

**90 Broad Owner, L.L.C. v Flomenhaft & Cannata,
L.L.P.**

2010 NY Slip Op 34120(U)

July 21, 2010

Supreme Court, New York County

Docket Number: 116934/2009

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

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90 BROAD OWNER, L.L.C.,
Plaintiff,

Index No. 116934/2009
DECISION and ORDER

-against-

FLOMENHAFT & CANNATA, L.L.P.,
MICHAEL FLOMENHAFT, and JACOBY &
MEYERS, L.L.P.,

Defendants.

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SOLOMON, J.:

BACKGROUND

Plaintiff 90 Broad Owner, L.L.C. (Owner) sues defendants for breach of a lease for an office at its building located at 90 Broad Street in Lower Manhattan (the Building). Defendant Flomenhaft & Cannata, L.L.P. (F&C), a law firm, is the tenant and Michael Flomenhaft (Flomenhaft) is the guarantor. The lease, made in 2006, was for 10 years. In February of 2009 F&C vacated its offices at the Building. Flomenhaft and several of F&C's attorneys were hired by Jacoby & Meyers, L.L.P. (J&M), moved the majority of F&C's law practice to J&M's offices, and formed the Neurolaw Trial Group within J&M.

In the third cause of action, Owner seeks to hold J&M liable for the sums due from F&C under the doctrine of continuation of business or de facto merger even though J&M is not a party to the lease. The complaint has been resolved as to F&C and Flomenhaft, leaving only the claim against J&M. J&M

moves to dismiss the complaint as to it on the ground that Owner has failed to state a cause of action.

DISCUSSION

F&C and J&M are partnerships. Owner contends that the newly formed Neurolaw Trial Group (not a partnership or corporation in and of itself) should be deemed the continuation of F&C's business and J&M should be liable for payment of rent due under F&C's lease.

The de facto merger doctrine and the continuation of business doctrine are corporate law doctrines. All of the cases cited by both parties involve corporate entities, not partnerships. Neither party cites to any authority in support of applying these doctrines to partnerships. Notwithstanding this, were the court to apply the de facto merger doctrine to this matter, Owner has not established the elements of such a 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., Inc.*, 286 AD2d 573, 574 [1st Dept, 2001]). The elements of a de facto merger include (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 (*In re New York City Asbestos Litigation*, 15 AD3d 254, 256 [1st Dept, 2005]). Continuity of ownership is "a necessary element of any de facto merger finding" (*Id.*), and is found when the parties to the transaction "become owners together of what formerly belonged to each" (*Id.*).

J&M hired Flomenhaft and the majority of F&C's attorneys as attorney-employees, not as managers or partners in J&M. That they were hired to expand J&M's practice into "Neurolaw" and were kept as a "group" is of no consequence. Owner does not allege that any F&C partner is now in any way an owner or manager of J&M.


Similarly, Owner has not alleged that F&C dissolved, or that there was a continuity of management, personnel, or physical location; indeed, the latter is not the case or this action would not have been brought. Notably, too, the hiring of some of the predecessor's employees is insufficient to establish continuity of management (see, *Kretzmer v. Firesafe Products Corp.*, 24 AD3d 158, 159 [1st Dept, 2005]).

Accordingly, Owner's complaint against J&M is inadequate to set forth a claim to hold J&M liable as a continuation of F&C; and it hereby is

ORDERED that the motion of defendant Jacoby & Meyers,
L.L.P. ~~to~~ to dismiss the complaint as to it is granted and the
complaint is dismissed as against it, with costs and
disbursements as taxed by the Clerk of the Court, and the Clerk
is directed to enter judgment accordingly.

Dated: July 21, 2010

ENTER:



J.S.C.

FILED

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JANE S. SOLOMON