

<b>IMS Fund LLC v Second Phase Inc</b>
2020 NY Slip Op 32713(U)
August 19, 2020
Supreme Court, New York County
Docket Number: 650856/2020
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14**

*Justice*

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IMS FUND LLC,

Plaintiff,

- v -

SECOND PHASE INC, SECOND PHASE CONSULTING,  
INC., VENKATA ATLURI, SRI BORRA, UJWAL  
VELAGAPUDI,

Defendant.

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INDEX NO. 650856/2020  
MOTION DATE N/A  
MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58

were read on this motion to/for DISMISS.

The motion by defendants Atluri, Borra, Velagapudi and Second Phase Consulting, Inc. (collectively, “Movants”) to dismiss on the grounds that the Court lacks personal jurisdiction over defendants, that the action should be heard in another forum and that the amended complaint fails to state a claim is granted.

**Background**

This action arises out of cash advances made by plaintiff to defendant Second Phase, Inc. (“SPI”) (the only non-moving defendant) in 2018 in exchange for security interest in SPI’s receivables. Plaintiff claims that these cash advances were made pursuant to four contracts and that SPI breached these agreements by ceasing to operate and forming under a different name, Second Phase Consulting, Inc. (“SPCI”).

Plaintiff contends that SPCI continued to operate with the exact same trade name as SPI and the that the former owner of SPI (non-party Troy Smith) retained a 25% ownership stake in the SPCI and continued as the president. Plaintiff now seeks to hold both SPI and SPCI liable for breach of contract and claims that defendants cannot evade their obligations by undergoing a de facto merger.

Movants argue that the sale involving SPI was a limited asset sale and did not include any existing accounts receivable, which were the subject of the contracts between plaintiff and SPI. Movants acknowledges that Mr. Smith retained a 25% interest in SPCI initially but eventually sold it. They claim that in May and June 2019, SPI (and Mr. Smith) refinanced the four 2018 contracts with plaintiff and continued to make payments until November 2019, when SPI went into default and Mr. Smith declared bankruptcy.

Movants claim that plaintiff has no basis for jurisdiction on the individual defendants and that any claim against SCPI is not cognizable because plaintiff refinanced the contracts with SPI *after* the assets were transferred to SPCI. Movants contend they are not, and have never been, parties to the 2018 or 2019 agreements between SPI and plaintiff. They insist that the individual defendants have no ties to New York and SPCI does not have an office or do any business in New York. Movants also argue that the case should be dismissed on forum non conveniens grounds and that plaintiff's claim of successor liability against SPCI fails to state a cause of action.

In opposition, plaintiff emphasizes that SPCI did everything it could to continue the business of SPI with the same employees, the same owners, same equipment, same telephone number and location. It argues that SPCI should not be able to benefit from SPI's reputation and infrastructure and avoid the liabilities of SPI. Plaintiff requests, in the alternative, that it be

allowed to conduct discovery pursuant to CPLR 3211(d) regarding jurisdiction over defendants. Plaintiff argues that New York is a convenient forum to litigate a case involving a New York-based plaintiff, contracts governed under New York law and to enforce claims brought under New York law.

In reply, Movants claim that plaintiff has an untenable successor liability theory of jurisdiction over SPCI and the individual defendants. They also observe that the plaintiff did not sufficiently explain why the 2019 agreements should not obviate the instant claims against Movants.

### 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]).

“In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972 [1994]).

Although Movants frame their argument as a lack of jurisdiction, their central claim is that plaintiff cannot state a cause of action against them because they are not parties to the agreements under which plaintiff is suing. The Court’s analysis must start with the sale and

transfer of assets from SPI to SPCI (NYSCEF Doc. No. 20). This agreement, entitled “Limit Asset Sale” noted that employees and contracts would be transferred to SPCI but that account receivables at closing, accounts payable at closing and cash on hand would not be included in the sale (*id.*). Movants say the limited assets were transferred on or about February 18, 2019.

On May 2, 2019, May 15, 2019, June 3, 2019 and June 6, 2019, plaintiff and SPI entered into agreements that specifically superseded the previous 2018 contracts between these parties (NYSCEF Doc. Nos. 23, 25, 27, 29). The last page of these documents states that these are refinance agreements and explicitly references a specific prior agreement form 2018 (*id.*).

Although plaintiff raises numerous arguments in opposition, it did not specifically explain why these refinance agreements are not a valid basis to grant Movants’ motion. Movants’ position is that plaintiff cannot state a claim based on successor liability where there is documentary evidence that the entity still existed. Here, the Court simply cannot ignore the fact that plaintiff entered into a series of agreements after the limited asset sale and formation of SPCI.

When SPI refinanced the agreements that form the basis of this action, SPCI had already been formed and SPI was continuing to operate. Put another way, plaintiff entered into a series of agreements with SPI in 2018. Then, in early 2019 SPI entered into a limited asset sale and SPCI formed. Then SPI and plaintiff refinanced those 2018 agreements and SPI complied until the end of 2019 when it stopped paying and went bankrupt. Nothing about this timeline of events evidences a cause of action asserted by plaintiff. In fact, plaintiff’s amended complaint directly admits that SPI “partially performed” under the 2019 agreements and breached on October 1, 2019 (NYSCEF Doc. No. 11, ¶¶ 64, 65). That suggests the dispute is between SPI and plaintiff, rather than with SPCI which was not a party to a single agreement with plaintiff.

## Summary

The essence of plaintiff's argument is that a limited asset transfer that happened prior to the execution of contracts that form the basis of this complaint somehow imposes liability on Movants. The Court rejects that theory. It can't be the case that SPI's eventual default nearly a year after SPCI was formed and after complying with the 2019 refinance agreements evidence of a scheme to defraud creditors. A buyer of a certain assets from another entity is not automatically liable for the liabilities of the seller if the seller defaults on an agreement which was entered into after the sale.

The fact that the owner of SPI (Mr. Smith) obtained a minority stake in SPCI is of no moment. As defendant Velagapudi points out, Mr. Smith stayed on for transition purposes and sold his assets to this defendant in July and September 2019 (NYSCEF Doc. No. 50, ¶ 10). This is not a case where an owner or managing member creates a new company which he controls, transfers all the assets and then tries to avoid liabilities by shutting down the first company. Mr. Smith sold certain assets to a new entity but the evidence submitted on this motion demonstrates that he did not control it. In fact, he is not even a party to this lawsuit. Plaintiff's claim that Mr. Smith and SPI entered into a series of agreements with plaintiff in 2019 knowing it was "operating as a shell" (NYSCEF Doc. No. 11, ¶ 45) might state a cause of action against them but does not raise a cognizable claim against SPCI or the individual defendants.

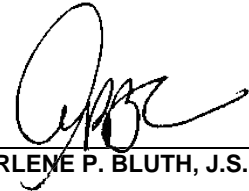
Accordingly, it is hereby

ORDERED that the motion by defendants Second Phase Consulting, Inc., Venkata J. Atluri, Sri Bhavani Borra and Ujwal Velagapudi to dismiss the claims against them are severed and dismissed and the clerk is directed to enter judgment accordingly with costs and disbursements after presentation of proper papers therefor.

Remote Conference: November 30, 2020.

8/19/2020

DATE



ARLENE P. BLUTH, J.S.C.

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CASE DISPOSED

GRANTED

DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

SUBMIT ORDER

APPLICATION:

CHECK IF APPROPRIATE:

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE