RCPI Landmark Props., LLC v Adam Harwood, D.M.D.P.C.
2015 NY Slip Op 32225(U)
November 23, 2015
Supreme Court, New York County
Docket Number: 151832/2015
Judge: Cynthia S. Kern

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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RCPI LANDMARK PROPERTIES, LLC
Plaintiff,

Index No. 151832/2015

-against-

DECISION/ORDER

ADAM HARWOOD, D.M.D.P.C., ADAM SCOT HARWOOD, D.M.D., P.C. AND ADAM HARWOOD, D.M.D.,
Defendants.

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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.....	1
Answering Affidavits.....	2
Cross-Motion and Affidavits Annexed.....	
Answering Affidavits to Cross-Motion.....	
Replying Affidavits.....	3
Exhibits.....	4

The plaintiff, a commercial landlord, has brought the present action against its former tenant Adam Harwood, D.M.D., P.C. ("Harwood PC") to recover rent, use and occupancy and other damages pursuant to the lease. It asserts claims against defendant Adam Scot Harwood, D.M.D., P.C. ("Scot Harwood PC") on the ground that Scot Harwood PC is a successor to the liabilities of Harwood PC as a result of its continuation of Harwood PC's business or its de facto merger with Harwood PC. Plaintiff also has brought a claim against the individual Adam Harwood on the ground that he guaranteed certain obligations under the lease. Defendants have brought the present motion for summary judgment dismissing the second cause of action asserted against Scot Harwood PC and the third cause of action asserted against Adam Harwood. As will

be explained more fully below, the motion for summary judgment is denied with respect to the second cause of action asserted against Harwood PC but is granted with respect to the third cause of action asserted against Adam Harwood.

The relevant facts are as follows. The defendant tenant Harwood PC operated a dentist practice in the suite it leased from plaintiff from 1996 through 2013. On July 1, 1996, plaintiff and Harwood PC entered into a commercial lease for a suite in the building. In 2007, the plaintiff and tenant Harwood PC executed a first amendment to the lease whereby they extended the expiration of the lease term to March 2025. Defendant Adam Harwood also entered into a limited guaranty of the lease on August 1996. The guaranty provided as follows:

> Notwithstanding anything to the contrary contained herein, the obligation here of the Guarantor shall be limited to the payment of an amount not more than $24,576.00 (the "Guaranty Amount"), except that... if on the fourth anniversary of the term commencement date, the Tenant (i) is not then in default in the due keeping, observance or performance of any term or condition of this Lease and (ii) has not previously been served during the immediately preceding 12 month period with a default notice for a non-payment of fixed rent, then, on and after such fourth anniversary, this Guaranty shall be of no further force or effect.

In its complaint, the plaintiff alleges that the tenant Harwood PC stopped paying rent in October 2014 and that the plaintiff obtained a default judgment of possession against Harwood PC in December 2014. It further alleges that Scot Harwood PC was created in March 2013 for the purpose of assuming and continuing the business operations of Harwood PC. It further alleges, upon information and belief, that Scot Harwood PC is owned and controlled by the same individual as Harwood PC (Alex Harwood); that Scot Harwood PC is carrying on the same business under the same trade name as Harwood PC; that Scot Harwood PC shares patients, clients and customers with Harwood PC; that Scot Harwood PC employs the same individuals as

Harwood PC; that Scot Harwood PC utilizes the same email, website, social media, logos and marketing materials of Harwood PC; that Scot Harwood PC assumed Harwood PC's account receivables and certain of Harwood PC's liabilities without payment of consideration therefor; and that Scot Harwood PC succeeded to Harwood PC's interest in furniture, medical equipment, other personal property and trade fixtures without payment of any consideration.

Defendant Adam Harwood has submitted an affidavit in support of the motion for summary judgment in which he alleges that in 2012, he decided that the dental practice being operated at the leased premises was no longer profitable and that a change was required. As a result, he entered into contracts with Dr. Jonathen Kamen to acquire the dental practice operated by Kamen in Greenwich Village. He and Kamen entered into a dental practice asset purchase agreement pursuant to which he agreed to pay Kamen $50,000 for the tangible assets, $350,000 for Kamen's goodwill, and $150,000 for the restrictive covenant not to compete and $900,000 for the commercial cooperative apartment. By assignment dated April 30, 2013, he signed the rights in and to the contract to Scot Harwood PC. In 2013, Scot Harwood PC closed on the purchase of the dentist practice from Kamen.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

Initially, the court finds that defendant Scot Harwood PC is not entitled to summary judgment dismissing the claim against it for successor liability. The general rule is that a corporation which acquires the assets of another is not liable for the torts or contractual obligations of its predecessor unless: "(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 v. Richards Shear Co, Inc.*, 59 N.Y.2d 239, 244 (1983). *See also Sweatland v. Park Corp.*, 181 A.D.2d 243 (4th Dept 1992). The de facto merger doctrine is an exception to the general rule that an acquiring corporation does not become responsible for the liabilities of the acquired corporation. *Fitzgerald v. Fitzgerald*, 286 A.D.2d 573 (1st Dept 2001). The doctrine is applied when the acquiring corporation has effectively merged with the acquired corporation rather than purchasing another corporation for the purpose of holding it as a subsidiary. *Id.* at 574. The "hallmarks of a defacto 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...Not all of these elements are necessary to find a defacto merger. Courts will look 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.* at 574-575. In *Burgos v. Pulse Combustion*, the First Department affirmed a finding that there were issues of fact with respect to whether there was mere continuation or merger successor liability where the evidence established that the purchaser purchased almost all of the

predecessor's fixed assets and intangibles, that the predecessor corporation ceased to exist soon after the sale, that the purchased corporation assumed a name nearly identical to that of the predecessor corporation, that at least one officer from the predecessor corporation was retained by the purchasing corporation and that the same products were manufactured at the plants transferred under the purchase agreement. 227 A.D. 2d 295 (1st Dept 1996).

There is a separate exception to the rule that an acquiring corporation does not become responsible for the liabilities of an acquired corporation where the purchasing corporation is a mere continuation of the selling corporation. *Schumacher*, 59 N.Y.2d at 244. In *NTL Capital, LLC v. Right Track Recording LLC,* the First Department found that the complaint sufficiently pleaded the mere continuation exception to the rule against successor liability by showing that the acquiring company had acquired the purchased company's "business location, employees, management and goodwill." 73 A.D.3d 410, 411 (1st Dept 2010).

In the present case, defendant Scot Harwood PC has failed to make a prima facie showing in its moving papers that there has not been a defacto merger between Harwood PC and Scot Harwood PC or that Scot Harwood PC is not a mere continuation of Harwood PC. Its sole argument in its moving papers is that it cannot be the de facto successor to Harwood PC because it acquired the assets and goodwill of another unrelated entity, namely Kamen. However, the fact that it acquired the assets of Kamen, by itself, is insufficient to establish a prima facie case that there was not a de facto merger between Harwood PC and Scott Harwood PC or that Scott Harwood PC was not a mere continuation of Harwood PC. It does not address any of the allegations in the complaint which allege that Scot Harwood PC was created for the purpose of assuming and continuing the business operations of the tenant Harwood PC or the other allegations in the complaint which support this allegation. Moreover, in their moving papers,

defendants do not address any of the other factors that the court considers to determine whether there has been a de facto merger or whether one business is a mere continuation of the other business, such as what assets Scot Harwood PC acquired from Harwood PC, whether there has been continuity of ownership between the two companies, whether there is continuity of management, personnel, assets and general business operations between the two companies and whether Scot Harwood acquired the trademark, customer lists, goodwill and the right to use the name of Harwood PC. Although defendants do address some of these issues in their reply papers, it is well-settled that evidence submitted for the first time in reply will not be considered by the court. *See Migdol v. City of New York*, 291 A.D.2d 201 (1st Dept 2002)("The affidavit...submitted with appellant's reply papers was properly rejected by the motion court since it sought to remedy these basic deficiencies in appellant's prima facie showing rather than respond to arguments in plaintiff's opposition papers.") Under these circumstances, defendants have failed to establish their entitlement to summary judgment dismissing the successor liability claim against Scot Harwood PC.

Defendants have established, however, that they are entitled to summary judgment dismissing the third cause of action against Adam Harwood based on his guaranty. Initially, defendants have made a prima facie showing that Adam Harwood is no longer liable pursuant to the guaranty. The guaranty unambiguously provides that "if on the fourth anniversary of the term commencement date, the Tenant (i) is not then in default in the due keeping, observance or performance of any term or condition of this Lease and (ii) has not previously been served during the immediately preceding 12 month period with a default notice for a non-payment of fixed rent, then, on and after such fourth anniversary, this Guaranty shall be of no further force or effect." In their moving papers, defendant Adam Harwood has specifically alleged in an

affidavit that the lease was not in default on the second, third or fourth anniversaries of the commencement date. In opposition, plaintiff has failed to raise any disputed issue of fact as to whether defendant Harwood PC was in default of any lease provision during the first four years of the lease. Therefore, defendants are entitled to summary judgment dismissing the claim based on the guaranty as it has expired by its own terms. Nor is plaintiff entitled to discovery on this issue as any information as to whether defendant was in default under the lease during the first four years would be in its possession.

Based on the foregoing, the third cause of action on the guaranty is dismissed and the remainder of the motion is denied. This constitutes the decision and order of the court.

Dated: 11/23/15

CK

J.S.C.

CYNTHIA S. KERN
J.S.C