Cullens v A.O. Smith Water Prods. Co.
2013 NY Slip Op 30393(U)
February 21, 2013
Supreme Court, New York County
Docket Number: 113473/04
Judge: Sherry Klein Heitler
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SCANNED ON 2/26/2013

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER
Justice

PART 30

Index Number : 113473/2004
CULLENS, DOROTHY
vs.
A.O. SMITH WATER PRODUCTS CO.
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. 113473/04

MOTION DATE ____________

MOTION SEQ. NO. 001

The following papers, numbered 1 to ____ , were read on this motion to/for ____________

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____________ | **No(s).** ____________

Answering Affidavits — Exhibits ____________ | **No(s).** ____________

Replying Affidavits ____________ | **No(s).** ____________

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the memorandum decision dated 2.21.13

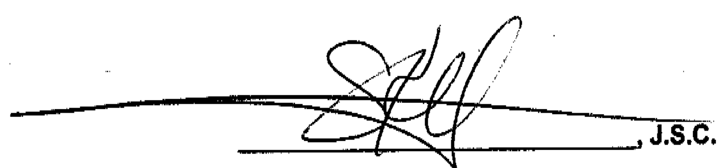
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ____________

FOR THE FOLLOWING REASON(S): ____________

FILED

FEB 26 2013

NEW YORK
COUNTY CLERK'S OFFICE



Dated: 2.21.13 ____________, **J.S.C.**

HON. SHERRY KLEIN HEITLER

1. **CHECK ONE:** .... ☐ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** ....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** .... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
   ☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

--X

DOROTHY CULLENS, as Administratrix for the Estate of JOSEPH L CULLENS, and DOROTHY CULLENS, Individually

Plaintiffs,

-against-

A.O. SMITH WATER PRODUCTS CO., et al.,

Defendants.

--X

KOHLER CO.,

Defendant/Third-Party Plaintiff,

-against-

APPROVED OIL CO. OF BROOKLYN, INC, Individually and as successor-in-interest to MVC HEATING CORPORATION d/b/a BELL FUEL OIL COMPANY, et al.,

Third-Party Defendants.

--X

Index No. 113473/04
Motion Seq. 001

DECISION & ORDER

T/P Index No. 590486/12

FILED
FEB 26 2013
NEW YORK
COUNTY CLERK'S OFFICE

SHERRY KLEIN HEITLER, J.:

Third-party defendant Approved Oil Co. of Brooklyn, Inc. ("Approved Oil") moves pursuant to CPLR 3211 to dismiss the third-party complaint against it bearing Index No. 590486/12. For the reasons set forth below, the motion is denied.

BACKGROUND

The underlying personal injury action was commenced on or about September 21, 2004. The complaint alleges that plaintiff's decedent Joseph Cullens was exposed to asbestos containing products manufactured, distributed, sold, or installed by the defendants.

In or about September, 2011, this matter was assigned to the September 2012 FIFO trial

cluster and discovery commenced. On April 23, 2012, Michael Coppola was deposed as a fact witness.[1] Mr. Coppola testified that he owned MVC Corporation "D/B/A"[2] Bell Fuel Oil Company ("MVC") where Mr. Cullens had worked as a service technician from 1980 to 2003. He provided testimony regarding Mr. Cullens' asbestos exposure during that time period.

Although Mr. Coppola testified that he still owns MVC, he also testified that he sold MVC to Approved Oil in or about November of 2011 (Deposition pp. 26-28, 102, 124-25). Based on such testimony, defendant Kohler filed the third-party complaint herein bearing Index No. 590486/12 naming "Approved Oil, Individually and as successor-in-interest to MVC Heating Corporation d/b/a Bell Fuel Oil Company" as a third party defendant. The third-party complaint seeks indemnification of Kohler in the event that a judgment is entered against it in the primary underlying action.

By letter dated August 1, 2012, Approved Oil requested that Kohler withdraw the third-party complaint against it on the ground that it is not the successor-in-interest to MVC. Approved Oil advised Kohler that the November, 2011 transaction testified to by Mr. Coppola was not a corporate sale, but an asset purchase pursuant to an asset purchase agreement dated as of November 21, 2011 ("APA") between MVC and Bell Fuel Oil, LLC ("Bell Fuel"), a separate corporate entity that had been formed in October of 2011. The APA provides that MVC sold to Bell Fuel certain tangible and intangible assets, including customer lists, goodwill, burner-service contracts, accounts receivable, telephone and fax numbers, delivery and service vehicles, parts, inventory, tools, communication equiptment, and use of the trade name "Bell Fuel Oil Co." The APA includes a non-compete clause by which Mr. Coppola agreed not to compete with Bell Fuel. Approved Oil

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[1] A copy of his deposition transcript is submitted as defendant's exhibit B ("Deposition").

[2] See Deposition pp. 19, 81.

contends that after the APA was executed, Bell Fuel hired Mr. Coppola as a non-managerial salaried employee and that he was not granted any ownership rights in the company.

Approved Oil filed this motion to dismiss on August 6, 2012. On September 17, 2012, Kohler amended the third-party complaint to add "MVC Heating Corporation" and "Bell Fuel Oil, LLC, Individually and as successor-in-interest to MVC Heating Corporation", as third-party defendants.

On September 28, 2012, Kohler forwarded two partially executed No Opposition Summary Judgment Motions to Approved Oil for signature. On October 1, 2012, Kohler amended the third-party complaint by removing Approved Oil as a third-party defendant.

Notwithstanding, Approved Oil advised it would not execute the No Opposition Summary Judgment Motion and would continue to pursue this motion to dismiss because the amended third-party complaint names Bell Fuel as a third-party defendant. Approved Oil argues that pursuant to the APA, MVC specifically retained all tort liabilities arising out of events that occurred prior to November 21, 2011, including Mr. Cullens' alleged asbestos exposure, and Bell Fuel thus is not a proper party to this action. Kohler opposes on the ground that Bell Fuel assumed MVC's liabilities as its successor-in-interest.

DISCUSSION

Initially, the court notes that the notice of motion herein was filed on behalf of Approved Oil, an entity which is no longer a party to the third-party action. As there was no request to amend the notice on Bell Fuel's behalf, the motion as it relates to Approved Oil is moot. In reply, the defendant asks the court to treat this motion as having been brought on Bell Fuel's behalf as well.[3]

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[3] See defendant's reply memorandum of law, dated October 17, 2012, at 1, n. 1.

In the interests of judicial economy, the court will consider the motion on the merits.

CPLR 3211(a)(1) provides, in part, that a "party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . [a] defense is founded upon documentary evidence . . . ." In determining a motion to dismiss under CPLR 3211, the court is bound to "liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" and to "accord plaintiffs the benefit of every possible inference." *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 (2002). In order to prevail on a motion to dismiss based on documentary evidence, "the documents relied upon must definitively dispose of plaintiff's claim." *Bronxville Knolls v Webster Town Ctr. Partnership*, 221 AD2d 248, 248 (1st Dept 1995). "Such a motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 (2002).

The defendant argues that the third-party complaint should be dismissed because Bell Fuel explicitly declined to acquire MVC's liabilities under the APA. However, under well-settled New York law, a corporation which acquires the assets of another may nevertheless be deemed to have acquired a selling corporation's tort liabilities. This may occur where: (1) the purchasing corporation expressly or impliedly assumes the predecessor's tort liability; (2) there is a *de facto* merger of seller and purchaser; (3) the purchasing corporation is a mere continuation of the selling corporation; or (4) the transaction is entered into fraudulently to escape such obligations. *See Schumacher v Richards Shear Co.*, 59 NY2d 239, 245 (1983).

In this case, Kohler argues that the APA resulted in a *de facto* merger between MVC and Bell Fuel. *See Van Nocker v A.W. Chesteron, Co.*, 15 AD3d 254, 256 (1st Dept 2005) (a transaction

structured as an asset purchase may be deemed a *de facto* merger).[4] In turn, the defendant contends that Kohler's *de facto* merger claims must be rejected as a matter of law because the presence of continuity of ownership is necessary to all *de facto* merger claims and no such continuity is present here. *See Cargo Partner AG v Albatrans, Inc.*, 352 F3d 41, 47 (2d Cir 2003) (applying New York law). In this respect, defendant argues that the asset purchase was an all-cash transaction as opposed to a stock transfer. In support defendant relies on the affidavit of Bell Fuel's owner, Mr. Vincent Theurer[5], who avers, among other things, that no shareholders of MVC became direct or indirect shareholders of Approved Oil or Bell Fuel under the APA.[6] Article II thereof, which pertains to the closing of the sale, has been redacted almost in its entirety. Moreover, the APA refers to several exhibits and schedules as attachments that are not included as part of the record on this motion. Without a complete and unredacted copy of the APA, the court cannot determine whether the defendant's claims are accurate. Therefore, the defendant's motion is denied.

Moreover, several New York State cases suggest that continuity of ownership is not strictly required to assert a *de facto* merger claim. *See Fitzgerald, supra*, at 575 (*de facto* merger doctrine is premised 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

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[4] The hallmarks of a *de facto* merger include: "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. *Fitzgerald v Fahnestock & Co.*, 286 AD2d 573, 574-575 (1st Dept 2001).

[5] Mr. Theurer's affidavit, sworn to on August 6, 2012, is submitted in support of defendant's motion in chief.

[6] The APA is submitted as exhibit "2" to the motion in chief.

will purchased."); *see also Matter of AT&S Transp., LLC v Odyssey Logistics & Tech. Corp.*, 22 AD3d 750, 752 (2d Dept 2005) (*de facto* merger factors should be "analyzed in a flexible manner that disregards mere questions of form and asks whether, in substance, it was the intent of the successor to absorb and continue the operation of the predecessor."); *Sweatland v Park Corp.*, 181 AD2d 243, 246 (4th Dept 1992) (theories of successor liability are rooted in equity and "[p]ublic policy considerations dictate that, at least in the context of tort liability, courts have flexibility in determining whether a transaction constitutes a *de facto* merger").[7]

In any event, the merits of Kohler's *de facto* merger claim cannot be addressed in the context of this motion to dismiss without further disclosure from the defendants. At a minimum, it appears that there was a cessation of MVC's ordinary business operations and a continuation of those same operations by Bell Fuel using substantially all (if not all) of MVC's assets. Among other things, it appears that the telephone and fax numbers previously assigned to MVC are now used by Bell Fuel and that there is no apparent way to contact MVC by these means. These facts are sufficient to preclude dismissal and to direct the parties to promptly proceed with discovery.

The court has considered the defendant's remaining contentions and finds them to be without merit.

Accordingly, it is hereby

ORDERED that Approved Oil Co. of Brooklyn, Inc.'s motion to dismiss the third-party

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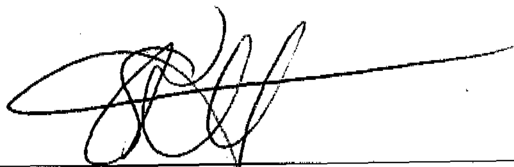
[7] In *Vill. Builders 96, L.P. v U.S. Labs., Inc.*, 121 Nev. 261, 270 (2005), the Nevada Supreme Court held that this flexible approach is "more reasonable because it properly balances the successor corporation's rights to be free from liabilities incurred by its predecessor, with the important interest involved in ensuring that ongoing businesses are not able to avoid liability by transferring their assets to another corporation that continues to operate profitably as virtually the same entity."

complaint bearing Index No. 590486/12 is denied in its entirety. The third-party defendants are directed to answer the third-party complaint herein within 20 days of service of notice of entry of this decision and order.

This constitutes the decision and order of the court.

DATED: 2-21-13



SHERRY KLEIN HEITLER
J.S.C.

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