

**Leaf Capital Funding, LLC v Morelli Alters Ratner,
P.C.**

2013 NY Slip Op 32475(U)

October 8, 2013

Supreme Court, New York County

Docket Number: 654233/2012

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____
CYNTHIA S. KERN
J.S.C. Justice

PART _____

Index Number : 654233/2012
LEAF CAPITAL FUNDING, LLC
vs
MORELLI ALTERS RATNER, P.C.
Sequence Number : 002
DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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 annexed decision.

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

Dated: 10/9/13

CK
CYNTHIA S. KERN
J.S.C., J.S.C.

- 1. CHECK ONE: CASE DISPOSED
- 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 55

-----X
LEAF CAPITAL FUNDING, LLC,

Plaintiff,

Index No. 654233/2012

-against-

DECISION/ORDER

MORELLI ALTERS RATNER, P.C. as successor by merger
and/or successor by interest to MORELLI RATNER, P.C.
d/b/a MORELLI RATNER,

Defendant.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affirmations in Opposition.....	<u>2</u>
Replying Affidavits.....	<u>1</u>
Exhibits.....	<u>3</u>

On or about December 5, 2012, plaintiff commenced the instant action against defendant Morelli Ratner, P.C. (“Morelli Ratner”) asserting claims for breach of contract, statement of account and replevin. Thereafter, plaintiff moved to amend its complaint to add defendant Morelli Alters Ratner, P.C. (“MAR”) as an alleged successor by merger and/or successor an interest to Morelli Ratner, which this court granted. MAR now moves for an order pursuant to CPLR § 3211(a)(1) and (a)(7) dismissing plaintiff’s first and second causes of action for breach of contract and statement of account. For the reasons set forth below, defendant’s motion is denied.

The relevant facts are as follows. This action was commenced by plaintiff to collect the sum of \$93,489.38 based upon Morelli Ranter's alleged breach of a written Equipment Lease Agreement (the "Lease") entered into between the parties on or about January 28, 2011. In its original complaint, plaintiff asserted claims for breach of contract, statement of account and replevin. On or about May 22, 2013, by order of this court, plaintiff served an amended complaint asserting an additional claim of successor liability against MAR on the ground that Morelli Ratner merged with Alters Law Firm to form the new corporate entity MAR and as such MAR is a successor by merger and/or successor in interest to Morelli Ratner. MAR now brings the instant motion to dismiss arguing that the documentary evidence clearly establishes that it is not a successor of, nor did it merge, with Morelli Ratner and as such it is not responsible for Morelli Ratner's liabilities. Additionally, MAR argues that it cannot be held liable under a breach of contract claim or an account stated claim as there is no privity between plaintiff and MAR.

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). "[A] complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept 1990). "In order to prevail on a motion to dismiss based on documentary evidence pursuant to CPLR 3211(a)(1), the documents relied upon must definitively dispose of plaintiff's claim." *Bronxville Knolls, Inc., et al. v. Webster Town Ctr. Partnership*, 221 A.D.2d 248 (1st Dept 1995).

Generally, a corporation which acquires the assets of another is not liable for the torts or

contractual obligations of its predecessor. *Schumacher v Richards Shear Co, Inc.*, 59 N.Y.2d 239 (1983); *see also Fitzgerald v. Fahenstock & Co.*, 286 A.D.2d 573 (1st Dept 2001). However, in *Schumacher*, the court identified four exceptions to this rule. Under *Schumacher*, a successor corporation may be liable when: “(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 is entered into fraudulently to escape such obligations.” *Schumacher*, 59 N.Y.2d at 244. In order to impose liability under the second exception—a de facto merger theory of liability—plaintiff must demonstrate “cessation of ordinary business operations and the dissolution of the selling corporation as soon as possible after the transaction.” *Van Nocker v. A.W. Chesterton Co.*, 15 A.D.3d 254, 256 (1st Dept 2005). However, the dissolution criterion “may be satisfied, notwithstanding the selling corporation’s continued formal existence, if that entity is shorn of its assets and has become, in essence, a shell.” *Id.* at 257.

In the instant action, MAR’s motion to dismiss plaintiff’s complaint is denied as it has failed to present documentary evidence that definitely establishes it cannot be held liable under any of the *Shumacher* exceptions to successor liability. Pursuant to CPLR § 3211 (a)(1), “[a] party may move for judgment dismissing one or more cause of action asserted against him on the ground that . . . a defense is founded upon *documentary evidence*.” (emphasis added). “[A] dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994). What constitutes “documentary evidence” may vary in each instance. However, “[i]t is clear that affidavits and deposition testimony are not “documentary evidence” within the intendment of a

CPLR 3211 (a)(1) motion to dismiss.” *Fontaneta v. John Doe 1*, 73 A.D.3d 78, 87 (2nd Dept 2010). Here, MAR presents only the affidavit of Benedict P. Morelli, president of both Morelli Ratner and MAR, to support its contention that is it not a successor in interest and/or successor by merger to Morelli Ratner. As this affidavit is not documentary evidence, MAR’s motion to dismiss must be denied.

Additionally, to the extent that MAR relies on the print out from the New York State Department of State website listing Morelli Ratner as an active corporation as evidence that it cannot be held liable under a de facto merger theory of successor liability, such reliance is unavailing as the dissolution criterion “may be satisfied, notwithstanding the selling corporation’s continued formal existence.” *See Van Nocker*, 15 A.D.3d at 256. Accordingly, on this motion to dismiss, it is immaterial that Morelli Ratner is still an active corporation.

MAR’s remaining arguments regarding the lack of privity for a breach of contract claim or account stated claim are misplaced and unavailing as plaintiff is not asserting a direct claim for breach of contract or account stated against MAR but seeking to hold MAR liable for these causes of action through a claim of successor liability. Indeed, there would never be privity of contract with a successor corporation as they did not exist when the contract was first entered into.

Accordingly, MAR’s motion to dismiss plaintiff’s complaint is hereby denied in its entirety. This constitutes the decision and order of the court.

Dated: 10/8/13

Enter: _____

CK

CYNTHIA S. KERN
J.S.C.