

<b>Avamer 57 Fee LLC v Hunter Boot USA LLC</b>
2024 NY Slip Op 32146(U)
June 25, 2024
Supreme Court, New York County
Docket Number: Index No. 653898/2023
Judge: Lyle E. Frank
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

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AVAMER 57 FEE LLC,

Plaintiff,

- v -

HUNTER BOOT USA LLC,AUTHENTIC BRANDS GROUP
LLC,MARC FISHER LLC,XYZ COMPANIES 1-2

Defendant.

-----X

INDEX NO. 653898/2023

MOTION DATE 10/31/2023, 10/31/2023

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 12, 13, 14, 15, 16, 17, 18, 30, 31, 35, 36, 37, 38, 39, 41, 43, 45

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 003) 24, 25, 32, 33, 40, 42, 44, 46

were read on this motion to/for DISMISSAL

Background

This case involves an alleged breach of a commercial lease agreement between plaintiff, Avamer 57 Fee LLC ("plaintiff"), and its tenant, defendant Hunter Boot USA LLC ("Hunter"). Plaintiff alleges Hunter stopped paying rent on its commercial lease for the 19th, 18th, and (part of) the 17th floor at 57 West 57th Street, New York, NY in August 2023. A few months prior, in June 2023, Hunter entered into a series of asset sale agreements with defendants Authentic Brands Group LLC ("Authentic") and Marc Fisher LLC ("Marc Fisher").

Plaintiff commenced this action to recover the outstanding rent it alleges it is owed, asserting claims against Authentic and Marc Fisher in addition to Hunter, on that basis that they are liable as successors of Hunter, and for tortious interference with contract. Defendants assert

that neither Authentic nor Marc Fisher assumed the Lease or Hunter's rights or obligations thereunder. Defendants move to dismiss pursuant to CPLR §§ 3211(a)(1) and 3211(a)(7).

### Standard

It is well-settled that on a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the pleading is to be liberally construed, accepting all the facts as alleged in the pleading to be true and giving the plaintiff the benefit of every possible inference. *See Avgush v Town of Yorktown*, 755 N.Y.S.2d 647 (2d Dep't 2003); *Bernberg v Health Mgmt. Sys.*, 756 N.Y.S.2d 96 (2d Dep't 2003). Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted *conclusively* establishes a defense to the asserted claims as a matter of law. *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994). “[S]uch motion may be appropriately granted only where the documentary evidence *utterly refutes* plaintiff’s factual allegations.” *Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314, 326 (emphasis added). A paper will qualify as “documentary evidence” only if it satisfies the following criteria: (1) it is “unambiguous”; (2) it is of “undisputed authenticity”; and (3) its contents are “essentially undeniable”. *VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 A.D.3d 189, 193 (1st Dep’t 2019).

### Discussion

#### **I. Breach of Contract**

Generally, a corporation that acquires assets of another is not liable for its predecessor's breaches of contract. *Ooarah, Inc. v. Covista Commc'ns, Inc.*, 139 A.D.3d 444 (1st Dep’t 2016). However, New York Courts have imposed liability in circumstances where either (1) the successor corporation expressly assumed the predecessor liability (2) there was a de facto merger (3) the successor corporation is a mere continuation of the predecessor corporation or (4) the

transaction was entered into fraudulently to escape such obligations. *Schumacher v. Richards Shear Co.*, 59 N.Y.2d 239 (1983).

Here, it is undisputed that there was no express or implied assumption of the lease obligation as both asset purchase sale agreements expressly disclaim any liability or obligations of Hunter. Thus, to sustain its claim for breach of contract against either or both defendants, plaintiff must establish that successor liability shall be imposed on defendants regardless, pursuant to an established exception.

An asset purchase transaction may constitute a de facto merger between buyer and seller, even if not formally structured as such. *TBA Glob., LLC v. Fidus Partners, LLC*, 15 N.Y.S.3d 769 (1st Dep't 2015). However, for the Court to treat an asset purchase transaction as a de facto merger, it is essential that there is continuity of ownership between the predecessor corporation and the purchasing entity following the transaction. See *In re New York City Asbestos Litig.*, 789 N.Y.S.2d 484 (1st Dep't 2005); *Highland Crusader Offshore Partners L.P. v. Targeted Delivery Technologies Holdings, LTD.*, 184 A.D.2D 116 (1st Dep't 2020); *Aguas Lenders Recovery Group LLC v. Suez S.A.*, 585 F.3d 696 (2nd Cir. 2009).

Here, plaintiff fails to allege continuity of ownership. In its complaint plaintiff does not allege that any of Hunter's owners, corporate directors, officers, or other employees joined Marc Fisher or Authentic Brands post asset sale. In fact, in its opposition, plaintiff appears to abandon the de factor merger theory and instead rely on the doctrine of mere continuation.

While similar in principle to the de facto merger doctrine, the mere continuation exception applies where there is "a mere change in form without a significant change in substance." *Wass v. County of Nassau*, 153 A.D.3d 887 (2nd Dep't 2017). Under the theory of mere continuation, New York Courts have imposed successor liability where "a successor

corporation is in essence reorganization of a now extinguished predecessor.” *Miot v. Miot*, 24 Misc., 3d 1224(A) (NY. Cnty. Sup. Ct. 2009); see also *Schumaker*, 59 N.Y.2d. The relevant factors in finding an asset sale is essentially a mere continuation of the predecessor company are whether (1) all or substantially all assets are transferred to the successor corporation (2) only one corporation exists after the transfer (3) assumption of identical or nearly identical name (4) retention of the same corporate officers and/or directors and (5) continuation of the same business. *Id.*

While no one factor is dispositive, the underlying theory of the mere continuation doctrine 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*. Here, even providing plaintiff all favorable inferences, the complaint fails to set forth factual allegations which if accepted as true, meet the parameters for a finding of mere continuation. First, it is undisputed that more than one corporation resulted from the transaction. Defendants Authentic and Marc Fisher are separate corporations, and each entered into separate asset purchase agreements with plaintiff. Although plaintiff alleges Authentic and Marc Fisher acted jointly, Hunter remained its own corporate entity. While plaintiff alleges Hunter was merely a judgment proof entity after the sale, this is disputed by the documentary evidence. Hunter received the proceeds from the sale, and thus could have paid plaintiff the outstanding balance of the commercial lease. That Hunter instead used the proceeds of the sale to pay its foreign creditors, is to this Court irrelevant.

Next, plaintiff has failed to allege that defendants purchased all or substantially all of Hunter’s assets. The asset purchase agreement between Authentic and Hunter demonstrates that Authentic purchased Hunter’s intellectual property, certain non-footwear apparel and accessories. The asset purchase agreement between Marc Fisher and Hunter demonstrates that

Marc Fisher acquired footwear inventory, removable fixtures, and a piece of equipment.

Therefore, each entity purchased separate assets from Hunter. Moreover, even providing plaintiff with the assumption that these entities are operating as one joint entity, plaintiff has still failed to allege that together the defendants purchased all or substantially all of Hunter's assets. Plaintiff has further failed to allege defendants are continuing with Hunter's business as it was prior to the transaction. Plaintiff's only basis for this allegation is its claim that Hunter's Instagram is operational. This is insufficient. As plaintiff itself notes, as Hunter is or was a global footwear brand, an allegation that defendants are operating the same business of Hunter, requires more.

While plaintiff contends that it should be allowed to pursue discovery to determine whether any of Hunter's employees were retained by defendants, the Court finds this unnecessary. As a whole, plaintiff's complaint fails to allege facts supporting a finding a mere continuation. Moreover, even if there was retention of Hunter employees, on its own that would still be insufficient.

Lastly, the Court finds plaintiff has failed to sufficiently allege defendants acted fraudulently. Here, there are no allegations that either of the defendants had any untoward relationship with Hunter beyond the transaction, nor that the transaction was anything more than an arms-length asset purchase transaction. Additionally, the documentary evidence demonstrates that Hunter received consideration in exchange for its sale of certain assets to Authentic and Fisher, and plaintiff does not allege that such consideration was insufficient. Plaintiff's argument that the inclusion of language in the Authentic and Fisher Agreements that the transaction "did not constitute a fraudulent conveyance" points to an inference that the parties were acting fraudulently, is unavailing.

Therefore, for the reasons set forth above, the Court finds plaintiff has failed to sufficiently allege a claim for breach of contract against either Authentic or Marc Fisher.

## II. Tortious Interference

To establish a claim for tortious interference with contract under New York law, the plaintiff must show the existence of its valid contract with a third party, defendants' knowledge of that contract, defendants intentional and improper procuring of a breach, and damages. *High Falls Brewing Co., LLC v. Bos. Beer Corp.*, 513 F. App'x 12 (2nd Cir. 2013). Specifically, a plaintiff must allege that the contract would not have been breached "but for" the defendant's conduct. *Burrowes v. Combs*, 808 N.Y.S.2d 50 (1st Dep't 2006). Although on a motion to dismiss the allegations in a complaint should be construed liberally, to avoid dismissal of a tortious interference with contract claim a plaintiff must support his claim with more than mere speculation. *Id.*

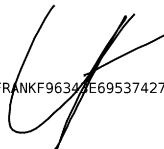
Plaintiff has failed to allege that but for defendants' actions, Hunter would not have breached its commercial lease with plaintiff and would have continued to abide by the lease. Plaintiff provides no support for this assertion. Plaintiff's contention that Hunter would have continued to pay the lease because it was not in arrears prior to the sale, is speculative. Moreover, plaintiff's claim that just by entering into the asset sale transaction with Hunter, defendants caused Hunter to breach, is conclusory. That defendants excluded liabilities from their transaction, on its own, does not support a claim for tortious interference with contract.

Accordingly, it is hereby

ADJUDGED that defendant Authentic Brands Group LLC's motion to dismiss is granted; and it is further

ADJUDGED that defendant Marc Fisher's motion to dismiss is granted; and it is further

ORDERED that the Clerk enter judgement accordingly.

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6/25/2024  
DATE

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LYLE E. FRANK, J.S.C.

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