurance fund to eliminate it, constitutes a failure to disclose or pay a tax liability in violation of the APA.

In *Matter of Tad Tech. Servs. Corp.* (Hudacs) (quoting *Matter of Cat's Pajamas [Roberts]*), which is relied upon by WLJ, although the word "liability" is mentioned by the Court, the question of whether a negative balance constitutes a liability as that word is commonly used, is not at issue in either decision. Rather, the focus of both *Matter of Tad Tech. Servs. Corp.* (Hudacs) and *Matter of Cat's Pajamas (Roberts)* is whether the Unemployment Appeals Board's decision to transfer the negative balances in the transferor company's account to the transferee was proper. In *Matter of Tad Tech. Servs. Corp.* (Hudacs), where petitioner had merged with and continued the business of four corporations, the Court concluded that the Commissioner's decision to transfer the prior companies' negative balances to the new employer was not irrational in order to protect the State's general account. Similarly, in *Matter of Cat's Pajamas (Roberts)*, which is quoted in *Matter of Tad Tech. Servs. Corp.*, the transferee employer "acquired the entire business, including inventory and good will ... [and] continued the business at the

same location and under the same name and for a time retained one of the predecessor's employees." *Matter of Cat's Pajamas [Roberts]*, 89 AD2d at 1029. The Appellate Division, Third Department rejected the company's argument that the transfer of the prior employer's negative experience was unconstitutional and irrational, concluding that it was not unconstitutional for the Unemployment Appeals Board to transfer negative balances where there was a total merger of businesses. In neither case did the Court consider whether a negative account balance constituted a "liability," in the context at issue here.

WLG contends that the existence of MRC's negative balance constitutes a violation of section 3.10, which states that MRC has no state tax liabilities. However, there is no evidence that MRC was ever notified by the Department of Labor that its negative balance constituted a violation of law. Rather, the 2014 Department of Labor notice to Complete Office Supply Warehouse Corp. (the Seller) indicating that the company had a negative balance and listing the unemployment rate of the company states that "A *voluntary contribution* made by 3/31/14 can remove these negative transfers and may result in a revised 2014 U.I. Rate." Gillett Aff, Exhibit K. The fact that such a contribution is described as "voluntary" suggests that the negative balance does not constitute a violation of law, but rather is part of the mechanism used by the Department of Labor

in determining an employer's unemployment insurance rate. Possibly for this reason, in *I.P.L. Corp. v Industrial Power & Light. Corp.* (202 AD2d 1029 [4<sup>th</sup> Dept 1994]), where the plaintiff corporation was seeking to recover on two promissory notes and guarantees executed by defendant, the Appellate Division rejected defendant's argument that a negative balance in an employer's unemployment insurance account constituted a tax liability. There the Court stated,

"there is no merit to defendants' contention that the failure of plaintiff to reveal its unemployment claims experience constituted a breach of its contractual warranty that plaintiff had paid all taxes and any accrued employee connected liabilities. The negative balance of plaintiff's 'employer's account' did not represent a tax liability or deficiency, but represented a negative unemployment claims experience that resulted in a future increase in premiums."

*Id.* at 1030.

Like the Court in *I.P.L. Corp.*, this Court concludes that MRC's apparent failure to disclose its negative balance in its employer's account did not represent a failure to disclose or pay a tax liability and did not constitute a breach of sections 3.10, 3.13 or 3.20 of the APA. Similarly, having a negative balance at the time of closing did not constitute a failure by MRC to pay taxes in violation of section 6.4 of the APA. In fact, notably, according to the Department of Labor, "The Employer's Account has no cash value [and]...is only a bookkeeping device used in determining the UI rate." *Gillett Aff*, Exhibit T.

Had WLG exercised its right to contest the transfer of MRC's negative balance, the Department of Labor might well have revised its initial determination. As this Court has already noted, in both *Matter of Tad Tech. Servs. Corp. (Hudacs)* and *Matter of Cat's Pajamas [Roberts]*, where the Department of Labor transferred the negative balances in the prior employer's accounts, there had been total mergers of the companies, and in *Matter of Cat's Pajamas (Roberts)*, the new company continued the business in the old location and even employed one of the old company's employees. Even if the Department of Labor continued to treat the APA as a business transfer, rather than an asset transfer, as urged by MRC in its correspondence, it might well have concluded that only a partial transfer had occurred, which would likely have affected the amount of negative balance transferred to WLG and, therefore, the amount of WLG's new insurance rate, as well. See *Allegheny Airlines v New York State Dept. of Labor*, 52 AD2d at 284 ("[Labor Law § 581 (4) (b)] becomes operative in the event of a partial transfer of a business and employees to another corporation. It does not vest discretion in the commissioner. He must make a proportionate allocation where there is a partial transfer of the business, but where there is a total transfer the transferee takes over the transferor's experience rating account").

Although both parties contend that the facts are not in

dispute, there are factual matters which have not been revealed to the court by either party which could have significance in the interpretation of relevant provisions of the APA. For example, although the APA provides that the Seller will terminate the employment of any employees who have full or part-time responsibilities with respect to any of the customer contracts which are sold to the Purchaser, it is not clear whether the Seller has continued to operate a business and has continued to maintain employees who did not have responsibilities for the customer contracts purchased by WLG. If MRC has remained in business and continues to have employees, it, presumably, continues to have an employer account with the Department of Labor, and that account would continue to maintain a negative balance which would impact MRC's unemployment insurance tax rate. That could explain MRC's July 16, 2015 letter to the Department of Labor indicating that the transaction between MRC and WLG was an asset transfer, rather than a business transfer, and that "[a]ccordingly, the employer account for MRC 56 Corp. should not be closed, and The Weeks-Lerman Group LLC should not be designated a successor to MRC 56 Corp." Gillett Aff in Opposition, Exhibit R. In any case, MRC's letter indicating that its employer account should not be closed, suggests that it recognized it had a continuing responsibility with respect to its unemployment insurance experience.

If, however, MRC no longer has a general account with the Department of Labor, as it claimed it did in its June 16, 2015 letter to the Department, and is no longer in business and no longer has employees, MRC's financial responsibilities arising for its past employees which constitute Excluded Liabilities may have shifted to WLG, in a manner not intended by section 1.4 of the APA governing Excluded and Assumed liabilities.

It is also unclear to the court whether WLG, in fact, hired any of MRC's prior employees as provided for in section 6.3 (b) of the APA. This question could also have an impact on whether MRC's general account with the Department of Labor, including the negative balance, constitutes an Excluded Liability under the APA which could trigger various rights and responsibilities of the parties with respect thereto.

Had WLG availed itself of its right to appeal the Department of Labor's decision, treating the transaction as a business transfer and transferring MRC's experience to WLG these issues might well have been clarified and the Department of Labor might have altered its decision to transfer MRC's negative balance to WLG.

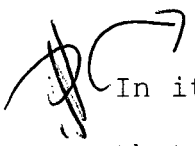
Finally, WLG also contends that MRC's failure to disclose its negative balance with the Department of Labor constitutes a violation of its obligations under section 3.20 of the APA to disclose any debts, liabilities or financial obligations not

listed in its 2009 financial disclosure. MRC's argument that it could have addressed the consequences of the transfer of the negative account balance by negotiating a different purchase price for the asset transfers is undermined by the fact that the existence of MRC's negative balance was never disclosed to WLG.

Because of these open questions of fact, on the basis of the record currently before the court, it cannot be determined whether defendant could justifiably withhold payment under the APA for those payments it made to eliminate the negative balance which was transferred to it by the Department of Labor. Therefore, both plaintiff's motion for summary judgment on its first cause of action for breach of contract and defendants' motion for summary judgment on its counterclaims for breach of the APA are denied.

MRC'S MOTION TO DISMISS WLG'S COUNTERCLAIMS

To the extent that MRC's motion to dismiss WLG's counterclaims is based on its arguments in support of its own motion for summary judgment, because that motion has been denied, its motion to dismiss WLG's first counterclaim is denied as well.



In its response to WLG's cross motion, however, MRC also argues that WLG's second, third and fourth counterclaims must be dismissed because they are asserted in WLG's second amended answer and amended counterclaims. That pleading was served and

filed without the consent of MRC and without leave of the court, and thus, according to MRC, was filed in violation of CPLR 3025 (a), which allows one amendment as of right "without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it." CPLR 3025 (a); see *Arts4All Ltd. v Hancock*, 25 AD3d 453, 453 (1<sup>st</sup> Dept 2006) ("Having once amended their complaint, plaintiffs were not entitled to serve a second amended complaint as of right").

Quoting a 1907 decision of the Appellate Division, First Department, WLG contends that because plaintiff served an amended pleading, which took the place of the prior pleading, WLG is entitled to serve a second amended answer and counterclaims in response to MRC's amended pleading. *Brooks Bros. v Tiffany*, 117 App Div 470, 471 (1<sup>st</sup> Dept 1907) ("Where an amended pleading is served it takes the place of the original pleading, and the action will proceed as if the original pleading had never been served, for the issues thus tendered are the ones upon which the action must proceed"). Thus, according to WLG, because MRC filed an amended pleading on May 3, 2018, WLG may file another amended pleading as of right. Here, however, the amended pleading filed by MRC was not an amended complaint, in response to which WLG could presumably have filed a second amended answer and amended counterclaims. Rather the amended pleading filed by MRC was an

amended reply addressing WLG's amended answer and counterclaim, to which WLG would not normally have had the right to file another answer. For this reason, WLG's filing of a second amended answer and amended counterclaims without a stipulation of the opposing party or leave of the court was in violation of CPLR 3025 (a) and is dismissed.

#### Motion to Compel Discovery

MRC moves for an order requiring WLG to provide complete answers to its interrogatories and to provide documents in response to its document requests. While MRC provides a copy of the letter sent to counsel for WLG objecting to defendant's responses to MRC's interrogatories and document demands, as this court has stated, "A letter, sent to opposing counsel, does not qualify as 'conferring' with opposing counsel 'in a good faith effort to resolve the issues raised by the motion,' as required by the Uniform Rules. See 22 NYCRR § 202.7(a) & (c)."

*140 W. 57th Street Bldg. LLC v Kate's Paperie LLC, No.*

*107833/2011*, 2013 WL 12341996, at \*1 (Sup. Ct, NY County, Aug. 9, 2013). MRC's motion to compel discovery is, therefore, denied.

It is noted that, subsequent to the filing of the within motions, by interim order dated December 3, 2018, this Court directed that the parties confer by telephone in an attempt to settle this matter, as well as any discovery issues. The interim order further provided that, on or before December 14, 2018,

counsel were to supply this court with a letter, outlining the most recent demand, offer and any remaining discovery issues. By joint letter of counsel dated January 8, 2019, counsel advised this court of their inability to settle this matter after numerous attempts, including attending mediation, via the Commercial Division ADR Program. The letter, however, failed to outline any discovery issues; thus, on or before July 31, 2019, plaintiff shall file a note of issue.

Accordingly, it is hereby

ORDERED that plaintiff MRC 56 Corp.'s motion is decided as follows:

a) the branch seeking summary judgment on its First Cause of Action is denied; and

b) the branch seeking summary judgment dismissing defendant The Weeks-Lerman Group, LLC's counterclaims is denied as to the first counterclaim and is otherwise granted; and

c) the branch seeking an order directing defendant to provide complete answers to interrogatories served by plaintiff and provide documents responsive to plaintiff's document demands is denied; and it is further


ORDERED that the cross motion of defendant The Weeks-Lerman Group, LLC for summary judgment on its first and second counterclaims is denied; and it is further

ORDERED that plaintiff shall file a note of issue, on or

before July 31, 2019; **this case is scheduled for a control date on September 3, 2019 (no appearances)**, to monitor compliance with this order, with respect to the filing of a note of issue; and it is further

ORDERED that within 30 days of entry of this order, defendant shall serve a copy upon plaintiff, with notice of entry.

Dated: July 3, 2019

  
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Hon. Doris Ling-Cohan, J.S.C.

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