

Hydraulic IP Holdings, LLC v Tan

2023 NY Slip Op 30598(U)

February 27, 2023

Supreme Court, New York County

Docket Number: Index No. 653046/2022

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

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HYDRAULIC IP HOLDINGS, LLC,
Plaintiff,

INDEX NO. 653046/2022

MOTION DATE 12/20/2022

MOTION SEQ. NO. 001

- v -

MELODY TAN, GBRANDS HOLDING, LLC, CC APPAREL,
LLC

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for DISMISSAL

Upon the foregoing documents, defendants' motion to dismiss is granted in part.

This action arises out of plaintiff's attempt to enforce a judgment entered against non-party Grace Apparel LLC ("Grace"). Plaintiff's complaint alleges that defendant Melody Tan ("Tan") has discontinued operation of Grace and transferred assets to continue operation through successor entities, defendants GBrands Holding, LLC ("GBrands"), and CC Apparel, LLC ("CC"), to avoid Grace Apparel's creditors. Defendants move pre-answer to dismiss the complaint pursuant to CPLR § 3211(a)(1) and (a)(7), plaintiff opposes the instant motion.

Background and Factual Allegations¹

On June 28, 2021, a judgment was entered as against Grace, the entire judgment amount remains outstanding. Defendant Tan is the CEO and office manager of Grace. In September 2020, prior to the judgment but after Grace's breach of the contract, Tan filed a certificate of

¹ As stated in the complaint, NYSCEF Doc. 1.

incorporation to form defendant GBrands. Tan has a 90 percent ownership interest in GBrands. In February 2020, Tan formed defendant CC. Grace, GBrands and CC all shared office space.

Grace has ceased operations and transferred its assets to either GBrands or CC or both.

Applicable Law

When considering a motion to dismiss based upon CPLR § 3211(a)(7), the court must accept the alleged facts as true, accord the plaintiff the benefit of every possible favorable inference, and determine whether the facts alleged fit into any cognizable legal theory. *See Leon v Martinez*, 84 NY2d 83 [1994]. With respect to CPLR § 3211(a)(1), a motion to dismiss on the ground that the action is barred by documentary evidence may be appropriately granted only where the documentary evidence utterly refutes a plaintiff's factual allegations, and conclusively establishes a defense as a matter of law. *See Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 327 [2002].

Discussion

Preliminarily, the Court agrees with plaintiff's argument in that CPLR § 3211(a)(1), is not applicable as the individual defendant's deposition testimony, is not documentary evidence for the purposes of the instant motion. *See Celentano v Boo Realty, LLC*, 160 AD3d 576, 577 [1st Dept 2018] (holding that a factual affidavit is not "documentary evidence" for purposes of CPLR § 3211(a)(1)). Similarly, with respect to the other documents submitted, the Court does not find that said documents establish a defense as a matter of law. Accordingly, the Court will determine whether the complaint states cognizable causes of action.

First Cause of Action

Plaintiff's first cause of action alleges successor liability based on *de facto* merger. "The *de facto* merger doctrine creates an exception to the general principle that an acquiring

corporation does not become responsible thereby for the pre-existing liabilities of the acquired corporation” (*Fitzgerald v Fahnestock & Co.*, 286 AD2d 573, 574 [1st Dept 2001]). It is well established that courts consider the following factors to determine whether the doctrine of *de facto* merger applies: (1) continuity of ownership; (2) cessation of ordinary business and dissolution of the acquired corporation; (3) assumption by the successor of the liabilities for the continuation of the business of the acquired corporation; and (4) continuity of personnel, physical location, general business operation. *Id.*

In support of its motion to dismiss, defendants cite to Tan’s deposition testimony, in which she testifies that there is not a continuation of Grace’s business operations to the successor entities and that Grace has not been dissolved.

The Court cannot consider Tan’s deposition testimony for the purposes of this motion. Further, the defendants’ contention that Grace is not dissolved is not dispositive on this issue as it is well established that not all factors must be present to establish a *de facto* merger (*see Fitzgerald*, 286 AD2d at 574).

The Court finds that the complaint adequately alleges that Tan controlled Grace and controls the successor entity defendants, and that Grace ceased its business operations and that the successor defendants continued the operations of Grace, namely a wholesale garment operation. Moreover, the complaint specifically alleges continuity of management, personnel, office location, assets, and general business operation from Grace to the successor entity defendants. Accordingly, the complaint sufficiently states a cause of action for successor liability/ *de facto* merger.

Second Cause of Action

Plaintiff's second cause of action seeks to hold Tan, individually liable, for the debt of Grace. The complaint alleges that Tan's ownership of Grace and the creation of the successor entities were done to avoid the debts of Grace.

"Generally, a plaintiff seeking to pierce the corporate veil must show that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 47 [2018] quoting *Conason v Megan Holding, LLC*, 25 NY3d 1, 18 [2015]).

The Court finds that plaintiff's complaint seeking to pierce the corporate veil is insufficient. The complaint is silent as to any alleged wrongful or fraudulent conduct by Tan. The only allegation is that Tan sought to avoid the creditors of Grace, is conclusory and not supported by factual allegations. Accordingly, it is hereby

ORDERED that defendants' motion to dismiss is granted in part; and it is further
ORDERED plaintiff's second causes of action is dismissed in its entirety; and it is further
ORDERED that the complaint is dismissed as against Melody Tan and the Clerk of the
Court is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and
it is further

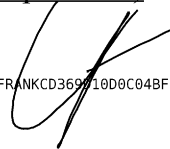
ORDERED that the caption be amended to reflect the dismissal and that all future papers
filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice
of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General

Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).

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2/27/2023
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE