

47 E. 34th St. (NY), L.P. v Bridgestreet Worldwide, Inc.

2022 NY Slip Op 31382(U)

April 26, 2022

Supreme Court, New York County

Docket Number: Index No. 653057/2018

Judge: Andrew Borrok

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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47 EAST 34TH STREET (NY), L.P.,

Plaintiff,

- v -

BRIDGESTREET WORLDWIDE, INC., VERSA CAPITAL
MANAGEMENT, LLC, DOMUS BWW FUNDING, LLC,
SEAN WORKER, LEE CURTIS, WAYNE WALKER,
WALTER DEMBIEC, JOHN DOE, JANE DOE, DOMUS
BWW FUNDING, LLC AND/OR BRIDGESTREET
WORLDWIDE, INC.,

Defendant.

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INDEX NO. 653057/2018

MOTION DATE _____

MOTION SEQ. NO. 013 014 015
016

**DECISION + ORDER ON
MOTION**

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 013) 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 396

were read on this motion to/for LEAVE TO FILE

The following e-filed documents, listed by NYSCEF document number (Motion 014) 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412

were read on this motion to/for LEAVE TO FILE

The following e-filed documents, listed by NYSCEF document number (Motion 015) 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 573

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

The following e-filed documents, listed by NYSCEF document number (Motion 016) 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572

were read on this motion to/for STRIKE PLEADINGS

Upon the foregoing documents and for the reasons set forth on the record (4.26.22), 47 East 34th

Street (NY), LP's (**47 East**) motion for summary judgment (Mtn. Seq. No. 015) is granted and

Versa Capital Management, LLC (**Versa**) and Domus BWW Funding, LLC's (**Domus**; Domus, together with Versa, hereinafter, collectively, the **Versa Parties**) cross-motion for summary judgment is denied. Given their prior admissions in this case, the Versa Parties fail to raise an issue of fact as to whether they are liable under the mere continuation doctrine and the alter ego doctrine. The Versa Parties' motion to amend their response to 47 East's first notice to admit (Mtn. Seq. No. 013) and their motion to amend the answer to add an affirmative defense (Mtn. Seq. No. 014) are denied because allowing the Versa Parties' to change the narrative of this case that has been pending for years in this Court by permitting them to take back admissions made to and relied upon by this Court would be prejudicial to 47 East. Finally, 47 East's motion to strike the Versa Parties' reply papers in further support of their cross-motion (Mtn. Seq. No. 016) is denied.

This case has been pending in front of this Court for years and the facts have been addressed in prior motions. Familiarity is presumed.

In the Court's decision and order dated November 6, 2019 (the **Prior Decision**; NYSCEF Doc. No. 261), the Court held that 47 East had made a *prima facie* showing that the Versa Parties completely absorbed BWW's business operations. This Court denied 47 East's motion for partial summary judgment **solely** because the Court held that there were issues of fact to the location of the business before and after the Foreclosure¹ and the degree to which there was continuity of employees and management. On the record before the Court, now, the plaintiff has resolved this limited factual issue not previously addressed by this Court.

¹ Any defined terms not defined in this decision and order shall have the definition given in the Prior Decision.
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Motion No. 013 014 015 016

The Versa Parties filed a notice of appeal of the Prior Decision (NYSCEF Doc. No. 317) but did not perfect that appeal, and the time to do so has now lapsed. A dismissal for failure to perfect an appeal is tantamount to an affirmance (*King v Compass Retail*, 226 AD2d 263, 263 [1st Dept 1996]). As such, the Prior Decision is now a final adjudication on the merits.

In the years following the issuance of the Prior Decision and as the record developed in this case, and given the substantial admissions by the defendants, when it became clear to the Court that summary judgment was appropriate, the Court directed 47 East to file this summary judgment motion (NYSCEF Doc. 415).

On a motion for summary judgment, the proponent 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 issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once that showing has been made, the burden shifts to the opposing party who must produce evidence in admissible form to establish a triable issue of material fact (*id.*). An admission made pursuant to a notice to admit is not evidence of the fact omitted, but conclusively resolves the fact (*Central Nassau Diagnostic Imaging, P.C. v GEICO*, 28 Misc.3d 34, 36 [1st Dept 2010]).

The Versa Parties have repeatedly throughout this litigation in responses verified by Mr. Kennedy, General Counsel of Versa and Domus admitted that **Domus** acquired 100% of BridgeStreet Corporate Housing LLC (**BridgeStreet**)'s equity from BWW on March 3, 2014, and that Domus directly or indirectly maintains ongoing ownership of BridgeStreet (*see, e.g.*,

NYSCEF Doc. No. 434, ¶¶ 1-3, 13). Both Mr. Kennedy and Mr. Worker's CPLR 3123 admissions are binding on the Versa Parties for all purposes (*Cent. Nassau Diagnostic Imaging, P.C. v. Geico* 905 NYS2d 431, 432 [1st Dept 2010]; *Matter of Liquidation of Union Indem. Ins. Co. Of New York*, 89 NY2d 94 [1996]). Additionally, to this Court and the Delaware court in the Delaware Action, the defendants have represented that Versa Capital Management owns and controls Domus.

As discussed above, the Versa Parties filed a notice of appeal of the Prior Decision. They did not perfect it and the time to do so has lapsed. The defendants cannot now collaterally attack the decision by rearguing the issues raised on appeal (*Bray v Cox* 38 NY2d 350, 353-54 [1976]) or otherwise try to change the record with a different narrative based on new affidavits that contradict their prior admissions and statements to this Court which this Court has relied on in issuing the Prior Decision and managing this case for years. For the avoidance of doubt, there are no new newly discovered facts or changes in the law and the facts at issue are the facts as to the ownership and organization of the defendants. The defendants now simply want a do-over so that they can change their story (*cf. Storper v. WL Ross & Co., LLC*, 2020 WL 4919396, at * 3-5 [Sup Ct, NY County Aug 20, 2020]).

Summary judgment must be granted under the mere continuation doctrine. As discussed above, the Versa Parties have throughout this litigation told this Court that 100% of BWW's equity was acquired by Domus on March 3, 2014, and that those businesses were owned, managed and controlled by Domus and Versa (*see* Worker Answer; NYSCEF Doc. No. 432, ¶¶ 40-54; Versa Parties' Responses to First Notice to Admit; NYSCEF Doc. No. 434, ¶¶ 1-3, 13). To be clear,

the defendants not only admitted to this Court that Domus is owned by Versa, but also they made the same admission in the Delaware Action (NYSCEF Doc. No. 542, at 5 n 3).

It is undisputed that BWW was a holding company whose operations were controlled by its wholly owned limited liability companies and that, when the equity in those limited liability companies were transferred to the Versa Parties, those operations were conducted by the same limited liability companies and controlled by the Versa Parties.

It is now clear that the business operations after the transaction had exactly the same locations, management and employees as before the Versa Parties took over. Indeed, the Employee Head Count was 450 before the transaction and 450 directly after the transaction – all covered by the same worker’s compensation policy (NYSCEF Doc. No. 425). It does not matter that the headcount was prepared by the Versa Parties’ insurance consultant, Marsh, USA. The 2014 Credit Agreement, dated March 3, 2014, establishes that all locations of BWW operating limited liability companies remained the same after foreclosure (NYSCEF Doc. No. 431). It is also irrelevant that Versa was headquartered elsewhere. Messrs. Worker, Curtis, Dembiec and Dunn managed the business both before and after the foreclosure. Mr. Dembiec testified that there was “**a change in ownership, not a change in operating**” (Walter Dembiec deposition tr at 233, lines 1-13; NYSCEF Doc. No. 218 [emphasis added]).

The Versa Parties completely absorbed BWW’s business and good will. The defendants’ attempt to suggest that this was assigned to Walker Nell Partners, Inc. for the benefit of BWW’s credits misrepresents the record. On March 3, 2014, BWW assigned all of its material contracts

and good will to BridgeStreet pursuant to the Assignment Agreement (NYSCEF Doc. No. 430) and all of BWW trademarks, tradenames and related goodwill were held in a wholly owned subsidiary BridgeStreet TM LLC which was sold to the Versa Parties pursuant to the Collateral Transfer Agreement. On March 4, 2014, only the remaining assets were transferred to Walker Nell. The Court further notes that Mr. Walker was on the board Walker Nell.

Finally, the Court in its Prior Decision rejected the defendants remaining arguments about the mere continuation doctrine. That is the law of this case. The defendants have failed to raise a material issue of fact. Thus, summary judgment is warranted.

47 East has also demonstrated entitlement to summary judgment on its cause of action for alter ego liability. In order to demonstrate its entitlement to summary judgment, 47 East must demonstrate that (i) the Versa Parties exercised complete domination of BWW with respect to the transaction attacked, and (ii) such domination was used to commit a fraud or wrong against 47 East, resulting in injury (*Cortlandt Street Recovery Corp. v Bonderman*, 31 NY3d 30, 47 [2018]). In support of this motion, 47 East adduces among other things the September 13, 2013 **Forbearance Agreement** (NYSCEF Doc. No. 203) and the November 26, 2013 **Default Letter** (NYSCEF Doc. No. 207). The Forbearance Agreement and the Default Letter demonstrate the Versa Parties complete domination of BWW, including by requiring BWW to (i) reconstitute its board with directors selected by Versa, (ii) require its subsidiaries to amend their operating agreements and issue certificated membership interests to BWW, (iii) deliver and assign those certificated interests to the Versa Parties, (iv) grant additional collateral security, and (v) require its subsidiaries to guaranty all loans owed to the Versa Parties. This was done in exchange for a

new “loan” that was almost entirely recycled back to the Versa Parties (*id.*). The Forbearance Agreement was approved by BWW after the Versa Parties selected the board of directors for BWW. Thus, the board of BWW was not disinterested and the Foreclosure was a logical and predictable and orchestrated conclusion.

The Forbearance Agreement and the Default Letter also demonstrate the lack of observance of corporate formalities and how the domination of BWW was used to commit a fraud or wrong against 47 East. Simply put, the Versa Parties controlled all of the funds of BWW via Versa control agreements (NYSCEF Doc. No. 456-457) and thus permitted them to starve BWW without making adequate provision for contingent claims. Despite their attestation to the contrary, this they had an obligation to do and they could not divert assets to the Versa Parties (*ABN AMRO Bank NV v MBIA Inc.* 17 NY3d 208 [2011]; *Grammas v Lockwood Assocs, LLC* 95 AD3d 1073 [2d Dept 2012]). Stated differently, the Versa Parties rendered BWW judgment proof because they conducted a leverage buyout using preexisting debt of a company which had going concern value, layered on new secured debt so they could distribute the new debt to themselves and then restricted operating cash flow. Having done this, they can not now claim that the entity was insolvent or the fraudulent transfer claims fail.

The Versa Parties’ cross-motion for summary judgment must also be denied. Their contention that the mere continuation doctrine fails because the Versa Parties were not the acquiror of BWW is controverted by the Versa Parties’ own admissions, as discussed above. Those admissions are binding and conclusively resolve the issue. The Versa Parties’ contention that they are entitled to summary judgment because there is nothing actionable about the Foreclosure

because it is the ordinary exercise for a secured lender to foreclose on collateral worth less than the amount of unpaid debt belies the record and otherwise fails to account for their conduct. This was not merely a typical foreclosure on collateral. The Versa Parties dominated BWW, rendered BWW insolvent and forced the Foreclosure. Finally, the Versa Parties' affirmative defenses fail to create any issue of fact. The Court has considered the Versa Parties remaining arguments and finds them unavailing.

47 East's motion to strike the Versa Parties' reply papers (Mtn. Seq. No. 016) is denied as moot. Although the submission of the reply papers was clearly untimely and without authorization from the Court, consideration of the reply papers does not change the result. Therefore, the motion to strike the reply papers is denied.

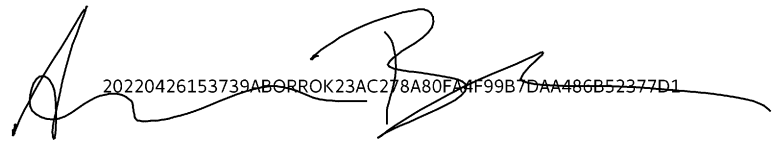
The Versa Parties argue that they should be permitted to amend their response to 47 East's first notice to admit (Mtn. Seq. No. 013) because they assert that it was the result of an inadvertent error and goes to the heart of the controversy. They do not provide an explanation as to why they permitted this alleged error to remain on this Court's docket for years and never attempted to correct the record prior to 47 East's motion for summary judgment. They also argue that they should be allowed to amend their answer (Mtn. Seq. No. 014) to assert an affirmative defense for lack of standing, but again offer no excuse for their failure to have pled this differently for the years this case has been pending. None of this information was learned in discovery or during the course of this case. All of it was in the exclusive possession and control of the Versa Parties. The Versa Parties' attempt years into the litigation to take back admissions and other statements made to this Court and other courts regarding its acquisition and control of the assets fails. This

ship has sailed. As to their new theories, none of them have been explored, and their attempt to do so by self-serving affidavits that contradict prior statements is unavailing.

It is hereby ORDERED that 47 East's motion for summary judgment (Mtn. Seq. No. 015) is granted; and it is further

ORDERED that the Versa Parties' motions to amend (Mtn. Seq. Nos. 013, 014), their cross-motion for summary judgment, and 47 East's motion to strike (Mtn. Seq. No. 016) are denied; and it is further

ORDERED that 47 East shall serve judgment on notice.


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4/26/2022
DATE

ANDREW BORROK, JSC

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE