SUPREME COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER
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JOSEPH DIMAURO and JOSEPH DIMAURO, AS TRUSTEE OF THE DiMAURO TRUST UNDER AGREEMENT DATED SEPTEMBER 28, 1984, AS AMENDED BY AMENDED AGREEMENT OF TRUST, DATED June 11, 1987,

Plaintiffs,

-against-

DECISION & ORDER

Index No.: 58165/12

UNTIED LLC, AGNES NANCY VARSAMES, PAUL A. VARSAMES, LOUIS VARSAMES, JOHN VARSAMES, JEAN VARSAMES, INDIVIDUALLY AND AS BENEFICIARY OF THE JEAN VARSAMES IRREVOCABLE TRUST, PAUL VARSAMES DEVELOPMENT, LLC and ANV ESTATES, LLC,

Defendants.
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ADLER, J.

The following papers numbered 1 to 70 were read on defendants' motion to dismiss the complaint pursuant to CPLR §3211(a)(1), (5) and (7):

	Papers Numbered
Notice of Motion; Affidavit of Paul A. Varsames; Exhibits	1-30
Memorandum of Law in Support	31
Affidavit in Opposition of Joseph DiMauro; Affidavit of Mark C. Durkin, Esq.; Exhibits	32-51
Memorandum of Law in Opposition; Exhibits	52-66
Reply Affirmation of Brian T. Belowich, Esq.; Exhibits	67-69
Reply Memorandum of Law	70

This action arises out of an agreement entered into on or about March 17, 2000, between plaintiff and defendant United LLC ("United") for the construction of a single-

family dwelling located at 18 Wrights Mill Road in the Town of North Castle, New York. A prior action for breach of contract and negligence in the performance of the construction agreement (Index No.: 8139/05) was dismissed by the Supreme Court, Westchester County (Bellantoni, J.) on December 13, 2005 based upon the existence of an arbitration clause in the agreement.

Following the issuance of an arbitration award in favor of plaintiff, a petition pursuant to CPLR §7510 was brought to confirm the arbitration agreement (Index No.: 14323/11). The unopposed application was granted by this Court by Decision and Order dated November 30, 2011. On May 16, 2012, plaintiff commenced this post-judgment action seeking a declaration that certain conveyances and transfers by defendant United to defendants Agnes Nancy Varsames, Paul A. Varsames, Louis Varsames, John Varsames, and Jean Varsames were fraudulent, void and a nullity.

It is alleged in the complaint that on or about November 18, 2004, plaintiff informed defendant United of his claim for improper and negligent design and construction of the residence. It is further alleged that on or about May 18, 2005, plaintiff commend an action in the Supreme Court, Westchester County seeking approximately $3.5 million in damages. As stated above, that action was dismissed on December 13, 2005.

Plaintiff contends that, based upon United's knowledge of plaintiff's claims, the following conveyances of funds from United's bank account maintained at Provident Bank during the period from July 11, 2005 to August 15, 2006 were fraudulent and made in an effort to "cover up and conceal the right, title and interest of" United. These conveyances are represented by checks dated: (1) July 18, 2005 in the amount of

$125,000.00 made payable to defendant Paul Varsames; (2) May 23, 2006 in the amount of $125,000.00 made payable to defendant Paul Varsames; (3) May 23, 2006 in the amount of $50,000.00 made payable to defendant Louis Varsames; (4) August 15, 2006 in the amount of $122,000.00 made payable to defendant Paul Varsames; (5) August 15, 2006 in the amount of $125,000.00 made payable to defendant Louis Varsames; (6) August 15, 2006 in the amount of $122,000.00 made payable to defendant John Varsames; and (7) August 15, 2006 in the amount of $122,000.00 made payable to defendant Jean Varsames Irrevocable Trust.

Defendants now seek to dismiss the first and second causes of action insofar as the allegations therein relate to the above-referenced transfers on the ground that any claims related thereto are barred by the applicable statute of limitations.

On a motion to dismiss a cause of action as barred by the statute of limitations, "a defendant bears the initial burden of establishing prima facie that the time in which to sue has expired" (*Tsafatinos v. Wilson Elser Moskowitz Edelman & Dicker, LLP*, 75 A.D.3d 546, 903 N.Y.S.2d 907, quoting *Savarese v. Shatz*, 273 A.D.2d 219, 220, 708 N.Y.S.2d 642 [internal quotations omitted]). "Only if the defendant makes such a prima facie showing does the burden then shift to the plaintiff to aver evidentiary facts establishing that the case falls within an exception to the statute of limitations" (*Philip F. v. Roman Catholic Diocese of Las Vegas*, 70 A.D.3d 765, 766, 894 N.Y.S.2d 125, quoting *Savarese v. Shatz*, 273 A.D.2d 219 [internal quotations omitted]), "or that a question of fact exists as to whether an exception applies (*Id.* at 766, citing *Santo B. v. Roman Catholic Archdiocese of N.Y.*, 51 A.D.3d at 957, 861 N.Y.S.2d 674).

Defendants contend that any claims with respect to these transfers are barred by the applicable three-year statute of limitations set forth in Limited Liability Company Law §508(c). Pursuant to Limited Liability Company Law §508, a limited liability company is prohibited from making any distributions to a member to the extent that it exceeds the fair market value of the assets of the limited liability company (LLCL §508[a]). Any member who receives a distribution in violation of the provisions of subdivision (a) and who was aware at the time that the distribution violated the provisions thereof, is liable *to the limited liability company* for the amount of the distribution (LLCL §508[b] [emphasis added]). However, "unless otherwise agreed, a member who receives a wrongful distribution from a limited liability company shall have no liability after the expiration of three years from the date of the distribution" (LLCL §508[c]).

Contrary to defendants' contention, the plain language of the statute indicates that its provisions apply to actions maintained on behalf of a limited liability company against a member thereof who receives a distribution that exceeds the fair market value of the assets of the limited liability company and who is aware of that fact at the time he or she receives the distribution. Moreover, defendants have not cited any case law in support of their contention that the provisions of Limited Liability Company Law §508 apply to actions brought by third-party creditors.[1]

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[1]Although defendants have limited their motion to the three-year statute of limitations contained in Limited Liability Company Law §508(c), the Court notes that pursuant to New York law, a claim for constructive fraud is governed by the six-year limitation set forth in CPLR §213(1), and such a claim accrues at the time the fraud or conveyance occurs (*Wall St. Assoc. v. Brodsky*, 257 A.D.2d 526, 530, 684 N.Y.S.2d 244). In the case of actual fraud, the claim is timely if an action is commenced within six years of the date that the fraud or conveyance occurs or within two years of the date that the fraud or conveyance is discovered or should have been discovered, whichever is later (*Id.*; CPLR §203[g]).

In the alternative, defendants move to dismiss the first and second causes of action pursuant to CPLR §3211(a)(1) based on a defense founded upon documentary evidence. To succeed on a motion pursuant to CPLR §3211(a)(1), the documentary evidence must "utterly refute" the plaintiff's factual allegations, "conclusively establishing a defense as a matter of law" (*Midorimatsu, Inc.v. Hui Fat Co..*, 99 A.D.3d 680, 681-682, 951 N.Y.S.2d 570, quoting *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190 [internal quotations omitted]; *Snyder v. Voris, Martini & Moore*, 52 A.D.3d 811, 812, 860 N.Y.S.2d 622). In order to qualify as "documentary," the "evidence must be unambiguous and of undisputed authenticity" (*Fontanetta v. John Doe 1*, 73 A.D.3d 78, 86, 898 N.Y.S.2d 569). While documents reflecting out-of-court transactions such as mortgages, deeds and contracts clearly qualify as "documentary evidence," (*Cives Corp. v. George A. Fuller Co., Inc.*, 97 A.D.3d 713, 714, 948 N.Y.S.2d 658, quoting *Fontanetta v. John Doe 1*, 73 A.D.3d at 83 [internal quotations omitted]), affidavits and deposition testimony do not (*Fontanetta v. John Doe 1*, 73 A.D.3d at 86). Moreover, only if the documentary evidence disproves a material allegation of the complaint is dismissal warranted (see *Snyder v. Voris, Martini & Moore*, 52 A.D.3d at 812, citing *Weiss v. TD Waterhouse,* 45 A.D.3d 763, 847 N.Y.S.2d 94).

Although not specifically plead in the complaint, in opposition to defendant's motion plaintiff states that the claims asserted in the first and second causes of action are claims of constructive fraud under DCL §273, §273-a and §274, as well as a claim for actual fraud under DCL §276.

In order to state a claim pursuant to DCL §273, a plaintiff must establish that the debtor made a conveyance, that it was insolvent prior to the conveyance or rendered insolvent thereby, and that the conveyances were made without fair consideration (*Wall St. Assoc. v. Brodsky*, 257 A.D.2d 526, 528, 684 N.Y.S.2d 244). "A finding of constructive fraud * * * may thus be predicated upon proof of insolvency and lack of fair consideration, without a showing of actual motive or intent to defraud" (*Zanani v. Meisels*, 78 A.D.3d 823, 824, 910 N.Y.S.2cd 533, quoting *American Panel Tec. v. Hyrise, Inc.*, 31 A.D.3d 586, 587, 819 N.Y.S.2d 768) [internal quotations omitted]). The insolvency element can be sufficiently made out from a complaint where it is alleged that the defendant debtor was judgment-proof when plaintiff attempted to enforce its judgment (*Id.*). Lastly, the "[f]airness of the consideration is a question of fact and an intra-family transaction places a heavier burden on defendant to demonstrate fairness" (*Id.*).

Similarly, under DCL §274 a plaintiff is required to allege that defendant fraudulently made "conveyance[s] * * * without fair consideration," which left the defendant with "unreasonably small capital."

A claim pursuant to DCL §276 addresses actual fraud and does not require proof of unfair consideration or insolvency (*Wall St. Assoc. v. Brodsky*, 257 A.D.2d at 529). Additionally, "[d]ue to the difficulty of proving actual intent to hinder, delay, or defraud creditors, the pleader is allowed to rely on 'badges of fraud' to support his case, i.e., circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent" (*Id.*, quoting *Pen Pak Corp. v. LaSalle Natl. Bank of*

Chicago, 240 A.D.2d 384, 386, 658 N.Y.S.2d 407 [internal quotations omitted]; see also *Steinberg v. Levine*, 6 A.D.3d 620). Examples of such circumstances include a close relationship between the parties to the alleged fraudulent transfer, a questionable transfer not in the transferor's usual course of business, the inadequacy of the consideration, the transferor's knowledge of the creditor's claim and the inability to pay it, and the retention by the transferor of control of the property after the conveyance (*Wall St. Assoc. v. Brodsky*, 257 A.D.2d at 529).

The checks and deeds fail to show conclusively that the transfer of funds were not fraudulent and the affidavit submitted by defendant Paul Versames in opposition to the motion does not constitute "documentary evidence" within the meaning of CPLR §3211(a)(1) (see *Flowers v. 73rd Townhouse, LLC*, 99 A.D.3d 431, 951 N.Y.S.2d 393, 394). Without the affidavit, it cannot be concluded that the transfers were not fraudulent (see *Id.*). In any event, the evidence submitted in support of the motion does not utterly refute the plaintiff's allegations and conclusively establish a defense as a matter of law (see *Granada Condominium III Assn. v. Palomino*, 78 A.D.3d 996, 913 N.Y.S.2d 668).

However, insofar as plaintiff seeks to assert a claim pursuant to DCL §273-a,[2] with the exception of the July 18, 2005 transfer, no action was pending at the time of the conveyances alleged in the complaint, nor does the complaint allege the existence

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[2]"Pursuant to DCL §273-a, [e]very conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such an action or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment."

of an unsatisfied judgment, an essential element of a cause of action under this provision (see *Coyle v. Lefkowitz*, 89 A.D.3d 1054, 1056, 934 N.Y.S.2d 216). Consequently, any claim pursuant to this statutory provision should be limited to this single transfer.

Defendants further move to dismiss the third (conspiracy to defraud creditors) and eighth (piercing the corporate veil) causes of action pursuant to CPLR §3211(a)(7), to dismiss the fourth cause of action pursuant to CPLR §§3211(a)(7) and 3016(b), and the fifth, sixth and seventh causes of action (successor liability) pursuant to CPLR §§3211(a)(1) and (7).

On a motion to dismiss pursuant to CPLR §3211(a)(7) for failure to state a cause of action, the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190; *Leon v. Martinez*, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 638 N.E.2d 511; *Euell v. Incorporated Vil. of Hempstead*, 57 A.D.3d 837; 871 N.Y.S.2d 224; *Well v. Rambam*, 300 A.D.2d 580, 753 N.Y.S.2d 512; *Jacobs v. Macy's East*, 262 A.D.2d 607, 693 N.Y.S.2d 164). Further, a court may consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*Lucia v. Goldman*, 68 A.D.3d 1064, 893 N.Y.S.2d 90; see also *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 389 N.Y.S.2d 314, 357 N.E.2d 970).

Where evidentiary material is submitted in support of the motion, the court must determine whether the proponent of the pleading has a cause of action, not whether the

proponent has stated one (*Cog-Net Bldg. Corp. v. Travelers Indemnity* Co., 86 A.D.3d 585, 586, 927 N.Y.S.2d 669, quoting *Rietschel v. Maimonides Med. Ctr.,* 83 A.D.3d 810, 810, 921 N.Y.S.2d 290; *Peter F. Gaito Architecture v. Simone Dev. Corp.*, 46 A.D.3d 530, 531, 846 N.Y.S.2d 368). "[U]nless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" (*Norment v. Intervaith Ctr. of New* York, 98 A.D.3d 955, 956, 951 N.Y.S.2d 531, citing *Guggenheimer v. Ginzburg,* 43 N.Y.2d at 274-275).

Defendants move to dismiss the third cause of action for conspiracy to defraud creditors pursuant to CPLR §3211(a)(7) on the ground that New York does not recognize an independent cause of action for civil conspiracy to commit a tort. In the absence of a properly plead claim of fraud, a claim of conspiracy to commit fraud is not viable since the State of New York does not recognize an independent cause of action in tort for conspiracy (*Waggoner v. Caruso*, 68 A.D.3d 1, 6, 886 N.Y.S.2d 368, *affd.* 14 N.Y.3d 874, 903 N.Y.S.2d 17, 929 N.E.2d 396, citing *Salerno v. Pandick, Inc.*, 144 A.D.2d 307, 308, 534 N.Y.S.2d 179). In light of the Court's holding with respect to defendants' motion to dismiss the first and second causes of action pursuant to CPLR §3211(a)(1), the complaint adequately sets forth a claim for conspiracy to commit fraud. Nor does the evidentiary material submitted in support of the motion that a material fact as claimed by the plaintiff to be one is not a fact at all and/or that no significant dispute exists regarding it.

In the eighth cause of action, plaintiff seeks to pierce the corporate veil to impose liability on defendant "Paul Varsames doing business as Paul Varsames Development" based upon the same claims of fraudulent conveyance.

As a general rule, a corporation exists independently of its owners, who are not personally liable for its obligations, and individuals may incorporate for the express purpose of limiting their liability (*see Bartle v. Home Owners Coop.*, 309 N.Y. 103, 106, 127 N.E.2d 832). An exception to this general rule is the concept of piercing the corporate veil which permits, in certain circumstances, the imposition of personal liability on owners for the obligations of their corporation (*Matter of Morris v. New York State Dept. of Taxation & Fin.*, 82 N.Y. 2d 135, 140-141, 603 N.Y.S.2d 807, 623 N.E. 2d 1157). "The corporate or limited liability company veil will be pierced to achieve an equitable result, among other instances, when a corporation [or limited liability company] has been so dominated by * * * another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called the other's alter ego" (*Last Time Beverage Corp. v. F & V Distrib. Co.*, 98 A.D.3d 947, 950, 951 N.Y.S.2d 77, quoting *Austin Powder Co. v. McCullough*, 216 A.D.2d 825, 827, 628 N.Y.S.2d 855 [internal quotations omitted]).

A party seeking to pierce the corporate veil must demonstrate 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" (*Matter of Morris v. New York State Dept. of Taxation & Fin.*, 82 N.Y. 2d at 141; *Love v. Rebecca Dev., Inc.*, 56 A.D.3d 733, 733,

868 N.Y.S.2d 125; *Millennium Constr., LLC v. Loupolover,* 44 A.D.3d 1016, 1016, 845 N.Y.S.2d 110). The party "must further establish that the controlling corporation abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene" (*Love v. Rebecca Dev., Inc.,* 56 A.D.3d 733 [citations omitted]; see *Gateway I Group, Inc. v. Park Ave. Physicians, P.C.,* 62 A.D.3d 141, 877 N.Y.S.2d 95). Factors to be considered in determining whether the owner has "abused the privilege of doing business in the corporate form" include whether there was a "failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use" (*Millennium Constr., LLC v. Loupolover,* 44 A.D.3d at 1016-1017, 845 N.Y.S.2d 110;).

The complaint here alleges that Paul Varsames d/b/a Paul Varsames Development exercised complete domination and control over United, that Paul Varsames d/b/a Paul Varsames Development and United had overlapping ownership and personnel, both companies shared the same office space and telephone numbers, monies or funds of United were used by Paul Varsames and Paul Varsames d/b/a Paul Varsames Development, and that United was inadequately capitalized and intermingled funds with Paul Varsames d/b/a Paul Varsames Development. Thus, the eighth cause of action adequately pleads a cause of action (see *Last Time Beverage Corp. v. F & V Distrib. Co.*, 98 A.D.3d 947; *Grammas v. Lockwood Assoc., LLC*, 95 A.D.3d 1073, 944 N.Y.S.2d 623), and the evidentiary material submitted in support of the motion does not establish that a material fact as claimed by the plaintiff to be one is not a fact at all and/or that that no significant dispute exists regarding it.

Defendants seek to dismiss the fourth cause of action pursuant to CPLR §3211(a)(7) and 3016(b). It is alleged therein that in or about 2006, defendant United transferred all of its assets, good will, business premises, telephone numbers, employees, customer lists and accounts receivable to Paul Varsames doing business as Paul Varsames Development. It is further alleged that the transfer was made to cover up and conceal the right, title and interest of United, was done without fair consideration therefor, and with the intent to hinder, delay and defraud the plaintiff. Lastly, it is alleged that as a result of the transfer, United "retained little or no capital with which to meet its obligations and especially the transaction with and claims of the plaintiffs herein," and that the transfer rendered United insolvent.

Plaintiff has adequately pleaded a cause of action under DCL §276. The allegations of a deliberate attempt to stave off creditors by putting property in such a form and place that plaintiff could not reach it sufficed in support of his claim (see *AMP Servs., Ltd. v. Walanpatrias Found.*, 34 A.D.3d 231, 232, 824 N.Y.S.2d 37; *Pen Pak Corp. v. LaSalle Natl. Bank of Chicago*, 240 A.D.2d 384, 658 N.Y.S.2d 407; *Flushing Sav. Bank v. Parr*, 81 A.D.2d 655, 438 N.Y.S.2d 374, *appeal dismissed* 54 N.Y.2d 770, 443 N.Y.S.2d 61, 426 N.E.2d 752). Although CPLR §3016(b) requires a plaintiff to detail the allegedly fraudulent conduct , "that requirement should not be confused with unassailable proof of fraud" (*Pludeman v. Northern Leasing Sys., Inc.*, 10 N.Y.3d 486, 492, 860 N.Y.S.2d 422, 890 N.E.2d 184). Furthermore, the evidentiary material submitted in support of the motion fails to establish that a material fact as claimed by the plaintiff to be one is not a fact at all and/or that no significant dispute exists regarding it.

The fifth, sixth and seventh causes of action allege two theories of successor liability as to defendants Paul Varsames d/b/a Paul Varsames Development (fifth and seventh causes of action) and Paul Varsames Development, LLC (sixth cause of action).

The general rule is that a corporation that acquires the assets of another corporation is not liable for the torts of its predecessor. There a four exceptions to this rule. A corporation may have successor liability if: "(1) it expressly or impliedly assumed 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 was entered into fraudulently to escape such obligations" (*Schumacher v Richards Shear Co.*, 59 N.Y.2d 239, 245, 464 N.Y.S.2d 437, 451 N.E.2d 195). The second and third exceptions "are based on the concept that a successor that effectively takes over a company in its entirety should carry the predecessor's liabilities as a concomitant to the benefits it derives from the good will purchased" (*Grant-Howard Assoc. v. General Housewares Corp.*, 63 N.Y.2d 291, 296, 482 N.Y.S.2d 225, 472 N.E.2d 1).

In the fifth cause of action, it is alleged that Paul Varsames d/b/a Paul Varsames Development was a mere continuation of United in that it acquired its assets, business location, employees, management and good will, and that United stopped doing business in 2006. It is further alleged that Paul Varsames d/b/a Paul Varsames Development was the dominant owner of United and continued to own United along with other family members. In the sixth cause of action it is alleged that defendant Paul Varsames Development, LLC is a mere continuation of defendant Paul Varsames d/b/a

Paul Varsames Development in that it acquired its assets, business location, employees, telephone numbers, management and good will. It is further alleged that defendant Paul Varsames was the owner of Paul Varsames d/b/a Paul Varsames Development and is the owner of Paul Varsames Development, LLC.

Accepting the facts as alleged in the complaint as true, and according the plaintiff the benefit of every possible favorable inference, the complaint adequately pleads a cause of action for successor liability under the "mere continuation" exception. Moreover, the evidentiary material submitted in support of the motion fails to establish that a material fact as claimed by the plaintiff to be one is not a fact at all and/or that no significant dispute exists regarding it.

In the seventh cause of action, plaintiff alleges the second exception, commonly referred to as the "de facto merger doctrine" with respect to defendant Paul Varsames d/b/a Paul Varsames Development. This exception is applied in those situations where "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.*, 286 A.D.2d 573, 574, 730 N.Y.S.2d 70). "The hallmarks of a de facto merger are the continuity of ownership; cessation of ordinary business and dissolution of the predecessor 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, a continuity of management, personnel, physical location, assets, and general business operation" (*Matter of AT & S Transp. v. Odyssey Logistics & Tech. Corp.*, 22 A.D.3d 750, 751 803

N.Y.S.2d 118, quoting *Fitzgerald v. Fahnestock & Co.,* 286 A.D.2d at 574 [internal quotations omitted).

However, not all of these elements are necessary for a finding of a de facto merger. "Courts will look to whether the acquiring corporation was to obtain for itself intangible assets such as good will, trademarks, patents, customer lists and the right to use the acquired corporation's name" (*Fitzgerald v. Fahnestock & Co.*, 286 A.D.2d at 574-575). Additionally, if a corporation "is shorn of its assets and has become, in essence, a shell," the legal dissolution of the corporation is not required in order for a court to make a finding of a de facto merger (*Id.* at 575).

To the extent defendants seek dismissal pursuant to CPLR §3211(a)(1), as stated above, the affidavit submitted by defendant Paul Varsames does not constitute "documentary evidence" within the meaning of CPLR §3211(a)(1) (see *Flowers v. 73rd Townhouse, LLC*, 99 A.D.3d 431), and the documentary evidence submitted does not conclusively establish a defense to the asserted claims as a matter of law. Moreover, plaintiff has adequately plead a de facto merger (see *AT & S Transp., LLC v. Odyssey Logistics & Technology Corp.*, 22 A.D.3d 750, 803 N.Y.S.2d 118), and the evidentiary material submitted in support of the motion fails to establish that a material fact as claimed by the plaintiff to be one is not a fact at all and/or that no significant dispute exists regarding it.

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss the complaint pursuant to CPLR §3211 is GRANTED to the extent that any claim in the first and second causes of action

based on DCL §273-a should be limited to the July 18, 2005 transfer and in all other respects is DENIED; and it is further

ORDERED, that the parties appear in the Preliminary Conference Part on January 28, 2013 at 9:30 a.m.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
January 8, 2013

HON. LESTER B. ADLER
SUPREME COURT JUSTICE

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