

**JAL LLC v Rosenthal & Rosenthal, Inc.**

2023 NY Slip Op 33669(U)

October 19, 2023

Supreme Court, New York County

Docket Number: Index No. 151350/2021

Judge: Debra A. James

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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. DEBRA A. JAMES**

**PART 59**

*Justice*

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JAL LLC, as assignee of ANNELIESE LINDNER and JACK LINDNER,

Petitioner,

INDEX NO. 151350/2021

MOTION DATE 03/24/2021

MOTION SEQ. NO. 001

- v -

ROSENTHAL & ROSENTHAL, INC.,

Respondent.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 12, 21, 22, 23, 24, 25, 26, 29, 30

were read on this motion to/for ENFORCEMENT.

ORDER

Upon the foregoing documents, it is

ORDERED that the petition of JAL LLC, as assignee of ANNELIESE LINDNER and JACK LINDNER, that seeks enforcement of the Consent Judgment, entered on April 23, 2010 (2010 Consent Order), in Lindner v Rosenthal & Rosenthal, NY County Supreme Court Index No. 109584/2009, and of the Consent Judgment entered on November 28, 2012, in Lindner v Rosenthal & Rosenthal, NY County Supreme Court Index No. 651919/2012 (Kenney, J.), is DENIED; and it is further

ADJUDGED and DECLARED that defendant ROSENTHAL & ROSENTHAL, INC., is entitled to a declaration that Major Label Group LLC is not a successor or continuation of Fashion Avenue Sweater Knits,

LLC and, that accordingly, ROSENTHAL & ROSENTHAL, INC, is not obliged to pay to JAL LLC, as assignees of ANNELIESE LINDNER and JACK LINDNER, 10% of the factoring and letter of credit commissions derived from Major Label Group LLC.; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

#### DECISION

Under the 2010 Consent Order, respondent ROSENTHAL & ROSENTHAL, INC. ("Rosenthal"), is obligated to pay to JAL LLC, as assignee of ANNELIESE LINDNER and JACK LINDNER ("JAL") 10% of the factoring or letter of credit commissions charged by Rosenthal with respect to non-party Fashion Avenue Sweater Knits LLC ("FASK") or "any entity which constitutes a continuation of the current business of [FASK] or in which [FASK] or Fashion Avenue Knits, Inc. retains directly or indirectly majority ownership, management, or control of such entity" (NYSCEF Doc. No. 5).

The petition alleges that non-party Major Label Group LLC ("MLG"), as the undisputed purchaser of the FASK assets through a secured party sale with Rosenthal, is a continuation of FASK.

Rosenthal opposes the petition, arguing that FASK is no longer in business and that it acquired the FASK assets as a secured creditor but did not obtain any ownership or equity interest in FASK, and therefor never conveyed same to MLG.

The sale of the FASK assets were memorialized by a secured party bill of sale wherein MLG purchased from Rosenthal the assets of FASK, including but not limited to, trademarks, purchase orders, goodwill, inventory, contract rights, and equipment, which Rosenthal received as the Secured Party of MLG (NYSCEF Doc. No. 23). No shareholder interests, let alone a majority thereof, were conveyed under such secured party bill of sale.

JAL contends that the purchase of the FASK assets, MLG's employment of certain former-FASK employees, and MLG employees listing "Major Label Group, formerly Fashion Avenue Knits<sup>1</sup>" on their resumes are sufficient to establish that MLG is a mere continuation of FASK. This court disagrees.

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". Thus, this exception applies where "it is not simply the business of the original corporation which continues, but the corporate entity itself". (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"

(Wass v County of Nassau, 153 AD3d 887, 889 [2d Dept 2017]

[citations omitted]). The mere continuation exception is not applicable to the instant matter as there was no sale between

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<sup>1</sup> Fashion Avenue Knits, Inc. was the predecessor to FASK.

FASK and MLG, because it was Rosenthal, who acquired the FASK assets as a secured creditor, and thereafter sold only such assets to MLG. Thus, the record before the court does not establish that FASK underwent something akin to a "corporate reorganization" or a "mere change in form".

Nor does the petitioner sufficiently allege that there was a de facto merger between FASK and MLG, as there is no assertion that FASK continued ownership, management, or control of MLG or that MLG maintained the same physical location and general business operation as FASK (see Matter of AT & S Transp., LLC v Odyssey Logistics & Tech. Corp., 22 AD3d 750, 752 [2d Dept 2005]):

The hallmarks of a de facto merger are the continuity of ownership; cessation of ordinary business and dissolution of the predecessor as soon as possible; assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and a continuity of management, personnel, physical location, assets, and general business operation. These factors are analyzed in a flexible manner that disregards mere questions of form and asks whether, in substance, it was the intent of the successor to absorb and continue the operation of the predecessor.

The petitioner fails to establish that MLG is a continuation of FASK. Clearly there could be no intent by MLG to absorb and continue the operation of FASK, with which it had absolutely no privity. The evidence also refutes that FASK directly or indirectly retained majority ownership, management, or control of MLG. As petitioner has not prima facie established that MLG

is a mere continuation of FASK or that FASK entered into a de facto merger with MLG, it is not entitled to 10% of the factoring or letter of credit commissions charged by Rosenthal with respect to MLG.

*Debra A. James*

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10/19/2023

DATE

DEBRA A. JAMES, 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