Arch Ins. Co. v Petrocelli Elec. Co., Inc.
2019 NY Slip Op 33462(U)
November 20, 2019
Supreme Court, New York County
Docket Number: 653580/13
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15
---------------------------------------X
ARCH ISURANCE COMPANY,

Plaintiff,

-against-

Index No.: 653580/13

PETROCELLI ELECRIC CO., INC., PETROCELLI ELECTRIC OF NJ, INC., PETROCELLI INDUSTRIES, INC., PETROCELI ELECTRICAL COMMUNICATIONS CO., INC., f/k/a Petrocelli Communications Co., Inc., EA TECHNOLOGIES CORPORATION, QNCC ELECTRICAL CONTRACTING CORP., DEBT & EQUITY ASSOCIATES, LTD., SMFS CORP., PEC REALTY CORP., PETROCLLI PALMIERI, J.V., LLC, ILMS REALTY CORP., FMSS, LLC, TRANSIT TECHNOLOGIES, LLC, 2100 FELVER LLC, ALLAN BRITEWAY ELECTRICAL CONTRACTORS, INC., And ALLAN BRITEWAY ELECTRICAL SERVICES, INC.,

Defendants.
---------------------------------------X

CRANE, J:

In this action, plaintiff Arch Insurance Company (Arch) contends it is owed in excess of $5 million under nine insurance policies: (1) seven commercial general liability and automobile insurance policies that Arch issued to defendant Petrocelli Electric Co., Inc. (Petrocelli Electric) and other defendant named insureds (the Petrocelli Electric Insureds) and (2) a workers' compensation and a commercial general liability policy that Arch issued to Petrocelli Electric of New Jersey, Inc. (Petrocelli NJ), and other defendant named insureds (the Petrocelli NJ Insureds). Arch contends that the total amount due under the policies is comprised of policy premiums, defense costs, and self-insured retentions (SIRs) that it incurred in connection with the defense and indemnification of defendants in underlying personal injury lawsuits. Arch

asserts that, with respect to the defense costs and SIRs, it advanced those funds because the Petrocelli Electric Insureds refused to defend themselves in the underlying lawsuits. Arch further asserts that the Petrocelli NJ Insureds have failed to pay policy premiums owed to it pursuant to premium audits conducted under those policies.

Arch now moves for partial summary judgment on the issue of liability and (1) an order requiring defendants to reimburse it for defense costs and the funds it advanced prior to satisfaction of the SIRs under seven insurance policies in order to defend certain defendants; (2) an order requiring defendants to reimburse Arch for additional premiums under two additional insurance policies based on the actual exposure during the policy periods; and (3) can order holding defendant Allan Briteway Electrical Contractors, Inc. (Allan Briteway), the alleged successor corporation of the Petrocelli entity defendants, liable for the SIRs and additional premiums due under the nine policies.

For the following reasons, the court denies Arch's motion for partial summary judgment.

BACKGROUND

The Petrocelli Electric Insureds' Policies

Between 2005 and 2011, Arch issued seven general liability and automobile liability insurance policies to the Petrocelli Electric Insureds (the Petrocelli Electric Insureds' Policies). Each of the Petrocelli Electric Insureds' Policies contains an SIR – the amount that the insured must cover before Arch's payment obligation is triggered.

The SIR Endorsement in each of the Petrocelli Electric Insureds' Policies sets forth the applicable SIR amount and identifies the rights and obligations of the Petrocelli Electric Insureds and Arch within the SIR:

> "You shall be responsible for the investigation and settlement of any 'claim' or 'suit' for damages with the Self-Insured Retention, and for the payment of all

> 'Allocated Loss Adjustment Expenses.' You shall exercise utmost good faith, diligence and prudence to settle all 'claims' and 'suits' within the Self-Insured Retention. Defense costs, however, shall not be included in any Self-Insured Retention paid by you.
>
> We shall have the right but not the duty to participate with you at our own expense in the defense or settlement of any 'claim' or 'suit' seeking damages covered under the Policy. . . . You will continue to be responsible for the payment of the Self-Insured Retention"

(*see* aff of Neil Putman, a vice-president of Arch Insurance Group, exhibits A-G, at 32).

Throughout the Petrocelli Electric Insureds' Policies, including the SIR Endorsement, "you" means both the named insured shown in the Declarations (i.e., Petrocelli Electric) and any other person or organization qualifying as a named insured (i.e., the named insureds added to the policies by the named insured endorsement) (*see id.*). Arch alleges that the SIR Endorsement makes clear: (1) all named insureds are responsible for payment of the SIR and investigating, handling and settling claims that fall within the SIR; (2) Arch did not have a duty to participate with the named insureds in the defense of any claim, but rather, the insureds were responsible for paying all defense costs; and (3) defense costs are not included in any SIR paid by the named insureds.

The SIR Endorsement also explains that:

> "[Arch's] obligation to pay those sums that you become legally obligated to pay as damages applies only to the amount of damages in excess of any Self-Insured Retention amounts stated in the Schedule above to which the Policy would otherwise apply, subject to the Limits of Insurance set forth in the Declarations applicable to this Endorsement and the 'occurrences' to which the Policy apply.
>
> 'Allocated Loss Adjustment Expenses' for claims within the Self-Insured Retention shall be paid by you and shall reduce the Self-Insured Retention amounts stated in the above Schedule. After the Self-Insured Retention amount has been exceeded, we shall pay all 'Allocated Loss Adjustment Expenses'" (*see id.*).

Arch argues that the SIR Endorsement provides that its obligation to pay any damages does not trigger until the SIR has been satisfied.

In 2006, Arch amended the Petrocelli Electric Insureds' Policies to include a Broad Form Named Insured Endorsement (the Named Insured Endorsement) that lists the other entities who qualify as Named Insureds under the policies. The Named Insured Endorsement listed the following entities as "Named Insured" – Petrocelli Electric Company Inc.; Petrocelli Industries Inc.; Petrocelli Communications Company; EA Technologies/Petrocelli JV; Petrocelli Industries Inc./QNCC; QNCC/Petrocelli Electric Company Inc.; Debt and Equity Associates Inc.; SMFS Corp.; PEC Realty Corp.; Petrocelli/Palmieri Joint Venture LLC; Integrated Network Systems Inc.; Four Sites Construction Corp.; ILMS Realty Associates; FMSS Holding Company; and Transit Technologies LLC. In 2009, Arch's agent, Marsh USA, amended the Named Insured Endorsement to include 2100 Felver, LLC and Petrocelli NJ.

Arch asserts that, other than Allan Briteway, the defendants in this action qualify as named insureds under the Petrocelli Electric Insureds' Policies, because they are listed on the Named Insured Endorsement. Arch further asserts that, pursuant to the terms and conditions of these policies, all of the named insureds are responsible for paying the defense costs, satisfying the SIRs, and investigating, handling and settling claims that fall within the SIRs. Arch takes the position in this action that defendants, as named insureds under the policies, are jointly and severally responsible for the defense costs and SIR amounts that Arch advanced under the Petrocelli Electric Insureds' Policies.

Arch alleges that it was forced to pay defense costs and advance funds prior to exhaustion of the SIRs, because the Petrocelli Electric Insureds refused to defend themselves in the underlying lawsuits, or otherwise pay the amounts that they were contractually obligated to pay

within the SIRs (Putman aff, ¶ 16; aff of Marc Reyes, Arch's lead claims handler for the policies, ¶¶ 4-6 and 8). Arch asserts that these amounts total in excess of $5 million (Putman aff, ¶ 16).

According to Arch, it sent invoices with supporting documentation for each of these payments at the time they were billed and at several times over the course of the litigation (Reyes aff, ¶¶ 4-6; Putman aff, ¶ 17). Arch asserts that it also regularly met with representatives of the Petrocelli Electric Insureds to discuss the SIR amounts owed to it (Reyes aff, ¶ 8; Putman aff, ¶ 17). Arch contends that the Petrocelli Electric Insureds have refused to reimburse it for the defense costs or SIR amounts advanced under the Petrocelli Electric Insureds' Policies (Putman aff, ¶ 18).

The Petrocelli NJ Insureds' Policies

Arch also insured the Petrocelli NJ Insureds under workers' compensation policy no. 11WC12407003 issued for the June 1, 2011 to June 1, 2012 policy period (the Petrocelli NJ WC Policy), and commercial general liability policy no. 11GPP2407103 issued for the June 1, 2011 to June 1, 2012 policy period (the Petrocelli NJ CGL Policy) (collectively, the Petrocelli NJ Insureds' Policies) (*see* Putman aff, exhibits H and I).

Pursuant to the terms of the Petrocelli NJ Insureds' Policies, the calculations for the initial premiums relied on the Petrocelli NJ Insureds' estimated payroll for the dates of coverage. Because the initial premiums were based on estimates, the Petrocelli NJ Insureds' Policies are subject to audit based on the actual exposure (i.e., payroll) during the effective dates of coverage:

> "The premium shown on the Information Page, schedules and endorsements is an estimate. The final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classifications and rates that lawfully apply to the business and work covered by this policy"

(*see id.*).

Pursuant to the policies, the audit can result in additional premiums owed to Arch, or the return of premiums to the Petrocelli NJ Insureds:

> "If the final premium is more than the premium you paid to us, you must pay us the balance. If it is less, we will refund the balance to you"

(*see id.*).

Each policy also provided that premiums would be calculated in accordance with Arch's rules and rates:

> **Premium Audit**
>
> "a. We will compute all premiums for this Coverage Part in accordance with our rules and rates.
>
> b. Premium shown in this Coverage Part as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period and send notice to the first Named Insured"

(*see id.*).

Arch contends that, following the audits, it was determined that additional premiums were due under the Petrocelli NJ Insureds' Policies (Putman aff, ¶ 25). Arch further contends that it sent invoices for an additional premium in the amount of $14,097 under the Petrocelli WC Policy, and an additional premium in the amount of $12,866 under the Petrocelli CGL Policy (*see id.*, exhibits J and K). According to Arch, the Petrocelli NJ Insureds never disputed the audits, but just refused to pay (*id.*, ¶¶ 26-27). Arch contends that, pursuant to the terms of the Petrocelli NJ Insureds' policies, the Petrocelli NJ Insureds are responsible for $26,963 in additional premiums owed under the Petrocelli NJ Insureds' Policies.

Corporate History of Allan Briteway and Petrocelli Electric

Petrocelli Electric was formed in 1959 under the laws of the state of New York (aff of Norman Fidelman, the senior vice president of Allan Briteway, and a former officer and board member of Petrocelli Electric, ¶ 4). Petrocelli NJ is a wholly owned subsidiary of Petrocelli Electric (*id.*, ¶ 5). Petrocelli Electrical Communications Co., Inc. f/k/a Petrocelli Communications Co., Inc., is also a wholly owned subsidiary of Petrocelli Electric (*id.*, ¶ 6). Petrocelli Electric was involved in significant construction projects in New York City, including projects at the World Trade Center (WTC) and Weill Cornell Medical Center (Weill Cornell), and for years was New York's City's leading street light contractor.

In 2009, because of ongoing legal problems of Santo Petrocelli Sr., Santo Petrocelli Jr. purchased all of his father's Petrocelli Electric's shares, and became the sole shareholder of Petrocelli Electric (*id.*, ¶ 7). As of 2006, Santo Petrocelli Sr., Santo Petrocelli Jr., Fidelman and Florence Petrocelli Gordon were the directors of Petrocelli Electric (*id.*, ¶ 8). Santo Petrocelli Sr. resigned as a director in 2006 (*id.*, ¶ 9). Santo Petrocelli, Jr., Fidelman and Gordon were directors of Petrocelli Electric until the company's dissolution by proclamation in 2016 (*id.*, ¶¶ 10-11).

Allan Briteway began doing business as Allan/Briteway Electrical Contractors, Inc. sometime in 2004 (*id.*, ¶ 12). In 2006, SAIDS, LLC (SAIDS), that Santo Petrocelli, Jr. owns, purchased Allan Briteway from UIL Holdings Corporation, Xcelecom, Inc. (*id.*, ¶ 13). SAIDS did not purchase Allan Briteway with Petrocelli Electric shares. Rather, SAIDS purchased Allan Briteway with cash (*id.*).

Santo Petrocelli Jr., Ann Marie Petrocelli and William Brown were the directors of Allan Briteway from the time SAIDS acquired it until 2014 (*id.*, ¶ 15). Brown served as President until

2014, when Santo Petrocelli Jr. took over as president (*id.*, ¶ 17). Petrocelli Electric and Allan Briteway never had the same directors (*see id.*, ¶¶ 15-18). Fidelman alleges that, in addition, Petrocelli Electric and Allan Briteway have always maintained separate operations and control (*id.*).

Allegations About Successor Liability

Arch contends that Allan Briteway is liable as a successor corporation for the amounts owed under the policies. Arch points to Santo Petrocelli Jr.'s testimony that, after his father was indicted on conspiracy and bribery charges, he purchased Allan Briteway in order to use "the branding of Allan Briteway," because the Petrocelli name "wasn't good for the industry" (Petrocelli dep at 46-47 [aff of J. Gregory Lahr, exhibit 3]). Personnel, property, contracts and other assets were then migrated from Petrocelli Electric to Allan Briteway in order to continue business operations. More specifically, Arch alleges that Petrocelli Electric and Allan Briteway shared common ownership, management, office space, a business address, and contact information; Allan Briteway took over Petrocelli Electric's New York operation, as well its business in Southern New Jersey; Petrocelli Electric transferred employees, customers, contracts, vehicles, equipment, and furniture to Allan Briteway; and Petrocelli Electric and Allan Briteway had a regular practice of transferring funds between the companies and principals as needed. According to Arch, Allan Briteway thus qualifies as a successor liable for the amounts owed by Petrocelli Electric to Arch under the Petrocelli Electric Insureds' Policies and Petrocelli NJ Insureds' Policies pursuant to the de factor merger and/or mere continuation exceptions under New York law.

Defendants sharply contest Arch's version of the facts, and contend that Petrocelli Electric and Allan Briteway are separate and distinct legal entities, and that any dealings between

Petrocelli Electric and Allan Briteway were arms-length for good and valuable consideration. Defendants allege that between 2010 and 2011, Petrocelli Electric began to experience severe financial difficulties, which put it on a path to potential defaults on two of Petrocelli Electric's largest contracts, the WTC and Weill Cornell projects (Fidelman aff, ¶ 27). Petrocelli Electric provided payment and performance bonds for each project, and Santo Petrocelli Jr. personally indemnified the bonding company and the WTC contract. Petrocelli Electric sold the contracts for WTC and Weil Cornell to Allan Briteway for good and valuable consideration, and maintained independent corporate records detailing these transactions in order to ensure successful completion and avoid a default (*id.*, ¶ 28). Allan Briteway sold Petrocelli Electric the WTC contract on April 11, 2011, and the Weill Cornell contract on October 1, 2011 (*id.*).

After buying the contracts, Allan Briteway hired key Petrocelli Electric personnel to help with the contracts (*id.*, ¶ 29). Defendants allege that the projects were staffed by union labor, so Allan Briteway hired union labor to complete the work, and that thus, no employees were transferred. Defendants also assert that customers were not transferred from Petrocelli Electric to Allan Briteway, but that rather, they chose to do business with Allan Briteway.

In January 2012, by Bill of Sale, Petrocelli Electric sold Allan Briteway various assets, furniture, fixtures, tools and equipment for a price determined by an independent appraiser (*id.*, ¶ 29). In conjunction with this asset sale, Allan Briteway entered into a lease with Petrocelli Electric for office space at 22-09 Queens Plaza North, Long Island City in January 2012. The lease obligated Allan Briteway to pay Petrocelli Electric $780,000 per year in rent. Brown signed the lease as president of Allan Briteway, and Santo Petrocelli, Jr. signed for Petrocelli Electric.

From 2007 to 2012, Petrocelli Electric sold a series of vehicles to Allan Briteway. Defendants assert that the vehicles were purchased for fair market price (*id.*, ¶ 32). As of 2013, after selling some of its assets to Allan Briteway, Petrocelli Electric still owned operating assets and substantial accounts receivable worth several million dollars (*id.*, ¶ 33). Defendants assert that over time, Petrocelli Electric collected the accounts receivable and paid off its creditors (*id.*). In 2016, Petrocelli Electric dissolved by proclamation (*id.*, ¶ 34). Allan Briteway remains operational (*id.*).

Defendants allege that Allan Briteway and Petrocelli Electric always maintained separate corporate formalities, separate bank accounts, and operated independently (*id.*, ¶ 35). Neither company guaranteed the trade debts of the other (*id.*). Loans made between the companies were documented in each corporation's records, and conformed to the practices and policies set forth in each company's governing documents (*id.*, ¶ 36). Through the date of dissolution, the board of directors of each company made business decisions for the benefit of each independent entity (*id.*, ¶ 37). Defendants further allege that, at no time were the business transactions between Allan Briteway and Petrocelli Electric based on fraud, or undertaken to avoid creditors or otherwise render any of the companies unable to pay its obligations in the ordinary course of business.

DISCUSSION

"'[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Ayotte v Gervasio*, 81 NY2d 1062, 1062 [1993] [citation omitted]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers"

(*Winegrad*, 64 NY2d at 853; *see also Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982 [1993]).

The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. [DE] v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]). The court is required to examine the evidence in a light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). Summary judgment should not be granted if there are genuine material issues of disputed fact (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *Tronlone v Lac d'Amiante Du Quebec*, 297 AD2d 528, 528-529 [1st Dept 2002], *affd* 99 NY2d 647 [2003]).

When analyzing a dispute over insurance coverage, courts should look first to the language of the policy (*Raymond Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 NY3d 157, 162 [2005]; *Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 221 [2002]). As with the construction of all contracts, "unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court" (*White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007] [internal citation omitted]; *see also Vigilant Ins. Co. v Bear Stearns Cos., Inc.*, 10 NY3d 170, 177 [2008]).

Reimbursement of Defense Costs

In the first branch of the motion, Arch contends that under the plain language of the SIR Endorsement, the Petrocelli Electric Insureds are each responsible for payment of the defense costs and other amounts that Arch advanced to defend the claims against the Petrocelli Electric Insureds. However, Arch has failed to demonstrate that the policy language entitles it to the reimbursement of defense and other costs.

The SIR Endorsement provides that "defense costs . . . shall not be included in any Self-Insured Retention paid by [the insured]," but that Arch has "the right but not the duty to participate with you at our own expense in the defense or settlement of any 'claim' or 'suit' seeking damages covered under the Policy." Arch interprets this language as meaning that Arch had no duty to defend, that defendants are responsible for defense and other costs expended to defend the suits at issue, and that they are entitled to be reimbursed for those costs. However, the policy does not support this argument.

Although Arch may not have had the duty to defend the Petrocelli Electric Insureds, the SIR Endorsement clearly states that it has the right to do so. It is undisputed that Arch exercised this right, and voluntarily defended the claims at issue. The policy language is clear that any decision by Arch to exercise its right to participate in the defense or settlement of any claim or suit is done at its own expense. There is nothing in the policy language that entitles reimbursement of any defense or other costs expended in defending those claims or suits. Accordingly, Arch has failed to demonstrate that it is prima facie entitled to reimbursement of its defense or other costs under the language of the SIR Endorsement, and its motion for partial summary judgment on this issue is denied. In light of this determination, it is unnecessary to reach Arch's additional argument that the named insureds are jointly and severally liable for the defense costs and other amounts that Arch advanced to defend the claims at issue.

Additional Premiums

In its second branch of the motion, Arch contends that the terms of the Petrocelli NJ Insureds' Policies provide for an audit, and specify that the Petrocelli NJ Insureds are responsible for payment of any additional premium. The audit reveals additional premiums were warranted and that Arch sent invoices for the additional premiums due which the Petrocelli NJ Insureds

refused to pay. However, Arch has failed to demonstrate its entitlement to summary judgment on this issue. The policy provides that Arch will "compute the earned premium" at "the close of each audit period," and "send notice to the first Named Insured." Arch has failed to produce any correspondence or documentary evidence indicating it provided the Petrocelli NJ Insureds with any invoices or requests for additional premiums. Additionally, Arch has not produced any evidence that Petrocelli NJ was audited, that such an audit produced additional premiums in the amount of $26,963, or how such additional premium was computed. Rather, Arch provides only two premium audit statements (*see* Putman aff, exhibits J and K), that merely set forth the claimed amount owed. This evidence is insufficient to grant summary judgment in Arch's favor on this issue.

Successor Liability

In its third branch of the motion for summary judgment, Arch contends that, after Petrocelli Electric lost valuable contracts and its reputation, Santo Petrocelli, Jr. purchased Allan Briteway and began the migration of personnel, property, and assets from Petrocelli Electric to Allan Briteway in order to continue its business operations under a different trade name, and avoid certain liabilities, including its liabilities under the policies. Thus, Arch argues, Allan Briteway is liable as a successor corporation for the amounts owed by Petrocelli Electric under the Petrocelli Electric Insureds' Policies and Petrocelli NJ Insureds' Policies pursuant to the de facto merger and/or mere continuation exceptions under New York law.

Although a corporation that purchases the assets of another corporation generally is not responsible for the seller's liabilities (*New York v National Serv. Indus., Inc.*, 460 F3d 201, 209 [2d Cir 2006]), New York law provides four exceptions to this rule. A buyer will be liable as a successor if: "(1) it expressly or impliedly assumed the predecessor's tort liability [the

assumption of liability exception], (2) there was a consolidation or merger of seller and purchaser [the de facto merger exception]; (3) the purchasing corporation was a mere continuation of the selling corporation [the mere continuation exception], (4) the transaction is entered into fraudulently to escape such obligations [the fraudulent transfer exception]" (*Schumacher v Richards Shear Co.*, 59 NY2d 239, 245 [1983]).

The de facto merger and mere continuation exceptions are similar – both consider whether a transaction is in substance a consolidation or merger of the buyer and seller. When assessing the application of de facto merger and mere continuation exceptions, New York courts focus on: "(1) continuity of ownership; (2) cessation of ordinary business and dissolution of the acquired corporation as soon as possible; (3) assumption by the purchaser of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and (4) continuity of management, personnel, physical location, assets, and general business operation" (*National Serv. Indus., Inc.*, 460 F3d at 209; *accord Fitzgerald v Fahnestock & Co.*, 286 AD2d 573, 574 [1st Dept 2001]).

Arch argues Allan Briteway qualifies as a successor liable for the amount owed under the policies because (1) Santo Petrocelli, Jr owns both Petrocelli Electric; (2) Petrocelli Electric has ceased doing business but has failed to formally dissolve; (3) Allan Briteway assumed responsibility for Petrocelli Electric's largest bonded contracts – WTC and Weill Cornell; and (4) Petrocelli Electric and Allan Briteway shared management (Santo Petrocelli was Petrocelli Electric's president and is now president of Allan Briteway), office space, and a business address, and Petrocelli Electric transferred employees (including Fidelman, electricians and office staff), customers (including Nomura and Random House), vehicles, equipment, and furniture to Allan Briteway.

In opposition to the motion for summary judgment, defendants raise issues of fact, through both Fidelman's affidavit and documentation, as to whether Allan Briteway can be denominated a successor corporation, under New York law, for amounts allegedly owed under the policies. Thus, this branch of the motion must also be denied.

The first criterion, continuity of ownership, exists where the shareholders of the predecessor corporation become direct or indirect shareholders of the successor corporation as a result of the successor's purchase of the predecessor's assets, as occurs in a stock-for-assets transaction. Stated otherwise, continuity of ownership describes a situation where the parties to the transaction "become owners together of what formerly belonged to each" (*Cargo Partner AG v Albatrans, Inc.*, 352 F3d 41, 47 [2d Cir 2003]). It has been held that, because continuity of ownership is "the essence of a merger," it is a necessary element of any de facto merger finding, although not sufficient to warrant such a finding by itself (*id.* at 46-47). Continuity of ownership has been interpreted to mean that the seller of an asset gains ownership interest in the purchaser through the asset sale itself. There is no continuity of ownership where the consideration is paid in cash (*Matter of New York City Asbestos Litig.*, 15 AD3d 254, 256 [1st Dept 2005]). Defendants raise issues of fact as to whether continuity of ownership exists between Petrocelli and Allan Briteway by alleging that SAIDS purchased Allan Briteway for cash, and not with shares in Petrocelli Electric (*see* Fidelman aff, ¶13; *see also* exhibit A-6 [securities purchase agreement]).

Additionally, in order for the "mere continuation" theory to apply, the alleged predecessor corporation must be extinguished, and the alleged continuation must be the only corporation to survive the transactions (*Schumacher*, 59 NY2d at 245; *see also Diaz v South Bend Lathe Inc.*, 707 F Supp 97, 100 [ED NY 1989] ["If the predecessor corporation continues

to exist after the transaction, in however gossamer a form, the mere continuation exception is not applicable"]). Here, Petrocelli Electric remained extant until 2016. Fidelman alleges that Petrocelli Electric did not cease doing business as soon as possible. Rather, Petrocelli Electric was dissolved by proclamation, and may be legally reinstated. Moreover, this dissolution occurred long after Allan Briteway purchased Petrocelli Electric's assets (*see* Fidelman aff, ¶¶ 28-34).

Defendants also raise issues of fact, through Fidelman's allegations that at all times prior to the dissolution of Petrocelli Electric, Allan Briteway and Petrocelli Electric maintained separate corporate formalities; separate bank accounts; separate boards of directors; separate insurance policies; did not guarantee the debts of one another; and were owned by separate legal entities (*see* Fidelman aff, ¶¶ 28-37). Ownership continuity is not a question of common ownership, but whether Allan Briteway gained ownership interest in Petrocelli Electric as a result of the asset transfer. Arch's argument focuses on the fact that Santo Petrocelli Jr. is the sole shareholder of Petrocelli Electric and owns SAIDS, LLC, the limited liability company that is the sole shareholder of Allan Briteway. However, although Santo Petrocelli, Jr. is a common owner, there has never been a stock-for-stock transfer or any transfer of ownership interests between Petrocelli Electric and Allan Briteway.

Fidelman further alleges that Allan Briteway did not assume all liabilities necessary for the continuation of Petrocelli Electric's business operations. Rather, Allan Briteway only acquired liability as required to facilitate the execution of specific contracts sold to Allan Briteway by Petrocelli Electric for valuable consideration, not for the continuation of Petrocelli Electric in its entirety (*see id.*, ¶ 28; *see also* exhibit A-13 [contract purchase and assignment and assumption agreement]).

Defendants also present evidence that the board of directors and officers of Allan Briteway and Petrocelli Electric were never the same (*see id.*, ¶¶ 8-9, 15, 18); that Petrocelli Electric's personnel did not continue with Allan Briteway, given that union members worked for both entities (*see id.*, ¶ 29), and that Petrocelli Electric sold assets to Allan Briteway via arms-length transactions (*see id.*, ¶¶ 12-18). These allegations, as well as the documents defendants supply, are sufficient to raise issues of fact as to whether Allan Briteway is a mere continuation of Petrocelli Electric. Thus, the third branch of the motion for partial summary judgment is also denied.

Accordingly, it is hereby

ORDERED that plaintiff's motion for partial summary judgment is denied.

Dated: November 20, 2019

ENTER:

J.S.C.

HON. MELISSA A. CRANE
J.S.C.