

**Mitchell v FBM, LLC**

2008 NY Slip Op 32056(U)

July 17, 2008

Supreme Court, New York County

Docket Number: 0114876/2007

Judge: Joan A. Madden

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PRESENT: **HON. JOAN A. MADDEN**

PART 11

JSC-ice

Index Number : 114876/2007  
**MITCHELL, JUSTIN**  
 VS.  
**FBM, LLC**  
 SEQUENCE NUMBER : # 001  
 SUMMARY JUDGMENT

INDEX NO. 114876-07  
 MOTION DATE \_\_\_\_\_  
 MOTION SEQ. NO. #001  
 MOTION CAL. NO. \_\_\_\_\_

ad on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the annexed decision and order.

**FILED**  
 JUL 22 2008  
 NEW YORK  
 COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: July 17, 2008

*J*  
**HON. JOAN A. MADDEN** J.S.C.  
 JSC

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

-----X  
JUSTIN MITCHELL,

Plaintiff,

INDEX NO. 114876/07

-against-

FBM, LLC,

Defendant.

-----X  
JOAN A. MADDEN, J.:

Plaintiff moves for an order pursuant to CPLR 3212 granting summary on his first cause of action for a declaratory judgment that defendant FBM, LLC, is the successor-in interest to and/or the alter corporate entity of Fidelity Borrowing, LLC ("Fidelity Borrowing"). Defendant opposes the motion.

The following facts are not disputed unless otherwise noted. In January 2005, plaintiff commenced an action against Fidelity Borrowing seeking damages for breach of an employment contract (Justin Mitchell v. Fidelity Borrowing LLC, Index No. 100724/05, Supreme Court, New York County). By a decision and order entered May 31, 2007, the Appellate Division First Department determined that plaintiff was entitled to summary judgment on his breach of contract claim against Fidelity Borrowing. The Appellate Division awarded plaintiff damages in the amount of \$160,000, plus interest from May 12, 2004, and remanded the issue of mitigation of damages to the Supreme Court for a "determination of how much, if any, should be deducted for mitigation, or failure to mitigate damages." On remand, the court issued a decision and order dated July 31, 2007, which "determined on consent that \$5,000 be deducted from the total

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amount awarded to plaintiff by the Appellate Division, First Department.” On August 14, 2007, a judgment was entered in plaintiff’s favor in the sum of \$155,00, together with interest in the sum of \$45,442.60, and costs and disbursements of \$1,780.92, for a total amount of \$202,224.53.

On November 7, 2007, plaintiff commenced the instant action against FBM, LLC. The complaint asserts a first cause of action for a declaratory judgment that defendant FBM, LLC “is the successor-in-interest and/or alter corporate entity” of the judgment debtor, Fidelity Borrowing. The complaint also asserts second, third, fourth, fifth, sixth and seventh causes of action for fraudulent conveyance under various provisions of the Debtor and Creditor Law.

Plaintiff is now moving for summary judgment on his first cause of action for a declaration that defendant FBM, LLC is the successor-interest and/or alter corporate entity of Fidelity Borrowing. Plaintiff submits an affidavit, the pleadings and other documents from the Fidelity Borrowing action, the pleadings in the instant action, and other documents. In his affidavit, plaintiff asserts that defendant FBM, LLC is “clearly the successor to Fidelity Borrowing and has seamlessly continued Fidelity Borrowing’s operations.” Specifically, plaintiff alleges that from November 2002 until April 2006, Fidelity Borrowing was a mortgage broker, and that on August 23, 2005, “approximately six months after filing its Answer in the Fidelity Borrowing Lawsuit, Fidelity Borrowing’s principals filed an application on behalf of defendant FBM, LLC to become a mortgage bank.” Citing to New York Banking Law §590(2)(b), plaintiff asserts that a mortgage banker need not have a separate license to serve as a mortgage broker, because a mortgage banker can act as both a mortgage banker and broker. Based on the Banking Law, plaintiff argues that since a mortgage bank can also operate as a mortgage broker, there was no “legitimate reason” for defendant to apply for a mortgage banking license, as opposed to

Fidelity Borrowing, and for Fidelity Borrowing to close its operations once defendant obtained the license. Plaintiff alleges that “there was no basis for transferring the business of Fidelity Borrowing to defendant except as an illegal effort to avoid” liability to him, since when Fidelity Borrowing ceased operations in April 2006, it “was a valuable going concern with approximately 100 employees.”

Plaintiff asserts that on April 11, 2006, defendant obtained its mortgage banking license using the trade name “Fidelity Borrowing,” and on the same day, Fidelity Borrowing surrendered its mortgage broker license. Plaintiff states that he searched telephone and bank records, and found no evidence that Fidelity Borrowing is still in business or has assets, and found that Fidelity Borrowing’s former bank accounts are closed. Plaintiff also asserts that defendant’s website and Fidelity Borrowing’s website, “are identical,” and that defendant is using the same toll-free telephone number as Fidelity Borrowing. Plaintiff states that a comparison of the two websites “clearly indicates that, aside from expanding the business to include mortgage banking in addition to mortgage brokering, no other changes in business occurred when defendant became the successor to Fidelity Borrowing.”

Plaintiff argues that under the successor liability doctrine, the expansion of the business through the formation of defendant as the “successor to Fidelity Borrowing” does not relieve defendant from liability for his judgment. Under that doctrine, the purchaser of a corporation is liable for the debts of its predecessor only when: 1) the purchaser expressly or impliedly assumes 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 is entered into fraudulently to escape such obligations. See AT&S Transportation

LLC v. Odyssey Logistics & Technology Corp., 22 AD3d 750, 752 (2<sup>nd</sup> Dept 2005). Plaintiff relies on the circumstances of a “de facto merger,” in which the following factors are considered: 1) continuity of ownership; 2) cessation of ordinary business and dissolution of the predecessor as soon as possible; 3) assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and 4) continuity of management, personnel, physical location, assets and general business operation. See id.

Plaintiff asserts that his affidavit establishes the factors for a “de facto merger” as there was a continuity of ownership between defendant and Fidelity Borrowing; Fidelity Borrowing ceased its ordinary business; defendant assumed the liabilities ordinarily necessary for the uninterrupted continuation of Fidelity Borrowing’s business; and there was a continuity of management, personnel, physical location, assets and general business operations between the two entities. Plaintiff submits a copy of defendant’s mortgage banking application, which, according to plaintiff, shows that the principals of the two entities are identical, i.e. Brian Ofsie and Robert Jayne. Plaintiff also relies on Fidelity Borrowing’s February 2006 representations to the court in the other action, that it possessed furniture, fixtures and other assets worth \$151,110. Plaintiff states that “[g]iven that defendant started and continued in business at the same exact location as Fidelity Borrowing on April 11, 2006, without any interruption whatsoever, and that all of Fidelity Borrowing’s furniture, fixtures and assets are now in defendant’s possession,” defendant “must have assumed all liabilities ordinarily necessary for the uninterrupted continuation of Fidelity Borrowing’s business such a rent, utilities, telephone bills, employees’ salaries and insurance.”

Defendant opposes the summary judgment, arguing that such relief is premature, since

discovery has yet to commence. Defendant submits an attorney's affirmation, an affidavit of its "member," Brian Ofsie, and documents. Defendant asserts that plaintiff "ignored" its sole discovery demand to depose him, and "instead brought the instant motion for summary judgment, less than one month after receipt of defendant's answer." Defendant also asserts that in contrast to plaintiff, its does not possess the "materials" from the action against Fidelity Borrowing, since its has been unable to obtain those materials from Fidelity Borrowing's prior counsel.

In his affidavit, Brian Ofsie states that defendant was not formed to conduct mortgage brokerage business, but "to be an actual lender bank" and that defendant is now a bank, licensed to conduct business in New York and several other states, that it has a \$20 million line of credit for use in its origination of mortgage loans, and that its takes its own applications, has its own internal underwriters employed by FBM, and makes its own determinations as to loan approval. Ofsie states that Fidelity Borrowing and defendant were "simply in different lines of work," and that defendant was "not formed with the intent of succeeding to Fidelity's business, nor did the timing of FBM's business operations have any relationship to the commencement of plaintiff's lawsuit against Fidelity, or to plaintiff's judgment against Fidelity." Ofsie explains that FBM's business operations and the process of the licensing applications was started before plaintiff's lawsuit against Fidelity Borrowing. Ofsie also asserts that "we sought to open a mortgage banking business because we wanted to be an originator of loans" and since Fidelity already had a mortgage broker's license, FBM was created. Ofsie further asserts that defendant did not "take over" or purchase Fidelity Borrowing's business, and that the businesses "simply co-existed for

some time, until the mortgage and real estate industry downturn simply made it impossible to Fidelity to continue paying its bills.”

In light of the foregoing, plaintiff’s motion for summary judgment is denied. Discovery has not yet commenced, so neither plaintiff nor defendant has been deposed. After completion of discovery, the motion may be renewed, if the evidence warrants such relief. Moreover, even though some factors are present to suggest successor liability and noticeably absent from defendant’s papers is any statement as to whether it engages in mortgage brokering, the record as presented is inconclusive, and the parties conflicting affidavits raise issues of credibility which cannot be resolved in the context of summary judgment.

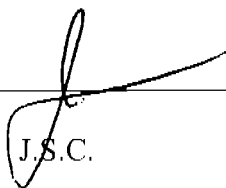
Accordingly, it is hereby

ORDERED that plaintiff’s motion for summary judgment is denied with leave to renew upon the completion of discovery; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on July 24, 2008 at 9:30 a.m., Room 351, 60 Centre Street.

DATED: July 17, 2008

ENTER:

  
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J.S.C.

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