Atrinsic, Inc. v Mother Nature, Inc.
2011 NY Slip Op 33984(U)
December 27, 2011
Supreme Court, New York County
Docket Number: 652400/2010E
Judge: Paul G. Feinman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: PAUL G. FEINMAN
Justice

PART 12

Index Number : 652400/2010 E
ATRINSIC, INC.,
vs.
MOTHER NATURE, INC.,
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. 652400/2010 E
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL. NO.

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 decided in accordance with the annexed memorandum decision & order.

PC 3/7/2012 2:15 pm

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

Dated: 12/27/2011 5:35 pm

Paul G Feinman
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12
---X

ATRINSIC, INC.,
Plaintiff,

-against-

MOTHER NATURE, INC. and NATURALIST.COM, INC.,
Defendants.
---X

Index Number 652400/2010E
Mot. Seq. No. 001

DECISION AND ORDER

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Papers considered in review of this motion to dismiss action:	**E-File Document Numbers**
Notice of motion, memorandum of law in support, Anderson affidavit and annexed exhibits A-C	5 - 6
Baker affidavit in opposition, Sack affirmation and annexed exhibits A-C and plaintiff's memorandum of law in opposition	11 - 16
Defendant's reply memorandum of law, Anderson reply affidavit and annexed exhibit D	19 - 20

PAUL G. FEINMAN, J.:

Defendants, Mother Nature, Inc. and Naturalist.com, Inc., move to dismiss plaintiff's, Atrinsic, Inc., compliant pursuant to CPLR 3211 (a) (1) and (7). Plaintiff opposes. For the reasons provided below, the motion is granted in part, and denied in part.

Background

This is an action for breach of contract and quantum meruit arising out of internet advertisement and marketing services provided pursuant to the terms of an "Insertion Order" entered between plaintiff and Mother Nature, Inc. (Doc. 5-3, ex. B, Insertion Order). The Insertion Order provides that "Atrinsic will build, manage, and optimize the Paid Search campaign for MotherNature, Inc. and their sites/stores, MotherNature.com, MyVitaNet.com,

HerbalRemedies.com, and PlanetRX.com" (Doc. 5-3, ex. B, insertion order). Naturalist is neither named as a party to the agreement, nor otherwise mentioned in its terms. Notwithstanding, the complaint alleges that both defendants have failed to pay the amount specified on invoices issued to them in September, October, and November of 2009, for services plaintiff provided pursuant to the terms and conditions of the Insertion Order (*id.* at ¶¶ 16-17). It asserts two causes of action against both defendants: (1) breach of contract; and (2) quantum meruit. In lieu of filing an answer, defendants moved to dismiss the complaint in its entirety under CPLR 3211 (a) (1) and (7).

Conceding that Naturalist is not a party to the Insertion Order, plaintiff suggests several alternative theories in its attempt to hold Naturalist liable for Mother Nature's alleged breach. It should be noted that these theories of recovery were only alluded to in the complaint in the following allegations. The complaint alleges that Naturalist, at all times relevant to this action, "was or is either the parent company of Mother Nature, the alter ego of Mother Nature, or the successor-in-interest to Mother Nature" (*id.* at ¶ 5). It further alleges that Naturalist, "having an identical business and common ownership with Mother Nature, benefitted from Atrinsic's services in the same manner as Mother Nature," and that "as an alter ego or successor-in-interest of Mother Nature, has expressly assumed the liabilities of Mother Nature [or in] the alternative, upon information and belief, Naturalist has assumed the liabilities of Mother Nature by operation of law" (*id.* at ¶¶ 6-7). The complaint is devoid of any additional factual allegations which would support imposing successor-in-interest or alter ego liability upon Naturalist, nor does it spell out the elements of any other theory of liability.

However, in opposition to defendants' motion to dismiss, plaintiff submitted an affidavit of Aaron Baker, its executive vice-president, which the court may consider to remedy any

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defects in the complaint (Doc. 11, Baker affid.; *see Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 [1st Dept 2009]). Baker describes, in detail, facts related to the Insertion Order between plaintiff and Mother Nature, including pre-agreement negotiations, his interpretation of its terms, and his assessment of the parties' performance. Notably, even looking outside the plain words of the Insertion Order, there is nothing in this affidavit, or in the complaint, to suggest that Naturalist had any role in negotiating the agreement, performing any of the obligations imposed upon Mother Nature, or that it would directly receive any of the benefits of plaintiff's services. In fact, the only reference to Naturalist is found in the affidavit's first paragraph, where it states that the affidavit was being made in opposition to defendants' motion to dismiss (*id.*).

Plaintiff also has submitted a printed version of an undated "Hoover's profile" from "answers.com" for "Naturalist.com, Inc.," which indicates that "Naturalist.com operates a network of Web sites featuring news, employment information, and product offerings related to ecology, the outdoors, and healthy living [and] its operations include EnviroNetwork (job listings) and E-Wire (press release service)" (Doc. 15, ex. C, Hoover's profile). The profile further claims that Naturalist "owns" Mother Nature.com, "which sells vitamins, supplements, and other natural health products" (Doc. 15, ex. C, Hoover's profile). This document appears to be the source of plaintiff's claim that "Naturalist now operates the websites formerly operated by Mother Nature, and sells the same services to the same customers," as it is cited for this point in plaintiff's memorandum of law (Doc. 16, Plaintiff's opp. memo. of law at 4).

Plaintiff also attaches to its attorney's affirmation two print-outs retrieved on March 31, 2011, from the New York State Department of State, Division of Corporations entity information database which indicate that "Mother Nature, Inc." and "Naturalist.com Incorporated" were each dissolved by proclamation or annulment of authority on January 27, 2010 (Docs. 13, 14; exs. A,

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B, NYS DOS print-outs). The print-outs list the same mailing address and registered agent for both Mother Nature and Naturalist (*id.*).

Analysis

Where defendant has moved to dismiss under CPLR 3211 (a) (7), the court's task is to determine whether plaintiff's pleadings state a cause of action (*see 511 W. Corp. v Jennifer Realty*, 98 NY2d 144, 152 [2002]). The motion must be denied "if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law'" (*id.*; quoting *Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001]; quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). In this context, the complaint is to be liberally construed and the court will "accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*id.*; citing CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). However, while "a complaint is to be liberally construed in favor of plaintiff on a CPLR 3211 motion to dismiss, the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence" (*Excel Graphics Tech., Inc. v CFG/AGSCB 75 Ninth Ave., LLC*, 1 AD3d 65, 69 [1st Dept 2003]).

To prevail on a motion to dismiss pursuant to CPLR 3211 (a) (1), defendant has the burden of demonstrating that the documentary evidence conclusively resolves all factual issues and that the plaintiff's claim fails as a matter of law (*Fortis Fin. Servs., LLC v Fimat Futures USA, Inc.*, 290 AD2d 383 [1st Dept 2002]).

1. ***Breach of contract - Mother Nature***

To state a claim for breach of contract, plaintiff must plead the following elements: (1) formation of an enforceable agreement between plaintiff and defendant; (2) performance by

plaintiff; (3) defendant's failure to perform; and (4) resulting damage (2 PJI 2d 4:1 [2009]). To establish the existence of an enforceable agreement, plaintiff must plead an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound (*Kowalchuk v Stroup*, 61 AD3d 118, 121 [1st Dept 2009] [citing 22 NY Jur 2d, Contracts § 9]).

Plaintiff has sufficiently plead each of the required elements to state a breach of contract claim as against Mother Nature, as evidenced by the insertion order between plaintiff and Mother Nature. The court rejects defendants' contention that plaintiff "cannot allege all of the elements," specifically, the second element, because plaintiff allegedly "failed to perform its obligations under the Insertion Order" (Doc. 6, Defendants' memo. of law at 1). The only proof offered in support of this contention is an affidavit of Mother Nature's chief executive officer, which does not constitute documentary evidence for purposes of CPLR 3211. As such, the court is required to accept the facts as they have been pleaded by plaintiff to be true (*see Sokoloff*, 96 NY2d at 414; *see also Tsimerman v Janoff*, 40 AD3d 242, 243 [1st Dept 2007]). Accordingly, the branch of defendants' motion seeking dismissal of plaintiff's breach of contract claim as against Mother Nature is denied.

2. *Quantum meruit - Mother Nature*

To state a cause of action for quantum meruit, plaintiff must allege: (1) the performance of services in good faith; (2) the acceptance of the services by the person to whom they are rendered; (3) an expectation of compensation therefor; and (4) the reasonable value of the services (*see Fulbright & Jaworski, LLP v Carucci*, 63 AD3d 487, 488-489 [1st Dept 2009]; *citing Soumayah v Minnelli*, 41 AD3d 390, 391 [1st Dept 2007]). While the existence of a valid and enforceable contract governing the particular subject matter will ordinarily preclude recovery in quasi-contract for events arising out of that same subject matter, where there is a

"bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue, plaintiff may proceed upon a theory of quantum meruit and will not be required to elect his or her remedies" (*IIG Capital LLC v Archipelago, LLC*, 36 AD3d 401, 405-406 [1st Dept 2007] [*internal citations omitted*]).

Here, defendants argue that plaintiff's quantum meruit cause of action is barred by the existence of an enforceable contract governing the subject matter, and that plaintiff has failed to allege that its services were performed for the benefit of Naturalist (Doc. 6, Defendants' memo. of law at 10; citing *Kagan v K-Tel Entertainment, Inc.*, 172 AD2d 375, 376 [1st Dept 1991] [holding that recovery under a theory of quasi contract requires plaintiff to demonstrate that services were performed *for the defendant* resulting in its unjust enrichment; it was not enough that defendant received a benefit from the activities of plaintiff if the services were performed at the behest of someone other than defendant). In opposition, plaintiff argues that it may maintain its quantum meruit cause of action as an alternative to its contract claim because there is a dispute over the scope of the written contract (Doc. 16, Plaintiff's opp. memo. of law at 12-13; citing *Loheac v Children's Corner Learning Ctr.*, 51 AD3d 476 [1st Dept 2008]).

Plaintiff has alleged sufficient facts to satisfy the four elements of a cause of action for quantum meruit as against Mother Nature, by alleging that plaintiff, in good faith, performed advertising and marketing services for Mother Nature, which it accepted, with a reasonable expectation of compensation for the reasonable value of those services. Furthermore, this cause of action is not barred by the existence of an enforceable contract between plaintiff and Mother Nature. Although the complaint alleges that plaintiff has not been compensated for Internet-based advertising and marketing services that it provided to defendants, [p]ursuant to the terms and conditions of the Insertion Order," there is a bona fide dispute over whether the services

performed by plaintiff are within the scope of the insertion order (*see IIG Capital LLC*, 36 AD3d at 405-406; *see also American Tel. & Util. Consultants, Inc. v Beth Israel Med. Ctr.*, 307 AD2d 834, 835 [1st Dept 2003]). Specifically, defendants have alleged that plaintiff, without obtaining Mother Nature's express written approval as required by the terms of the insertion order, performed services in excess of the budgeted monthly amounts (Doc. 5-1, Anderson affid. at ¶ 9). Given this unresolved dispute as to whether these services were within the scope of the parties' agreement, dismissal of plaintiff's quasi contract cause of action as against Mother Nature would be premature at this juncture (*see IIG Capital LLC*, 36 AD3d at 405). Accordingly, the branch of defendants' motion seeking dismissal of plaintiff's second cause of action is denied as it pertains to Mother Nature.

3. *Claims against Naturalist*

Defendants correctly argue that the documentary evidence - namely, the insertion order - conclusively demonstrates that Naturalist is not a party to the agreement between Mother Nature and Atrinsic (*see Leonard v Gateway II, LLC*, 68 AD3d 408 [1st Dept 2009] [breach of contract claims properly dismissed against all defendants except Gateway II where purchase agreements were unequivocally executed on behalf of Gateway II and plaintiff pointed to no other contracts involving any other defendant]). Whereas the Insertion Order specifically provides that "Atrinsic will build, manage, and optimize the Paid Search campaign for MotherNature, Inc. and their sites/stores, MotherNature.com, MyVitaNet.com, HerbalRemedies.com, and PlanetRX.com," it does not mention Naturalist at all (Doc. 5-3, ex. B, insertion order). The failure of plaintiff to show the existence of an enforceable agreement, a required element for a breach of contract cause of action, requires dismissal of this claim as against Naturalist.

Furthermore, plaintiff fails to sufficiently plead a cause of action for quantum meruit as against Naturalist. Because plaintiff does not dispute that it provided its services pursuant to the terms of the Insertion Order with Mother Nature, it can only look to that corporation for compensation (*see Hansen & Co. v Everlast Corp.*, 296 AD2d 103, 108 [1st Dept 2002]). Although there appears to be a dispute between Mother Nature and plaintiff about whether certain work that plaintiff performed complied with the terms of the Insertion Order, that work, as confirmed by the affidavit of plaintiff's executive vice-president, was performed solely on Mother Nature's behalf. Even if, as plaintiff's attorney contends, Naturalist received some form of indirect benefit from plaintiff's services, the terms of the Insertion Order, as well as plaintiff's affidavit, unequivocally show that plaintiff's activities were at the behest of Mother Nature, not Naturalist (*see Skillgames v Brody*, 1 AD3d 247, 250 [1st Dept 2003] [court not required to assume the truth of allegations that consist of bare legal conclusions or are clearly contradicted by documentary evidence]; *see also Hansen & Co.*, 296 AD2d at 108). In addition, plaintiff does not allege any service that was rendered to Naturalist for which plaintiff would reasonably expect compensation (*see Hansen & Co.*, 296 AD2d at 108). Therefore, plaintiff fails to allege sufficient facts to satisfy each of the required elements for stating a cause of action in quantum meruit.

Although acknowledging that Naturalist was not a party to the contract, plaintiff seeks to pierce the corporate veil and hold Naturalist liable for Mother Nature's dealings. A party seeking to pierce the corporate veil must allege that: "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Sheridan Broadcasting Corp. v Small*, 19 AD3d 331, 332 [1st Dept 2005]; quoting *Matter of*

Morris v New York State Dept. of Taxation & Fin., 82 NY2d 135, 141 [1993]). A complaint may adequately state a claim for abuse of the corporate form that may support a declaration piercing the corporate veil where it includes allegations that a parent corporation "abused its control of its wholly-owned subsidiary ... by causing it to engage in harmful transactions that now shield billions of dollars in assets from plaintiffs and expose them liability" (*ABN Amro Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 229 [2011]; citing *cf. East Hampton Union Free School Dist. v Sandpebble Bldrs. Inc.*, 16 NY3d 775, 776 [2011] [piercing the corporate veil claim properly dismissed where plaintiff failed to allege any harm purportedly resulting from an abuse or perversion of the corporate form]). However, an "inference of abuse does not arise ... where a corporation was formed for legal purposes or is engaged in legitimate business" (*Credit Suisse First Boston v Utrecht-America Finance Co.*, 80 AD3d 485, 488 [1st Dept 2011]; quoting *TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339-340 [1998] [dismissing alter-ego claims where it was undisputed that corporation was formed for legal purposes and was engaged in legitimate business, and plaintiff failed to show that corporation was used to commit fraud or malfeasance]).

To sufficiently plead facts indicating that an individual shareholder engaged in acts amounting to an abuse or perversion of the corporate form, plaintiff "must do more than merely allege that the individual [shareholder] engaged in improper acts or acted in 'bad faith' while acting on behalf of the corporation" (*East Hampton Union Free School Dist.*, 16 NY3d at 776). A complaint that "contains mere bare-bones allegations and is completely devoid of particularized support, as required," for a veil-piercing claim is insufficient (*Retropolis, Inc. v 14th Street Dev. LLC*, 17 AD3d 209, 211 [1st Dept 2005]). Rather, even if domination and control with respect to the transaction attacked have been adequately alleged, plaintiff must

plead "particularized statements detailing fraud or other corporate misconduct" (*Sheridan Broadcasting Corp. v Small*, 19 AD3d 331, 332 [1st Dept 2005]; quoting *Sheinberg v 177 E. 77, Inc.*, 248 AD2d 176 [1st Dept 1998]).

Whether Naturalist is simply a shareholder of Mother Nature, as it claims, or, as plaintiff alleges on information and belief, Naturalist owns Mother Nature as a wholly-owned subsidiary, is not determinative. "Parent and subsidiary or affiliated corporations are, as a rule, treated separately and independently so that one will not be held liable for the contractual obligations of the other absent a demonstration that there was an exercise of complete dominion and control" (*Sheridan Broadcasting Corp.*, 19 AD3d at 332; citing *Meshel v Resorts Intl. of N.Y.*, 160 AD2d 211, 213 [1st Dept 1990]). The following factors, none of which are dispositive, may be considered in determining whether the dominant corporation exercised complete domination and control with respect to the transaction attacked: (1) the disregard of corporate formalities; (2) inadequate capitalization; (3) intermingling of funds; (4) overlap in ownership, officers, directors and personnel; (5) common office space or telephone numbers; (6) the degree of discretion demonstrated by the allegedly dominated corporation; (7) whether dealings between the entities are at arm's length; (8) whether the corporations are treated as independent profit centers; and (9) the payment or guaranty of the corporation's debts by the dominating entity (*see Fantazia Intl. Corp. v CPL Furs New York, Inc.*, 67 AD3d 511 [1st Dept 2009])

As mentioned above, the complaint alleges that Naturalist was or is either the parent company of Mother Nature, the alter ego of Mother Nature, or the successor-in-interest to Mother Nature. The mere fact that Naturalist may be the parent company of Naturalist is insufficient in itself to allege domination and control (*Sheridan Broadcasting Corp.*, 19 AD3d at 332). Plaintiff does not allege in the complaint, or elsewhere, that Naturalist, in connection with

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Mother Nature's agreement with plaintiff, demonstrated disregard of corporate formalities, that Mother Nature was inadequately capitalized, or that there was an intermingling of funds between the two companies. Although plaintiff alleges that there is an overlap in ownership and the two companies share a common address, this is in itself insufficient to allege domination (*see Fantazia Intl. Corp.*, 67 AD3d at 511). However, the complaint also alleges, upon information and belief, that Naturalist is engaged in the same business as Mother Nature, "and now operates Mother Nature's business" and having "an identical business and common ownership Mother Nature, [Naturalist] benefitted from [plaintiff's] services in the same manner as Mother Nature" (Doc. 5-2, ex. A, Compl. at ¶¶ 4, 6). Although the affidavit of Mother Nature's chief executive officer disputes these allegations, claiming that Mother Nature still operates its own internet retail company, that Naturalist was not yet operational during the relevant time period, and that Mother Nature and Naturalist are operated separately from each other on a day-to-day basis, the court must assume the truth of plaintiff's factual allegations, absent documentary evidence conclusively refuting those allegations.

Even assuming that plaintiff has sufficiently plead Naturalist's domination over Mother Nature, it must allege that such domination was exercised in order to commit a wrong that was the proximate cause of plaintiff's loss (*see Fantazia Intl. Corp.*, 67 AD3d at 513). Plaintiff's claimed loss here was caused by Mother Nature's alleged breach of contract in failing to pay plaintiff for its services pursuant to the terms of the Insertion Order. However, there are no allegations that attribute any of Mother Nature's activities in connection with the insertion order to Naturalist's exercise of domination and control. Although plaintiff alleges that Naturalist is engaged in the same business as Mother Nature and now operates Mother Nature's business, it has not alleged particularized facts suggesting that Mother Nature, as a result, was left as

"nothing more than a judgment-proof empty shell," or that it was put in that position by Naturalist's domination (*see Fantazia Intl. Corp.*, 67 AD3d at 513).

As mentioned above, plaintiff also argues that it may maintain its two causes of action against Naturalist based on the principle of successor liability, positing that, although Naturalist was not a party to the insertion order, it "cannot escape successor liability for Mother Nature's obligations because its takeover of Mother Nature's business and websites constitutes either a de facto merger or consolidation with Mother Nature, or a mere continuation of Mother Nature's business, either of which supports a claim for successor liability" (Doc. 16, Plaintiff's opp. memo. of law at 12-13; citing *Schumacher v Richards Shear Co.*, 59 NY2d 239, 245 [1983]). *Schumacher* sets out the four circumstances in which a corporation that acquires the assets of another may be held liable for the torts of its predecessor, which include, as relevant here, where there was a consolidation or merger of the seller and purchaser, and where the purchasing corporation was a "mere continuation" of the selling corporation (59 NY2d at 245).

The de facto merger doctrine is applies "when the acquiring corporation has not purchased another corporation merely for the purpose of holding it as a subsidiary, but rather has effectively merged with the acquired corporation" (*Fitzgerald v Fahnestock & Co., Inc.*, 286 AD2d 573, 574 [1st Dept 2001]). In determining whether a de facto merger has occurred, the courts have looked to certain indicators:

> continuity of ownership; cessation of ordinary business and dissolution of the acquired corporation 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, continuity of management, personnel, physical location, assets and general business operation

(*id.* at 574). Generally, the court looks to whether the "acquiring corporation was seeking to obtain for itself intangible assets such as good will, trademarks, patents, customer lists and the right to use the acquired corporation's name" (*id.*). The underlying rationale for imposing liability on a successor by merger is to "to ensure that a source remains to pay for the victim's injuries" (*City of New York v Charles Pfizer & Co., Inc.*, 260 AD2d 174, 176 [1st Dept 1999]; quoting *Grant-Howard Assoc. v General Housewares Corp.*, 63 NY2d 291, 296-297 [1984])

The first criterion, continuity of ownership, "describes a situation where the parties to the transaction become owners together of what formerly belonged to each," exemplified by a stock-for-assets transaction "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" (*In the Matter of New York City Asbestos Litig.*, 15 AD3d 254, 256 [1st Dept 2005]; citing *Cargo Partner AG v Albatrans, Inc.*, 352 F3d 41, 47 [2d Cir 2003]). Because continuity of ownership is the "essence of a merger," it is "a necessary element of any de facto merger finding, although not sufficient to warrant such a finding by itself" (*id.* [holding that there was no continuity of ownership because the buyer paid for the acquired corporation's assets with cash, not with its own stock, and neither the purchasing corporation nor any of its shareholders had become a shareholder in the new corporation]).

Here, plaintiff argues that the following allegations are sufficient to support holding Naturalist liable as a successor under a de facto merger or mere continuation theory: (1) Naturalist was the majority or controlling shareholder in Mother Nature; (2) Mother Nature is "out of business"; (3) Mother Nature and Naturalist operate out of the same office; (4) Mother Nature and Naturalist have the same executives and employees; (5) Naturalist operates Mother Nature's former websites; (6) Naturalist offers the same services that Mother Nature formerly

offered; (7) Naturalist has the "same customers" as Mother Nature; and (8) "Naturalist is trading off of Mother Nature's goodwill" (Doc. 16, Plaintiff's opp. memo. of law at 15-16). Plaintiff contends that "[n]one of these allegations are disputed by [d]efendants," although defendants' moving and reply papers indicate otherwise. The court notes that only four of these allegations were specifically included in the complaint.

Almost all of the above-mentioned allegations appear to stem from plaintiff's interpretation of two print-outs from the NYS Department of State entity information database, retrieved March 31, 2011, which appear to show both defendants were dissolved by proclamation and annulment of authority on January 27, 2010 (Docs 14, 15, exs. A, B, DoS print-outs). This took place approximately ten months before this action was commenced by plaintiff's filing of the summons and complaint with the New York County Clerk's Office, on December 29, 2010. The complaint contains no allegations suggesting that either defendant had been dissolved at the time this action was commenced. Defendants' moving papers also make no mention of dissolution. To the contrary, the affidavit submitted by defendants, from R. Whitney Anderson, the chief executive officer of Mother Nature, Inc., and an officer of Naturalist.com, Inc., avers that "Mother Nature *is* a Delaware corporation that *maintains* its sole office in New York, New York," and "*operates* an internet retail company ..." (Doc. 5-1, Anderson affid. at ¶ 2 [*emphasis added*]). Naturalist is similarly described in the present tense.

Even accepting plaintiff's allegations to be true, the court finds that it has not sufficiently plead that Naturalist has succeeded Mother Nature's obligations under the Insertion Order pursuant to a de facto merger or mere continuance of Mother Nature's operations. First, plaintiff's bare-bones assertion that Naturalist has acquired Mother Nature's assets by operating Mother Nature's website and "trading off of Mother Nature's goodwill," lacks particularity as to

when and how this purported acquisition took place. Next, the documentary evidence provided by plaintiff refutes any allegation that a de facto merger or continuation took place in which Naturalist succeeded to Mother Nature's obligations pursuant to a de facto merger (*see Excel Graphics Tech., Inc.*, 1 AD3d 65 at 69 [the court need not accept as true factual allegations plainly refuted by documentary evidence]). The NYS DoS print-outs indicate that both corporations were dissolved on the same day. Thus, plaintiff cannot plead a necessary element of any de facto merger finding, "continuity of ownership" (*In the Matter of New York City Asbestos Litig.*, 15 AD3d at 256). In addition, plaintiff fails to provide particularized allegations supporting the "continuity of ownership" requirement because it does not claim that Naturalist purchased all of Mother Nature's assets for stock, or that the shareholders of the Naturalist became the direct or indirect shareholders of Mother Nature as a result of the Naturalist's purchase of Mother Nature's assets (*id.* at 256).

Finally, the facts of this case do not implicate the underlying rationale for imposing liability on a successor by merger, "namely, to ensure that a source remains to pay for the victim's injuries" (*id.* at 258). Notwithstanding its apparent dissolution, Mother Nature, indisputably the only party to the contract with plaintiff, has appeared by attorney in this action and may be held liable for any judgment that may be entered against it this action. Although it contests plaintiff's interpretation of the Insertion Order, it does not contend that it cannot be sued by virtue of its dissolution or purported transfer of assets. As such, there is no need to employ the exceptions to rule against successor liability, even assuming Naturalist is indeed a successor, applicable to de facto mergers or mere continuations of business.

The court notes that Mother Nature's apparent dissolution is not a bar to plaintiff maintaining this action against it. In this regard, Mother Nature maintains, through its attorney's

affirmation and the affidavit of its chief executive officer, that it continues to operate its internet retail business separate from Naturalist, as "Mother Nature, Inc." (*see e.g.* Doc. 19-1, Anderson reply affid. at ¶ 1). Although these documents may not be considered as documentary evidence in determining whether plaintiff properly plead its claims as against Mother Nature, they do suggest that any attempt by Mother Nature or plaintiff to subsequent deny Mother Nature's corporate existence would likely be precluded by the "corporation by estoppel" doctrine (*see generally Boslow Family Ltd. Partnership v Glickenhaus & Co.*, 7 NY3d 664 [2006]). Furthermore, even if Mother Nature was dissolved in January of 2010, statutory law authorizes plaintiff to maintain this suit against it. Because both Mother Nature is, or was, a Delaware corporation, the court looks to Delaware Code, title 8, § 278 (*see McCagg v Schulte Roth & Zabel LLP*, 74 AD3d 620, 626 [1st Dept 2010]). That section, in relevant part, provides the following:

> All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of 3 years from such ... dissolution ..., bodies corporate for the purpose of prosecuting and defending suits, whether civil, criminal or administrative, by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, to discharge their liabilities and to distribute to their stockholders any remaining assets, but not for the purpose of continuing the business for which the corporation was organized ...

(Del Code Ann, tit 8, § 278).

In summary, plaintiff fails to allege with the requisite particularity sufficient facts to support holding Naturalist liable for Mother Nature's alleged breach of contract, or in quantum meruit for services provided to Mother Nature, based on a "alter ego" theory or an exception to the general rule that a successor that acquires the assets of another is not liable for the debts of its

predecessor. Accordingly, the portion of defendants' motion seeking dismissal of the complaint as against Naturalist is granted.

Accordingly, it is

ORDERED that the motion of defendants, Mother Nature, Inc. and Naturalist.com, Inc., to dismiss the complaint herein is granted solely to the extent that the complaint is dismissed in its entirety as against defendant, Naturalist.com, Inc., 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 the action is severed and continued against the remaining defendant; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that defendant Mother Nature, Inc. shall serve and file an answer to the complaint within 20 days of service of a copy of this order together with notice of its entry, and that the remaining parties shall appear for a preliminary conference on March 7, 2011 at 2:15 p.m. in Part 12, 60 Centre Street, Room 212, New York, NY 10007.

This constitutes the decision and order of the court.

Dated: December 27, 2011
New York, New York

J.S.C.