

Westpoint Home, LLC v Dormify, Inc.

2024 NY Slip Op 33793(U)

October 11, 2024

Supreme Court, New York County

Docket Number: Index No. 654611/2022

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

-----X

WESTPOINT HOME, LLC,

Plaintiff,

- v -

DORMIFY, INC., QUADRANT MANAGEMENT INC., ON
CAMPUS MARKETING, LLC, OCM ACQUISITION CORP.,
CLERISY GLOBAL CAPITAL MANAGEMENT, LP, ALAN
QUASHA, and LISA MYERS,

Defendants.

INDEX NO. 654611/2022

MOTION DATE --

MOTION SEQ. NO. 001 004 005

**DECISION + ORDER ON
MOTION**

-----X

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 18, 23, 29, 31, 33, 38, 39, 40, 41, 42, 43, 44, 82, 84

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 47, 48, 49, 50, 51, 69, 75, 77, 79, 83, 85

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 53, 54, 55, 56, 57, 70, 76, 78, 80, 81, 86

were read on this motion to/for DISMISSAL.

This is an action by plaintiff Westpoint Home, LLC (Westpoint), who is an unsecured creditor of defendant On Campus Marketing, LLC (OCM), to recover debt. In motion sequence 001, defendants Dormify, Inc. (Dormify), Quadrant Management, Inc.¹ (Quadrant), OCM Acquisition Corp. (OCM Acquisition)² and Selina Zaccagno move

¹ Movants state that Quadrant Management, Inc. is now known as Quadrant Management LLC. (See NYSCEF Doc. No. [NYSCEF] 8, Notice of Motion at 2.)

² OCM Acquisition merged into Dormify on September 19, 2022. (NYSCEF 25, Amended Complaint [AC] ¶ 77; see NYSCEF 13, Certificate of Merger.)

pursuant to CPLR 3211 (a) (1) and (7) to dismiss the amended complaint.³ In motion sequence 004, defendant Alan Quasha moves pursuant to CPLR 3211 (a) (1) and (7) to dismiss the amended complaint. In motion sequence 004, defendants Lisa Myers and Clerisy Global Capital Management, LP (Clerisy Global) move pursuant to CPLR 3211 (a) (1) and (7) to dismiss the amended complaint.⁴

Background

The following facts are taken from the amended complaint and, for the purposes of these motions, are accepted as true. (*See CBS, Inc. v Ziff-Davis Publ. Co.*, 75 NY2d 496, 499 [1990].)

OCM was an online retail business dealing in university-approved merchandise and had its principal place of business in New Jersey. (NYSCEF 25, AC ¶ 12.) Westpoint supplied OCM with inventory pursuant to purchase orders. (*Id.* ¶ 94.) The amount still due from OCM to Westpoint is \$3,140,823.65. (*Id.* ¶ 95.) On September 16, 2022, OCM's assets were sold to OCM Acquisition, a holding company which merged into Dormify three days later. (*Id.* ¶¶ 13, 77.) Dormify and OCM were competitors. (*Id.* ¶ 7.) OCM "appears to be no longer operating." (*Id.* ¶ 12.)

Clerisy Global, a private equity firm, owns a controlling interest in Dormify. (*Id.* ¶ 19.) Myers is Clerisy Global's founder and managing partner. (*Id.* ¶ 11.) Quadrant Management is an investment management firm. (*Id.* ¶ 31.) Quasha is Quadrant Management's CEO. (*Id.* ¶ 10.) Clerisy Global technically owned OCM Acquisition, but

³ Westpoint filed its amended complaint prior to filing its opposition to motion sequence 001. Dormify, Quadrant, OCM Acquisition and Zaccagno elected to apply their motion to the amended complaint. (*See* NYSCEF 38, Reply Brief at 7/17 [mot. seq. no. 001].)

⁴ Westpoint failed to file a red-line copy of the amended complaint identifying all modifications and additions. (*See* Part 48 Procedures ¶ 11.)

Quadrant Management and Quasha in fact controlled OCM Acquisition. (*Id.* ¶ 31.)

After OCM Acquisition's merger into Dormify, Quasha became the chairman of Dormify's board of directors. (*Id.* ¶ 30.)

In 2021, OCM was in financial trouble, "including failing to timely make payments on approximately \$60 million in loans." (*Id.* ¶ 16.) OCM's lenders informed OCM that the "loans would need to be brought current or repaid in 2022" otherwise the lenders would foreclose on OCM's collateral, putting OCM out of business. (*Id.* ¶ 17.) In September 2021, defendants

"launch[ed] their scheme whereby Quadrant ... would take control of OCM's business, by orchestrating the acquisition by a shell company technically owned and controlled by Clerisy but in fact controlled by Quasha and Quadrant— that is, OCM Acquisition – of OCM's assets, but not any of OCM's liabilities, as part of a purported 'foreclosure sale' by OCM's 'banks' for approximately 60 cents on the dollar but representing no more than 5% of the debt, which included both tangible and intangible assets, which were sold to OCM Acquisition without any consideration – and the subsequent merger of that new company into Dormify." (*Id.* ¶ 31.)

Westpoint alleges causes of action for (i) breach of contract against OCM and Dormify and (ii) fraudulent transfer against all defendants. (*Id.* ¶¶ 93-101.) It seeks money damages and punitive damages. (*Id.* at 21/21.)

Discussion

On a CPLR 3211 (a) (1) motion to dismiss, the movant has the "burden of showing that the relied upon documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." (*Fortis Fin. Servs. v Filmat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002] [internal quotation marks and citation omitted].) "A cause of action may be dismissed under CPLR 3211(a)(1) only where the documentary evidence utterly refutes [the] plaintiff's factual allegations,

conclusively establishing a defense as a matter of law.” (*Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] [internal quotation marks and citation omitted].) “The documents submitted must be explicit and unambiguous.” (*Dixon v 105 West 75th St. LLC*, 148 AD3d 623, 626 [1st Dept 2017] [citation omitted].) Their content must be “essentially undeniable.” (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019] [internal quotation marks and citation omitted].) Affidavits and affirmations are not documentary evidence. (See *Mamoon v Dot Net Inc.*, 135 AD3d 656, 657 [1st Dept 2016].)

On a CPLR 3211 (a) (7) motion to dismiss, the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citation omitted].) “[B]are legal conclusions, as well as factual claims which are either inherently incredible or flatly contradicted by documentary evidence” cannot survive a motion to dismiss. (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995] [citation omitted].) Motion Seq. 001 – Dormify, Quadrant, OCM Acquisition and Zaccagno’s Motion to Dismiss

Selina Zaccagno

Westpoint withdrew its claims against Zaccagno in the amended complaint. (See NYSCEF 34, Stipulation; NYSCEF 25, AC.) Accordingly, Zaccagno is dismissed.

Breach of Contract

The elements of a cause of action for breach of contract are “the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and

resulting damages.” (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010] [citation omitted].)

Westpoint alleges no contract with Dormify. Rather, it alleges that Dormify is liable for OCM’s contracts because

“Dormify – by acquiring OCM’s tangible assets (via merger with OCM Acquisition) and taking its intangible assets (for less than reasonably equivalent value, if anything) – and employees and website, and by otherwise operating just as OCM did before its operations ceased – effectively merged with OCM under the common law *de facto merger* doctrine and/or has otherwise effectively continued OCM’s business and become a successor and/or alter ego of OCM and taken on OCM’s liabilities owed to Plaintiff.” (NYSCEF 25, AC ¶ 96.)

1. De Facto Merger

“[T]he general rule is that, absent a merger or consolidation, an entity purchasing the assets of another entity does not thereby acquire liabilities of the seller not expressly transferred in the sale.” (*Matter of TBA Global, LLC v Fidus Partners, LLC*, 132 AD3d 195, 209 [1st Dept 2015] [citation omitted].) However, “a purchase-of-assets transaction may be deemed to constitute a de facto merger between seller and buyer, even if not formally structured as such, under certain conditions.” (*Id.* [citation omitted].)

The court may regard the transaction as a de facto merger when 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 seller’s business; and (4) continuity of management, personnel, physical location, assets and general business operation.” (*Van Nocker v A.W. Chesterton, Co. (In re NY City Asbestos Litig.)*, 15 AD3d 254, 255-56 [1st Dept 2005] [citations omitted].)

“The first criterion, 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, as occurs in a stock-for-assets transaction. Stated otherwise, continuity of ownership describes a situation where the parties to the transaction "become owners together of what formerly belonged to each." (*Id.* at 256 [citation omitted].)

Westpoint alleges no facts raising an inference of continuity of ownership between OCM and Dormify. Indeed, while Westpoint alleges that "a hedge fund" owned OCM (NYSCEF 25, AC ¶ 34), there are no allegations as to whether such owner has become a direct or indirect shareholder of Dormify or whether the hedge fund has become an owner together with the owners of Dormify. The absence of such allegations is fatal; continuity of ownership "is a necessary element of any de facto merger finding."⁵ (*Van Nocker*, 15 AD3d at 256; see *KIND Operations Inc. v AUA Private Equity Partners, LLC*, 195 AD3d 446, 447 [1st Dept 2021] [affirming dismissal of breach of contract claim where no continuity of ownership is alleged].)

The court rejects Westpoint's unsupported request for discovery on the continuation of ownership issue. (*See Oorah, Inc. v Covista Communications, Inc.*, 139 AD3d 444, 445 [1st Dept 2016] [plaintiff who failed to allege continuity of ownership "has not shown that discovery on continuity of ownership would be anything other than a fishing expedition" (citation omitted)].)

⁵ The court notes that while continuity of ownership is a necessary element of a de facto merger in the ordinary case, it is not a necessary element where not-for-profit corporations, which lack owners, are involved. (*See Ring v Elizabeth Found. for the Arts*, 136 AD3d 525, 526-27 [1st Dept 2016].)

2. Mere Continuation

Another exception “to the general rule that a purchase-of-assets does not give rise to successor liability ... [is] the purchaser’s being the ‘mere continuation’ of the seller.” (*Van Nocker*, 15 AD3d at 256, n 3 [citation omitted].) This “exception refers to corporate reorganization, however, where only one corporation survives the transaction; the predecessor corporation must be extinguished.” (*Schumacher v Richards Shear Co.*, 59 NY2d 239, 245 [1983] [citations omitted].) Here, Westpoint’s allegations that OCM “appears to be no longer operating” are conclusory. (See NYSCEF 25, AC ¶¶ 12, 44.) Further, Westpoint’s allegations regarding the OCM website do not support this exception. Westpoint alleges that immediately after the merger, “if a customer entered the Dormify website it was directed to the OCM website.” (*Id.* ¶ 38.) This does not support that OCM was extinguished. Further, Westpoint alleges that if one went to ocm.com, one was “directed to a website with the heading ‘Dorm Room,’ which was essentially identical to the previous OCM website.” (*Id.* ¶ 39.) Again, this allegation does not evidence that OCM was in fact extinguished. Westpoint also alleges that the alleged merger left “OCM a mere shell company that is no longer operating.” However, “[a]n allegation that the seller has become a mere shell is not sufficient.” (*Cargo Partner AG v Albatrans Inc.*, 207 F Supp 2d 86, 95, n 10 [SDNY 2001] [collecting cases]; *Chung Tai Print. (China) Co Ltd. v Florence Paper Corp.*, 2024 NY Slip Op 32503[U], *29 [Sup Ct, NY County 2024] [holding that “the predecessor corporation cannot survive in any form, even as a shell entity” (citation omitted)]; *Schumacher*, 59 NY2d at 245 [“Since [predecessor company] survived the instant purchase agreement as a distinct, albeit

meager, entity, the Appellate Division properly concluded that [defendant] cannot be considered a mere continuation of [the predecessor company].)

Finally, the court notes that Westpoint does not oppose the motion to dismiss the alter ego theory, which is mentioned in passing in its amended complaint. (NYSCEF 25, AC ¶ 96.) The opposition's passage that Dormify "otherwise is a successor under New Jersey law" is not supported by any citations to authority.⁶ (NYSCEF 29, Opp Brief at 4/6.) Finally, Westpoint's reliance on a decision in a New Jersey action, which involves a different plaintiff, is unavailing.⁷ The breach of contract claim is dismissed as against Dormify.

Fraudulent Transfer

Movants argue that the fraudulent transfer cause of action should be dismissed on a number of grounds. Westpoint fails to address these arguments in its opposition brief. The fraudulent transfer claim is dismissed as against Dormify, Quadrant, and OCM Acquisition. (See *e.g. Butler v City of NY*, 202 AD3d 471, 472 [1st Dept 2022] [granting motion to dismiss to the extent it was unopposed].)

⁶ Westpoint proffers no argument that New Jersey law rather than New York law is applicable. Indeed, in its opposition, Westpoint cites to a New York case discussing New York law on successor liability. (NYSCEF 29, Opp Brief at 4/6 n 1 [citing *Bd. Of Trustees v Allure Metal Works, Inc.*, 209 AD3d 712 (2d Dept 2022)].)

⁷ Westpoint represented to this court that the "New Jersey court rejected Dormify's attempt to escape liability for its wrongful takeover of OCM in a similar case brought in that state by another OCM creditor" and that the New Jersey court "denied a motion to dismiss, *inter alia*, the 'Ninth Count' for 'Successor Liability' of the amended complaint." (NYSCEF 29, Opp Brief at 4-5/6.) Dormify did not move to dismiss the ninth count; only Zaccagno moved to dismiss the ninth count. (See NYSCEF 41, New Jersey Motion Papers at 3/303 [Notice of Motion]; NYSCEF 31, New Jersey Order.) Westpoint's counsel is reminded of the Rules of Professional Conduct. (Rules of Prof Conduct [22 NYCRR 1200.0] rule 3.3 [a] [1].)

Movants' request for an award of the costs of making the motion is unsupported by citation to law or argument and thus is denied.

Motion Seq. 004 – Quasha's Motion to Dismiss

In the fraudulent transfer cause of action, which is the only claim pleaded against Quasha, Westpoint alleges that

“Quadrant and Clerisy and then Dormify, through an improper scheme involving OCM Acquisition – and under the guise of a sham ‘Foreclosure and Sale Agreement’ that called for not the mere foreclosure of certain secured assets, but, in effect, transfer of OCM altogether (including its very valuable good will, proprietary lists, contract rights and employees) – acquired that inventory and the rest of the company for less than reasonably equivalent value, thereby leaving OCM a mere shell company that is no longer operating, and with nothing and otherwise unable to pay its debts owed to Plaintiff.” (NYSCEF 25, AC ¶ 100.)

Westpoint contends that as a result, defendants “have engaged in an intentional fraudulent transfer and violated New York’s and/or New Jersey’s Uniform Voidable Transactions Act and also constitutes an intentional fraudulent transfer under New York and/or New Jersey common law.” (*Id.* ¶ 101.)

The submitted Foreclosure and Sale Agreement demonstrates that the sale of OCM’s assets was to enforce “a security interest in compliance with Article 9 of the Uniform Commercial Code,” and thus, the transaction cannot constitute voidable transfer under New Jersey Uniform Voidable Transactions Act.⁸ (NJ Stat § 25:2-30 (e) (2); see e.g. NYSCEF 12, Foreclosure and Sale Agreement at 2-3/31 [recitals D and E]; *id.* ¶ 2.1.) Even if the transaction constituted a voidable transfer, Westpoint alleges no facts from which Quasha’s liability for money damages could arise; he is not alleged to

⁸ New York’s Uniform Voidable Transactions Act is inapplicable because OCM had its principal place of business in New Jersey. (See Debtor and Creditor Law § 279 [a] [2], [b]; NYSCEF 25, AC ¶ 12.) New York and New Jersey Uniform Voidable Transactions Acts, however, are similar.

be a transferee or beneficiary of the transfer. (NJ Stat § 25:2-30 [b];⁹ see *Banco Popular N. Am. v Gandi*, 184 NJ 161, 176, 876 A2d 253, 262 [2005] [remedies available under Uniform Voidable Transactions Act include “a money judgment against the transferee where the transfer cannot be undone, N.J.S.A. 25:2-30(a), (b)”]; Commercial Litigation in New York State Courts § 129:19 [5th ed, Oct. 2023 update] [discussing against whom liability for voidable transfer lies under section 277 of New York Debtor and Creditor Law, which is similar to NJ Stat § 25:2-30].)

In its amended complaint, Westpoint alleges under its claim for fraudulent transfer that defendants conduct “also constitutes an intentional fraudulent transfer under New York and/or New Jersey common law.” (NYSCEF 25, AC ¶ 101.) Westpoint fails to address the arguments directed at the claim for common law fraud, which is thus dismissed. (See *Butler*, 202 AD3d at 472; *Gary*, 60 AD3d at 413.) In any event, this claim is not pleaded with the requisite particularity. (See CPLR 3016 [b].) In its opposition brief, Westpoint mentions civil conspiracy and aiding and abetting liability. These causes of action, however, are not included in the amended complaint.

⁹ New Jersey Statutes § 25:2-30 (b) (2) states that “[r]ecovery ... of or from the asset transferred or its proceeds, by levy or otherwise, is available only against a person described in” section (b) (1). In turn, section 25:2-30 (b) (1) states: “Except as otherwise provided in this section, the creditor may recover judgment for the value of the asset transferred ... or the amount necessary to satisfy the creditor’s claim, whichever is less. The judgment may be entered against:

- (a) The first transferee of the asset or the person for whose benefit the transfer was made; or
- (b) An immediate or mediate transferee of the first transferee, other than:
 - (i) a good-faith transferee who took for value; or
 - (ii) an immediate or mediate good-faith transferee of a person described in subparagraph (i) of subparagraph (b) of paragraph (1) of subsection b. of this section.”

Quasha's motion is granted. Quasha's request for an award of the costs of making the motion is unsupported by citation to law or arguments, and thus, is denied.

Motion Seq. 005 – Myers and Clerisy Global's Motion to Dismiss

Myers and Clerisy Global move to dismiss the fraudulent transfer cause of action, which is the only claim alleged against them, on substantially the same grounds as Quasha. Westpoint filed one opposition brief for both motions (seq. 004 and 005). Accordingly, for the reasons discussed *supra*, Myers and Clerisy Global's motion is granted. Their request that for an award of the costs of making the motion is unsupported by citation to law or arguments, and thus, is denied.

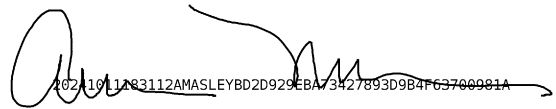
Accordingly, it is

ORDERED that Dormify, Inc., Quadrant Management, Inc., OCM Acquisition Corp.'s motion to dismiss the amended complaint (seq. 001) is granted and the amended complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants;

ORDERED that the action is dismissed as against Selina Zaccagno (see NYSCEF 34, Stipulation); and it is further

ORDERED that Alan Quasha's motion to dismiss the amended complaint (seq. 004) is granted and the amended complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that Lisa Myers and Clerisy Global Capital Management, LP's motion to dismiss the amended complaint (seq. 005) is granted and the amended complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants.



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10/11/2024

DATE

ANDREA MASLEY, 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