NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

ADVANTAGE PRINTING, INC,

Plaintiff,

-against-

MD HOSPITALITY LLC.,

Defendant.

Index No.: 650898/2017
DECISION/ORDER
Motion Sequence No. 01

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendant's pre-answer motion to dismiss under 3211 (a) (1) and 3211 (a) (7).

Papers	**NYSCEF Documents Numbered**
Defendant's Motion	4-13
Plaintiff's Opposition	18-27

Goldberg Rimberg & Weg PLLC, New York (Steven A. Weg of counsel), for plaintiff.
Kenneth J. Glassman, Esq. New York, for defendant.

Gerald Lebovits, J.

In 2009, Joel J. Klein was the sole member of MD Catering Services LLC (MD Catering). In 2010, Esther David purchased Klein's interest in MD Catering.

In spring 2012, MD Catering hired plaintiff as a consultant to perform services including marketing tasks, designing and maintaining a website, and creating promotional items, including brochures and mailings. According to the complaint, MD Catering stopped paying plaintiff in December 2013. In February 14, 2014, plaintiff filed a demand for arbitration with the American Arbitration Association (AAA).

On August 1, 2014, Esther David sold her interest in MD Catering to defendant MD Hospitality, LLC (MD Hospitality).

On August 21, 2015, plaintiff obtained an arbitration award against MD Catering and Mark David. The award was confirmed, and a judgment for plaintiff and against Moshe David a/k/a Mark David, and MD Catering d/b/a Mark David Catering (judgment debtors) for $59,510.13 was entered in Supreme Court, Nassau County, on November 10, 2015. (Defendant's Affidavit in Support.)

Plaintiff commenced this action on February 21, 2017, asserting five causes of action — successor liability-express assumption, successor liability-implied assumption, successor liability-mere continuation, successor liability-de facto merger, and declaratory judgment-alter

ego liability — against defendant to enforce the November 10, 2015, judgment that plaintiff obtained against MD Catering and its principal Moshe David.

According to the complaint, defendant MD Hospitality has two principals, Moishe Gubin and Joel Klein.

Defendant now moves to dismiss the complaint under CPLR 3211 (a) (1) and 3211 (a) (7).

In support of its motion to dismiss, defendant provides a Membership Interest Purchase Agreement (the agreement) dated August 1, 2014, in which Esther David sold her 100% interest in MD Catering d/b/a Mark David Hospitality to defendant MD Hospitality. (NYSCEF document no. 12.) Defendant argues that MD Catering and MD Hospitality are two separate entities. It argues that MD Hospitality is not a successor in interest to MD Catering Services. Defendant argues that MD Hospitality did not assume MD Catering's obligations under the agreement. Defendant argues that Esther David's transfer of her interest to MD Hospitality occurred more than 16 months before plaintiff obtained a judgment against MD Catering. MD Hospitality did not assume MD Catering's obligations to plaintiff.

Defendant also argues that plaintiff commenced an action in Supreme Court, Nassau County, against MD Catering and Madraigos Inc. in which plaintiff alleges that MD Catering paid Madraigos money, thus violating debtor-creditor law. Defendant argues that plaintiff is seeking the identical money judgment it secured in the arbitration for which plaintiff already obtained a judgment on November 10, 2015.

In opposition, plaintiff argues that the Membership Interest Purchase Agreement, dated August 1, 2014, is inherently incredible. Plaintiff provides tax documents submitted to the IRS to show that Esther David claimed on her taxes that she owned MD Catering in 2014. (Defendant's Affirmation in Opposition, Exhibit B). Plaintiff claims that liability existed on August 1, 2014. The complaint alleges that MD Catering owes plaintiff money between December 2013 and August 1, 2014. Thus, liability existed on August 1, 2014.

Also, plaintiff attaches additional exhibits to show that (1) MD Hospitality is using MD Catering's domain and name online; (2) MD Hospitality operates out of the same office as MD Catering; (3) Gubin, who purchased a catering business named Main Event – Mauzone Caterers, advertises that it is partnered with MD Catering. Plaintiff alleges that MD Hospitality has continued MD Catering's business; it retained Mark David as an employee. It alleges that MD Hospitality CEO is Mark David — who is also CEO to Main Event – Mauzone Caterers. Plaintiff alleges that defendant MD Hospitality and its principals looted MD Catering's account of more than $325,000.

Defendant's Motion to Dismiss under CPLR 3211 (a) (1)

Defendant's CPLR 3211 (a) (1) motion is denied. On a CPLR 3211 (a) (1) motion to dismiss, a defendant has the "burden of showing that the relied-upon documentary evidence 'resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim.'"

(*Fortis Fin. Servs. v Fimat Futures USA, Inc.*, 290 AD2d 383, 383 [1st Dept 2002] [citations omitted]; *accord Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 88 [1994].) The documentary evidence must "be unambiguous and of undisputed authenticity." (*Fontanetta v Doe*, 73 AD3d 78, 86 [2d Dept 2010], quoting Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 21-22.) Judicial records, mortgages, deeds, and contracts qualify as documentary evidence. (*Fontanetta*, 73 AD3d at 84.) Affidavits, examination before trial (EBT) transcripts, emails, and medical records are not the type of documentary evidence acceptable under CPLR 3211 (a) (1). (*Id.* at 85.) Affidavits and summary notes do not constitute documentary evidence within the meaning of the rule; they raise issues of credibility for a jury to decide. (*Art & Fashion Group Corp., v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014].)

Given the disputed facts, the agreement does not conclusively resolve plaintiff's claims. Defendant's CPLR 3211 (a) (1) motion is denied.

Defendant's Motion to Dismiss under CPLR 3211 (a) (7)

Defendants' CPLR 3211 (a) (7) motion to dismiss is also denied. On a CPLR 3211 (a) (7) motion to dismiss, the court determines only whether the facts, as plaintiff alleges them, fit within any cognizable legal theory. (*Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Basis Yield Alpha Fund (Master) v Goldman Sachs Group. Inc.*, 115 AD3d 128, 137 [1st Dept 2014] ["When documentary evidence is submitted by a defendant, the standard morphs from whether the plaintiff has stated a cause of action to whether he or she has one."].) A court must accept as true the facts alleged in a complaint and give a plaintiff the benefit of every possible favorable inference. (*Nonnon*, 9 NY3d at 827; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]; *Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006].)

In conclusory fashion, defendant argues that plaintiff cannot prevail on a theory of successor liability. Defendant cites *Broadway 26 Waterview, LLC v Bainton, McCarthy & Siegel, LLC* (94 AD3d 506, 507 [1st Dept 2012]), and *Nationwide Mut. Fire Ins. Co. v Long Is. A.C., Inc.* (78 AD3d 801, 801-802 [2d Dept 2010]), for that proposition.

Plaintiff's First and Second Causes of Action

The Court of Appeals has held the following regarding successor liability:

> "It is the general rule that a corporation which acquires the assets of another is not liable for the torts of its predecessor. There are exceptions and we stated those generally recognized in *Hartford Acc. & Ind. Co. v Canron, Inc.* A corporation may be held liable for the torts of its predecessor 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 is entered into fraudulently to escape such

obligations." (*Schumacher v Richards Shear Co.*, 59 NY2d 239, 245 [1983] [internal citations omitted].)

For implied liability, "the authorities suggest that the conduct or representations relied upon by the party asserting liability must indicate an intention on the part of the buyer to pay the debts of the seller." (*MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 40 Misc3d 643, 675 [Sup Ct, NY County 2013] [internal citations omitted].) But "where evidence is introduced demonstrating an intent by the asset buyer to pay the debts of the seller, express disclaimers do not preclude a finding of implied assumption of liabilities." (*Id.* at 675-676 [citations omitted].) Also, "[a] finding of an implied assumption is more likely where the asset seller becomes a mere shell as a result of the sale, creating the real possibility that creditors are left without a remedy." (*Id.* at 676-677 [internal quotation marks omitted].)

The complaint alleges that MD Hospitality assumed the judgment debtors' outstanding liabilities and obligations. Paragraph 2 of the agreement provides that the MD Hospitality "assume[s] all outstanding liabilities and obligations of the Companies." (NYSCEF document no. 21.) Exhibit B, attached to the agreement, provides a list of seller's liabilities as of August 1, 2014 — the date of the agreement. Advantage Printing is not listed as a known vendor for which seller was liable for any outstanding debts. But plaintiff obtained the arbitration award a year after the agreement: on August 21, 2015. That award was reduced to a judgment on November 10, 2015. Section 11 (b) provides that MD Hospitality agreed to hold seller harmless for all liabilities, obligations, damages, judgments, among other things for "obligations of the Company incurred subsequence to the Closing [August 31, 2014]." (NYSCEF document no. 21.)

Under the facts presented, plaintiff has adequately alleged that an express or implied assumption of successor liability by defendant exists arising out of the contractual relationship with MD Catering. (Plaintiffs' Affirmation in Opposition.) Defendants' motion to dismiss the first and second causes of action is denied.

Plaintiff's Third Cause of Action

Plaintiff sufficiently alleges a cause of action for continuation of successor liability.

An action for mere continuation of successor liability requires the plaintiff to show "that the firm was a mere continuation of defendant." (*Broadway 26 Waterview, LLC*, 94 AD3d at 506.) Plaintiff alleges in its complaint that all of MD Catering's business was transferred to MD Hospitality. (Complaint at ¶¶ at 57-64.)

Defendant does not explain why plaintiff has failed to state a cause of action for continuation of successor liability. Defendant's arguments are conclusory.

In any event, plaintiff sufficiently alleges a cause of action for continuation of successor liability. Plaintiff alleges that MD Hospitality uses the same internet domain (www.markdavidcatering.com). And the website refers to MD Catering as opposed to MD Hospitality.

Plaintiff also alleges that MD Hospitality operates out of the same offices as MD Catering. MD Catering Services LLC drew several checks, two checks dated January 15, and others dated April 15, and July 7, 2014. These four checks bear the address "332 East 86th 2nd Floor, New York, NY, 10028." Later, MD Hospitality drew five checks dated January 6, March 11, March 30, July 21, and October 16, 2015, all bearing the same address.

Plaintiff also alleges that Mark David was employed by MD Hospitality as evidenced by the payroll stub showing payment for several months for 2014 and 2015.

Also, plaintiff alleges that MD Hospitality is indistinguishable from MD Catering: The Orthodox Union, a supervisor of kosher levels, could not differentiate between MD Catering and MD Hospitality, and did not even notice the name change. The Orthodox Union responded to a subpoena and included payments from both MD Catering and MD Hospitality even though the request was only for MD Catering's information.

These facts, as alleged by plaintiff, fit within a cognizable legal theory of successor liability. Defendant's motion to dismiss the third cause of action is denied.

Plaintiff's Fourth Cause of Action

Plaintiff sufficiently alleges a cause of action for de facto merger.

An action for de facto merger exists

> "'when a transaction, although not in form a merger, is in substance a consolidation or merger of seller and purchaser. A de facto merger occurs '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.' Underlying the de facto merger doctrine is 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.' De facto merger is aimed at avoiding the 'patent injustice which might befall a party simply because a merger has been called something else.'" (*MBIA*, 40 Misc3d at 657 [internal citations omitted].)

Factors for a court to determine a de facto merger include "(1) continuity of ownership; (2) cessation of ordinary business and dissolution of the acquired corporation as soon as possible; (3) assumption by the successor of liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and (4) continuity of management, personnel, physical location, assets and general business operation." (*Id.*; *accord Fitzgerald v Fahnestock & Co.* 286 AD2d 573, 574-575 [1st Dept 2001].) A court's finding of de facto merger does not require that each factor be satisfied; "[i]nstead, these factors are 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." (*MBIA*, 40 Misc3d at 657 [internal citations and quotations omitted].)

As "long as the acquired corporation is shorn of its assets and has become, in essence, a shell, legal dissolution is not necessary before a finding of a de facto merger will be made. (*Fitzgerald*, 286 AD2d at 575.)

Defendant does not explain why plaintiff has failed to state a cause of action for de facto merger. Defendant's arguments are conclusory.

In any event, plaintiff states a cause of action for de facto merger. According to the facts as described above, plaintiff explains that MD Hospitality is using MD Catering's domain and name online. Plaintiff alleges that MD Hospitality operates out of the same office as MD Catering. Also, plaintiff states that Gubin (one of MD Hospitality's principals) advertises that it is partnered with MD Catering, not MD Hospitality. Plaintiff alleges that MD Hospitality has retained Mark David as an employee. It alleges that MD Hospitality's CEO is Mark David. Plaintiff alleges that defendant MD Hospitality and its principals looted MD Catering's account of more than $325,000. These facts, as alleged by plaintiff, fit within a cognizable legal theory. Defendants' motion to dismiss the fourth cause of action is denied.

Plaintiff's Fifth Cause of Action

To state a claim for alter-ego liability, plaintiff must allege "complete domination of the corporation in respect to the transaction attacked and that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." (*Baby Phat Holding Co., LLC v Kellwood Co.*, 123 AD3d 405, 407 [1st Dept 2014] [internal quotations omitted].) The First Department in *Baby Phat* noted that "[b]ecause a decision to pierce the corporate veil in any given instance will necessarily depend on the attendant facts and equities, there are no definitive rules governing the varying circumstances when this power may be exercised." (*Id.*) The court found that "the allegations that defendant, through its domination of PFLLC, misrepresented the value of the assets sold and then caused PFLLC to become judgment-proof, are also sufficient to support claims that defendant perpetrated a wrong or injustice against plaintiff, thus warranting intervention by a court of equity." (*Id.*)

Defendant does not explain why plaintiff has failed to state a cause of action for alter-ego liability. Defendant's arguments are conclusory.

In any event, plaintiff alleges that MD Hospitality stripped MD Catering of all its assets for one dollar. Plaintiff alleges that MD Hospitality later transferred substantial amounts of money from MD Catering's bank account to itself and its principals, leaving nothing in MD Catering's accounts. Plaintiff alleges that these transactions were meant to commit a fraud or wrong against plaintiff which resulted in plaintiff's injury. Plaintiff asserts that MD Catering has no money for which plaintiff can collect. These facts fit within a cognizable legal theory. Therefore, defendant's motion to dismiss the fourth cause of action is denied.

Accordingly, it is

ORDERED that defendant's motion to dismiss is denied in its entirety; and it is further

ORDERED that plaintiff serve a copy of this decision and order with notice of entry on all parties; and it is further

ORDERED that defendant must serve and file its answer within 20 days of service with notice of entry; and it is further

ORDERED that the parties appear for a preliminary conference on April 25, 2018, at 11:00 a.m. in Part 7, room 345, at 60 Centre Street.

Dated: January 30, 2018

J.S.C.

HON. GERALD LEBOVITS
J.S.C.