Bugliaro v Harmon Funeral Home, Inc.
2022 NY Slip Op 35074(U)
May 9, 2022
Supreme Court, Richmond County
Docket Number: Index No. 152091/2021
Judge: Paul Marrone, Jr.
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND
I.A.S. PART 3

MARY A. BUGLIARO

Plaintiff

- *against* -

HARMON FUNERAL HOME, INC.; HARMON FUNERAL HOME SOUTH, INC.; and S.C.I. FUNERAL SERVICES OF NEW YORK, INC.

Defendant

Index #152091/2021

DECISION and ORDER

Hon. Paul Marrone, Jr.
Justice of the Supreme Court

Motion #1

Recitation, as required by CPLR § 2219 (a), of the papers considered in the review of this motion:

Papers	**Numbered**
Defendant SCI's Motion to Dismiss, with supporting documents (dated February 17, 2022) ……………………….…...……………………...	**1**
Plaintiff's Opposition to Defendant SCI's Motion, with supporting document (dated February 28, 2022) …………………………………………...	**2**
Defendant SCI's Reply to Plaintiff's Opposition (dated March 9, 2022) …….	**3**

The plaintiff in this action, Mary A. Bugliaro (hereinafter "Plaintiff"), commenced this action against various defendants, including SCI Funeral Services of New York, Inc. (hereinafter "Defendant SCI"), for alleged damages resulting from Defendant SCI's unlawful interference with Plaintiff's right to immediate possession of her grandmother's remains, unlawful interference with Plaintiff's right to dispose of her grandmother's remains, and breach of contract. Defendant SCI moves herein for an order dismissing the action based upon documentary evidence. Plaintiff filed opposition to the motion, to which Defendant SCI filed a reply. Oral arguments were heard on March 10, 2022 with Plaintiff and Defendant SCI both represented by counsel, and the Court's decision was reserved.

For the reasons set forth below, Defendant SCI's motion is hereby denied.

Plaintiff's grandmother deceased on November 30, 2007 and, subsequently, Plaintiff entered an agreement with Harmon Funeral Home, Inc. (hereinafter "Defendant Harmon"), another defendant in this action, to cremate her grandmother's remains and inter them in a certain burial plot. On January 4, 2011, Defendant SCI purchased the assets of Defendant Harmon and Harmon Funeral Home South, Inc. (hereinafter "Defendant Harmon South"), another defendant in this action, as well as the assets of Kenneth McGinley, McGinley Funeral Home Inc., and 571 Forest Avenue, Inc. (hereinafter "the sellers", collectively). In or about October 2021, Plaintiff learned that the remains were never interred but, instead, stored in Defendant Harmon's basement.

When a party seeks dismissal on the ground that its defense is founded upon documentary evidence (CPLR 3211 [a] [1]), that evidence must resolve all factual issues as a matter of law and conclusively dispose of the plaintiff's claim (*Nevin v Laclede Prof'l Prods*., 273 AD2d 453 [2d Dept 2000]).

Defendant SCI attached to its motion the affidavit of William O' Brien, identified as Defendant SCI's Managing Director, to which it appended a copy of the Asset Purchase Agreement regarding the sale at issue (hereinafter "the APA"). Plaintiff argued that since affidavits may not be considered on a CPLR 3211 (a) (1) motion to dismiss because they are not documentary evidence (*Fontanetta v John Doe I*, 73 AD3d 78 [2d Dept 2010]), and since the APA was filed as an attachment to an affidavit, it should not be considered (*Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 347 [2d Dept 2003]).

Consequently, the Court will not consider the affidavit of Mr. O'Brien. In the interest of judicial economy, however, the Court will consider the APA, as the document speaks for itself.

Section 2.3 (b) of the APA states:

> *"[The sellers] will retain, and [Defendant SCI] will not assume or be responsible or liable with respect to. any liabilities or obligations of [the sellers], based in whole or in part on events or conditions existing prior to [closing], whether or not arising out of or related to the conduct of the [sellers' business] or associated with or arising from the Assets whether fixed or contingent or known or unknown (collectively, the "Retained Liabilities") including, without limitation, the following:*

…

> *"(vii) liabilities and obligations relating to any litigation, action, suit, claim, investigation or proceeding…based in whole or in part on events or conditions occurring or existing in connection with, or arising out of, or otherwise relating to, the [sellers], the conduct of the [sellers' business] at or prior to the [closing] or the ownership, possession, use, operation, sale or other disposition at or prior to the [closing] of any of the Assets (or any other rights, properties or assets owned or used by or held for use by or associated with the [sellers] at any time at or prior to the [closing])."*

As a general rule, a corporation which acquires the assets of another corporation is not liable for the torts of its predecessor (*Nationwide Mut. Fire Ins. Co. v Long Is. A.C., Inc*., 78 AD3d 801 [2d Dept 2010]). However, a corporation may be held liable for the torts of its predecessor if (1) it expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction was entered into fraudulently to escape such obligations (*Matter of AT&S Transp., LLC v Odyssey Logistics & Tech. Corp*., 22 AD3d 750, 752, [2d Dept 2005]). For a successor corporation to establish that it is entitled to summary judgment on the ground that it is not liable, it must demonstrate that none of the four aforementioned exceptions applies (*Hansen v Filtron Mfg. Co*., 282 AD2d 433, 434 [2d Dept 2001]).

In this case, the question arises as to whether, notwithstanding the liability provision of the APA, Defendant SCI incurred liability based upon effectively merging with the sellers, or operating as a mere continuation of the sellers.

The second exception is oftentimes referred to as a "de facto" merger and exists if the following factors are present: "(1) continuity of ownership; (2) cessation of ordinary business operations and the dissolution of the selling corporation as soon as possible after the transaction; (3) the buyer's assumption of the liabilities ordinarily necessary for the uninterrupted continuation of the sellers business; and (4) continuity of management, personnel, physical location, assets and general business operation" (*Matter of AT&S Transp., LLC* at 752). Although not all of these elements are necessary to find a de facto merger (*Fitzgerald v Fahnestock & Co*., 286 AD2d 573, 574-575 [1st Dept 2001]), it has been held that continuity of ownership is "the essence of a merger," and is a necessary element of any de facto merger finding (*Van Nocker v A.W. Chesterton, Co. [In re N.Y. City Asbestos Litig.]*, 15 AD3d 254, 265 [1st Dept 2005]). Continuity of ownership exists where the shareholders of the predecessor corporation become direct or indirect shareholders of the successor corporation as the result of the successor's purchase of the predecessor's assets (*id*.). Stated otherwise, continuity of ownership describes a situation where the parties to the transaction become owners together of what formerly belonged to each (*id.*).

With respect to the mere continuation exception, the underlying theory is that, if a corporation goes through "a mere change in form without a significant change in substance, it should not be allowed to escape liability" (*Wass v County of Nassau*, 153 AD3d 887, 888 [2d Dept 2018], quoting *Martin Hilti Family Trust v Knoedler Gallery, LLC*, 137 F Supp 3d 430, 458 [SD NY 2015]). Thus, this exception applies where "it is not simply the business of the original corporation which continues, but the corporate entity itself" (*Wass* at 889, quoting *Ladjevardian v Laidlaw-Coggeshall, Inc*., 431 F Supp 834, 839 [SD NY 1977]). A continuation envisions something akin to a corporate reorganization, rather than a mere sale, with "a common identity of directors, stockholders and the existence of only one corporation at the completion of the transfer" (*id.*, quoting *Ladjevardian* at 839).

The APA does not resolve all factual issues as a matter of law, nor does it conclusively dispose of Plaintiff's claim, as it does not speak to the identity of the shareholders or principals of either Defendant SCI or any of the sellers. Accordingly, dismissal of the action as against Defendant SCI, or any of the defendants, under CPLR 3211 (a) (1) would not be appropriate.

Both sides are directed to appear, in person, for a preliminary conference previously scheduled for May 18, 2022 at 10:00am. If the parties submit a proposed preliminary conference order signed by both parties, and it is acceptable to the Court, the preliminary conference will be canceled and a virtual compliance conference will be scheduled.

The foregoing constitutes the decision and order of the Court.

Dated: May 9, 2022
Staten Island, New York

Hon. Paul Marrone, Jr.
Justice of the Supreme Court