47 E. 34th St. (NY), L.P. v Bridgestreet Worldwide, Inc.
2019 NY Slip Op 33310(U)
November 6, 2019
Supreme Court, New York County
Docket Number: 653057/2016
Judge: Andrew Borrok

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 53EFM

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47 EAST 34TH STREET (NY), L.P.,

Plaintiff,

- v -

BRIDGESTREET WORLDWIDE, INC.,VERSA CAPITAL MANAGEMENT, LLC,DOMUS BWW FUNDING, LLC,SEAN WORKER, LEE CURTIS, WAYNE WALKER, WALTER DEMBIEC, JOHN DOE, JANE DOE, DOMUS BWW FUNDING, LLC AND/OR BRIDGESTREET WORLDWIDE, INC.,

Defendant.

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INDEX NO. 653057/2018

MOTION DATE 08/16/2018

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 27, 28, 29, 30, 31, 32, 33, 34, 35, 43, 45, 46, 47, 117, 122, 138, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 231, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 255, 256, 257, 258, 259

were read on this motion to/for DISMISS.

Versa Capital Management, LLC (**Versa**) and Domus BWW Funding, LLC (**Domus**, and together with Versa, the **Versa Parties**) move pursuant to CPLR § 3211 to dismiss the Amended Complaint as against them, and 47 East 34th Street (NY), L.P. (**47 East**) cross-moves for partial summary judgment pursuant to CPLR § 3212 or, in the alternative, for leave to amend pursuant to CPLR § 3025. The Versa Parties' motion to dismiss is granted to the extent that the fourth cause of action is dismissed in part and the fifth, sixth, and seventh causes of action are dismissed in their entirety, and is otherwise denied, and 47 East's motion for partial summary judgment is denied.

FACTS RELEVANT TO THE MOTION

Reference is made to (i) a Lease Agreement (the **Original Lease**), dated March 1, 2012, between 47 East and BridgeStreet, as such Original Lease was amended by a First Addendum of Lease (the **First Addendum;** the First Addendum, together with the Original Lease, hereinafter, the **Lease**), dated February 2014, by and among 47 East and BridgeStreet and (ii) Guaranty of Lease (the **Guaranty**), dated March 1, 2012, from BridgeStreet's parent company, BridgeStreet Worldwide, Inc. (**Worldwide**) to 47 East (NYSCEF Doc. Nos. 30, 31). Pursuant to the terms of the Lease, 47 East agreed to lease 110 residential apartment units in the building located at 47 East 34th Street, New York, New York (the **Building)** to BridgeStreet for a term of twenty-four months, commencing March 1, 2012 through and including February 28, 2014 (NYSCEF Doc. No. 30). Section 19 of the Lease provides that, among other things, any transfer of the Tenant's interest in the Lease, the dissolution of the Tenant and/or Guarantor, or any assignment for the benefit of creditors shall constitute an event of default (*id.*, § 19.1 [c]).

Section 32.15 of the Lease states that: "Tenant's obligations under this Lease are being guaranteed by Purchaser and Tenant's parent company, BridgeStreet Worldwide, Inc. (Guarantor), in accordance with the Guaranty, the form of which is annexed hereto as Exhibit F" (*id.*, § 32.15).

Section 1 of the Guaranty, provides, in relevant part:

> ***Guarantor, jointly and severally, unconditionally and irrevocably (a) guarantees that all sums stated in the Lease to be payable by Tenant, including, without limitation, all amounts payable thereunder, will be promptly paid in full when due, in accordance with the provisions thereof, (b) guarantees that Tenant will perform and observe each and every other covenant, agreement, term and condition in the Lease required to be performed or observed by Tenant and (c)***

> ***indemnifies and holds Landlord harmless from and against all losses, costs and damages . . . arising out of any failure by Tenant to pay or perform any of its obligations under the Lease, in each case in like amount and manner as Tenant would be obligated to pay, perform or observe under the Lease as it may be modified or amended from time to time*** (NYSCEF Doc. No. 30, Exhibit F, ¶ 1 [emphasis added]).

Significantly, the Lease is defined as "***that certain lease of even date herewith (as the same may be modified, amended, extended or renewed)***" (*id.* at 1).

Section 2 of the Guaranty provides that:

> The obligations, covenants, agreements and duties of Guarantor under this Guaranty ***shall in no way be waived, released, discharged, or impaired by reason of the happening from time to time of any of the following, although without notice to or the further consent of Guarantor***:
>
> (a) any consent, approval or other action or inaction or omission under or concerning the Lease, or the waiver by Landlord of the performance or observance by Tenant or Guarantor of any of the agreements, covenants, terms or conditions contained in the Lease or this Guaranty, except to the extent of any such consent, approval or waiver; or
>
> (b) the extension, in whole or in part, of the time for payment by Tenant or Guarantor of any sums owing or payable under the Lease or this Guaranty, or the acceptance of additional collateral or security from Tenant or Guarantor; or
>
> (c) any partial assignment of the Tenant's interest under the Lease or subletting of the Premises or any part thereof, any other partial transfer of the Tenant's interest in the Lease, with or without Landlord's consent, or any assignment or transfer of all of Tenant's interest in the Lease; or
>
> (d) ***the modification or amendment (whether material or otherwise) of any of the obligations of Tenant or Guarantor under the Lease or this Guaranty***; or
>
> (e) any failure, omission or delay on the part of the Landlord to enforce, assert or exercise any right, power or remedy conferred on or available to Landlord in or by the Lease or this Guaranty, or in any action on the part of Landlord granting indulgence or extension in any form whatsoever; or
>
> (f) the voluntary or involuntary liquidation, dissolution, sale of all or substantially all of the assets, marshaling of assets and liabilities, receivership, conservatorship,

> insolvency, bankruptcy, assignment for the benefit of creditors, reorganization, merger, arrangement, composition or readjustment of, winding up, or other similar proceeding affecting Tenant or Guarantor or any of their assets; or
>
> (g) the release of Tenant, Guarantor or any other party from the performance or observance of any of the agreements, covenants, term or conditions contained in the Lease, this Guaranty or other instrument, as applicable, by operation of law, or the release of any collateral or security held for the performance of Tenant's or Guarantor's obligations; or
>
> (h) ***the expiration of the Term*** or any holding over by Tenant or any subtenant after the expiration of the Term; or
>
> (i) any defect, invalidity or unenforceability of the Lease or any provision thereof; or
>
> (j) ***the transfer of any or all of the membership interests in Tenant***; [or]
>
> (k) any repossession, re-entry or re-letting of the Premises by Landlord; or
>
> (l) any other circumstance or condition that may result in a discharge, limitation or reduction of the liability of a surety or guarantor; or
>
> (m) ***the assumption of the Lease by any person*** or the rejection of the Lease by Tenant (*id.*, ¶ 2 [emphasis added]).

The Guaranty further provides that it "shall be binding upon, and inure to the benefit of, the parties hereto and their respective successors and assigns," and that Worldwide shall pay 47 East upon due demand for all reasonable out-of-pocket expenses incurred in connection with the enforcement or collection under the Guaranty (*id.*, ¶¶ 9, 11).

Worldwide took out a loan from Credit Suisse AG, Cayman Islands Branch (**Credit Suisse**). Pursuant to a Warrant Purchase Agreement, dated May 1, 2013, between Domus and Credit Suisse, Domus purchased the senior secured debt of Worldwide from Credit Suisse (NYSCEF Doc. Nos. 200, 201). Subsequently, pursuant to a Forbearance Agreement (the **Forbearance Agreement**), dated September 30, 2013, by and among Domus, Worldwide, BridgeStreet, and

several BridgeStreet affiliates, Domus agreed to forbear exercising its rights and remedies available as a result of Worldwide's default and to extend additional first lien loans to Worldwide in the amount of $12,520,985 to fund the working capital needs of its operating subsidiaries (NYSCEF Doc. No. 203). Worldwide failed to make the required payments under the Forbearance Agreement and remained in default. In November 2013, Domus terminated the Forbearance Agreement, called a Forbearance Event of Default, and began a consensual foreclosure process (the **Foreclosure**).

To effectuate the Foreclosure of Worldwide, the parties entered into (i) a Collateral Transfer Agreement, dated March 3, 2014, by and among Domus, Worldwide, BridgeStreet, and BridgeStreet's officers and directors (NYSCEF Doc. No. 212), and (ii) a Bill of Sale, of even date therewith, by and among Domus, Worldwide, and BridgeStreet (NYSCEF Doc. No. 213), pursuant to which Worldwide transferred all of its domestic and foreign assets to Domus in partial satisfaction of Worldwide's debt obligations. The following day, Domus filed a Certificate of Dissolution of Worldwide with the Delaware Secretary of State and Worldwide was officially dissolved (NYSCEF Doc. No. 215).

Following the Foreclosure and dissolution, BridgeStreet remained a tenant of 47 East in the Building and continued to operate its short-term corporate housing business. The Lease was extended pursuant to the First Addendum which First Addendum extended the lease term for one month ending on March 31, 2014 and was automatically renewable for successive one-month extension periods unless otherwise terminated by either party upon ninety-days' written notice

(NYSCEF Doc. No. 31, ¶ 1). The fixed monthly rent increased but the terms of the existing Lease otherwise remained unchanged and in full force and effect (*id.*, ¶ 4).

Importantly, the Building was eligible to receive tax abatements under Section 421-a of the New York Real Property Tax Law and had been receiving such benefits since July 1, 2009. In order to maintain the Building's 421-a program eligibility, units in the Building were not permitted to be rented for periods of less than six months (28 RCNY § 6-01 [c]). The Lease expressly required BridgeStreet to use the premises for permitted uses only and in a manner consistent with 421-a eligibility requirements, including by writing leases with minimum terms of six months (NYSCEF Doc. No. 30, §§ 3.1, 8.1, 8.2).

In 2014, the New York State Office of the Attorney General (**OAG**) commenced an investigation into the Building's 421-a tax benefits. The OAG alleged that the Building was being operated as a "hotel"—a use that is expressly prohibited under the 421-a program—because BridgeStreet was leasing units for terms of less than six months. On February 18, 2015, 47 East entered into an Assurance of Discontinuance (**AOD**) with the OAG, pursuant to which 47 East agreed to repay all of the taxes for which it had been exempted under the 421-a program. 47 East paid $4,446,153 to the City of New York as well as $275,000 to cover the OAG's investigation expenses.

47 East commenced an action against BridgeStreet seeking indemnification and reimbursement for damages arising from BridgeStreet's use of the premises for short-term corporate rental purposes in violation of the terms of the Lease, resulting in the building losing its eligibility for

tax abatements under the 421-a program (*47 E. 34th Street (NY), L.P. v BridgeStreet Corporate Hous., LLC*, Index No. 653320/2015) (the **BridgeStreet Action**). On August 14, 2018, 47 East commenced the instant action (the **Guarantor Action**) against the Versa Parties asserting successor liability claims for any judgment entered against BridgeStreet in the BridgeStreet Action.

BridgeStreet moved for partial summary judgment in the BridgeStreet Action pursuant to CPLR § 3212 dismissing the first cause of action for breach of contract to the extent that it sought damages for lost tax benefits and dismissing the remaining causes of action in the complaint. 47 East cross-moved for summary judgment pursuant to CPLR § 3212. In a Decision and Order, dated July 12, 2019, the court denied BridgeStreet's motion in its entirety and granted 47 East's motion for summary judgment as to liability and referred the matter to a Special Referee to determine the total amount of damages to which 47 East is entitled.

With summary judgment entered against BridgeStreet as to liability for all damages stemming from its breach of the Lease, the matter before the court is whether the Versa Parties are liable for the judgment under theories of successor liability, fraudulent conveyance, and alter ego.

DISCUSSION

A party may move for judgment dismissing one or more causes of action on the ground that the pleadings fail to state a cause of action for which relief may be granted (CPLR § 3211 [a] [7]). On a motion to dismiss pursuant to CPLR § 3211 (a) (7), the court must afford the pleadings a liberal construction and accept the facts alleged in the complaint as true, according the plaintiff

the benefit of every favorable inference (*Morone v Morone*, 50 NY2d 481, 484 [1980]). The court's inquiry on a motion to dismiss is whether the facts alleged fit within any cognizable legal theory (*id.*). Bare legal conclusions are not accorded favorable inferences, however, and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999]).

A party may also move to dismiss based on documentary evidence pursuant to CPLR § 3211 (a) (1). A motion to dismiss pursuant to CPLR § 3211 (a) (1) will be granted only where the documentary evidence conclusively establishes a defense to the plaintiff's claims as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]). Dismissal may also be sought the grounds that the action is time-barred by the statute of limitations (CPLR § 3211 [a] [5]), or that the court lacks personal jurisdiction over the defendant (*id.*, § 3211 [a] [8]).

Summary judgment will be granted only when the movant presents evidentiary proof in admissible form that there are no triable issues of material fact and that there is either no defense to the cause of action or that the cause of action or defense has no merit (CPLR § 3212 [b]; (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The proponent of a summary judgment motion carries the initial burden to make a *prima facie* showing of entitlement to judgment as a matter of law (*id.*). Failure to make such a showing requires denial of the motion (*id.,* citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing is made, the burden shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a triable issue of fact (*Alvarez*, 68 NY2d at 324).

Personal Jurisdiction

As a threshold matter, the Versa Parties argue that the court does not have personal jurisdiction over them. Pursuant to CPLR § 302 (a) (1), a court may exercise jurisdiction over a defendant that transacted business within New York or contracted anywhere to supply goods or services in the state. A single act or transaction may be sufficient to support jurisdiction under CPLR § 302 (a) (1), provided that the defendant's activities in New York were purposeful and there is a substantial relationship or articulable nexus between the transaction and the cause of action asserted (*Licci v Lebanese Canadian Bank*, 20 NY3d 327, 339 [2012]). In addition, CPLR § 302 (a) (1) "does not require that every element of the cause of action pleaded must be related to the New York contacts; rather, where at least one element arises from the New York contacts, the relationship between the business transaction and the claim asserted supports specific jurisdiction under the statute" (*id.* at 341).

In this case, the claims asserted arise directly from the Versa Parties' acquisition of BridgeStreet and its operating subsidiaries and from the subsequent Foreclosure. When the Versa Parties assumed the Lease by purchasing 100% of BridgeStreet's equity, they acquired the Building in New York and continued to use and occupy it. There is a substantial relationship between the transactions at issue and the claims asserted. Accordingly, the court has personal jurisdiction over the Versa Parties.

Successor Liability Claims (Enforcement of Guaranty and Breach of Contract)

As a rule, "[a] guaranty is a promise to fulfill the obligations of another party, and is subject 'to the ordinary principles of contract construction'" (*Cooperative Centrale Raiffeisen-*

Boerenleenbank, B.A. v Navarro, 25 NY3d 485, 491 [2015], quoting *Compagnie Financiere de CIC et de L'Union Europeenne v Merrill Lynch, Pierce, Fenner & Smith Inc.*, 188 F 3d 31, 34 [2d Cir 1999]). To prevail on a cause of action for breach of a guaranty, a plaintiff must establish "the existence of the guaranty, the underlying debt and the guarantor's failure to perform under the guaranty" (*Navarro*, 25 NY3d at 492). In addition, "'[a] guaranty is to be interpreted in the strictest manner,' particularly in favor of a private guarantor, and cannot be altered without the guarantor's consent" (*Lo-Ho LLC v Batista*, 62 AD3d 558, 559 [1st Dept 2009] [internal citations omitted]).

The Amended Complaint alleges that "[t]he Guaranty, by its terms, irrevocably and indefinitely binds [Worldwide] and its successors and assigns to all obligations arising under the Guaranty," and that because the Versa Parties are successors in interest to Worldwide, the Versa Parties are obligated to pay all amounts due to 47 East arising from BridgeStreet's breach of the Lease (Amended Complaint, ¶¶ 60-62). The Amended Complaint further alleges that the Versa Parties are liable for all damages awarded in the BridgeStreet Action and all amounts due as a result of the Versa Parties' actions in stripping Worldwide of its assets to avoid enforcement of the Guaranty (*id.*, ¶¶ 63).

In addition, the Amended Complaint alleges that the Versa Parties are contractually obligated under the Guaranty to pay all amounts due as a result of BridgeStreet's breach of the Lease and that, despite due demand for indemnification or reimbursement, the Versa Parties failed to make payments to 47 East (*id.*, ¶¶ 67-70), and that 47 East was damaged as a result of the Versa Parties' breach in the amount of at least $7 million (*id.*, ¶ 71). The allegations set forth in the

Amended Complaint are sufficient to sustain the causes of action for enforcement of the Guaranty and breach of contract.

To the extent that the Versa Parties argue that there can be no liability under the Guaranty because they did not reaffirm or renew the Guaranty for the extended lease term after the Lease Addendum, the argument is unavailing. A guarantor is not relieved of its liability under a guaranty where, as here, the guaranty itself contemplates modifications or extensions to the underlying lease agreement and states that the guarantor consents to and waives notice of such changes (*White Rose Food v Saleh*, 292 AD2d 377, 378 [2d Dept 2002], *affd* 99 NY2d 589 [2003]; *250 W. 78 LLC v Pildes of 83rd St., Inc.*, 129 AD3d 405, 406 [1st Dept 2015] [holding that guarantor not relieved of its obligations under guaranty where guaranty expressly covered any extended lease term and contemplated modifications to lease]).

Here, as discussed above, pursuant to the Guaranty, the guarantor guaranteed all obligations set forth in the Lease which is defined as the Original Lease as the same may be amended [i.e., "***that certain lease of even date herewith (as the same may be modified, amended, extended or renewed*** . . .)" (NYSCEF Doc. No. 30, Exhibit 1, at 1)]. The Guaranty further states that it is "irrevocable, unconditional and absolute" and that the guarantor "indemnifies and holds Landlord harmless from and against all losses, costs and damages . . . arising out of any failure by Tenant to pay or perform any of its obligations under the Lease . . . as it may be modified or amended from time to time" (*id.*, at ¶ 1). It also states that the guarantor waives notice of and consents to any modifications or extensions of the Lease and that the guarantor agrees that its obligations will not be released as a result of "the modification or amendment (whether material

or otherwise) of any of the obligations of Tenant or Guarantor under the Lease or this Guaranty" or "the expiration of the Term" of the Lease (*id.*, ¶¶ 2 [d], [h]). Therefore, under the explicit terms of the Guaranty, the guarantor waived notice of and consented to any future modifications or extensions of the Lease and is bound to the lease extension without the need for reaffirmation. Based on the foregoing, the Versa Parties' motion to dismiss is denied with respect to these claims. However, as described below, the Versa Parties' motion to dismiss is granted with respect to 47 East's claims based on *de facto* merger.

De Facto Merger

As a general rule, a corporation that acquires the assets of another corporation is not liable for the pre-existing liabilities of the acquired corporation (*Fitzgerald v Fahnestock & Co., Inc.*, 286 AD2d 573, 574 [1st Dept 2001]). The *de facto* merger doctrine creates an exception to this general rule "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" (*id.*). The *de facto* merger doctrine is premised on the theory "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 NY2d 291, 296 [1984]).

Under New York Law, the elements of a *de facto* merger claim include:

> continuity of ownership; cessation of ordinary business and the 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*, 286 AD2d at 574).

Continuity of ownership alone is not sufficient to establish a *de facto* merger, but it is a necessary element (*id.*; *Dritsas v Amchem Prods., Inc.*, 169 AD3d 526, 526-27 [1st Dept 2019]). Other considerations include "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" (*Dritsas*, 169 AD3d at 575). A *de facto* merger may be found even where not all elements are satisfied (*id.*, at 574-75).

In this case, 47 East alleges that Worldwide's entire operating business was transferred to Domus through the Foreclosure. As 47 East explains, "[i]n sum, one holding company [Domus] swapped places with another holding company [Worldwide], kept the same business, tradename, contracts, management, employees, locations, good will, and customers" (Pl.'s Mem. in Opp., at 2). 47 East describes Domus as "a virtual clone of [Worldwide], operating the same businesses, with the same employees, using the same trade names, physical assets and website" (*id.* at 12). 47 East further alleges that when Domus purchased Worldwide's senior secured debt from Credit Suisse, it acquired voting and other rights over Worldwide stock pledged by its shareholders to secure its debt (*id.*, ¶ 8).

Additionally, 47 East alleges that after the Foreclosure, a new board of directors for BridgeStreet was formed consisting primarily of senior executives of Versa (*id.*). The Versa Parties acknowledge that at least three Worldwide officers became officers of Domus BWW Group LLC, a Domus affiliate (Kennedy Aff, ¶ 10). And the Versa Foreclosure Checklist submitted in opposition to the Versa Parties' motion to dismiss establishes that the transfer of the Lease and approximately 62 material leases and other agreements necessary for the uninterrupted continued

operation of Worldwide's business were assigned to the Versa Parties through the Foreclosure (NYSCEF Doc. No. 208).

The First Department's decision in *Tap Holdings, LLC v Orix Fin. Corp.* (109 AD3d 167 [1st Dept 2013]) is instructive. In *Tap Holdings*, the defendant senior lenders extended loans to nonparty Tap Operating Company, LLC (**Tap**), primarily via a "senior secured credit facility," and took a security interest in substantially all of Tap's membership units (*id.* at 170). The plaintiff, Tap Holdings, LLC (**Tap Holdings**) also granted the defendants a security interest in 100% of its Tap membership units (*id.*). After the senior debt went into default, the senior lenders entered into a series of forbearance agreements pursuant to which they acquired a security interest in all of Tap's assets and a lien on 100% of the membership units of Tap's operating subsidiaries (*id.* at 170-71). Ultimately, after negotiations failed, the senior lenders exercised their security interests in Tap Holdings' membership interest in Tap, terminated Tap Holdings' voting rights, and replaced all but one member of Tap's board (*id.* at 170). Tap entered into a consensual foreclosure agreement with the senior lenders pursuant to which (i) Tap would transfer all of its assets, including all assets of its subsidiaries, to a newly-formed entity under the control of the defendants (**New Tap**), (ii) New Tap would assume Tap's liabilities, (iii) New Tap would retain Tap's employees, and (iv) New Tap would fund the wind-up and dissolution of Tap (*id.* at 171).

The Court in *Tap* found that the complaint adequately pled successor liability claims under the *de facto* merger, mere continuation, and alter ego doctrines (*id.* at 174-76). The Court explained that the element of continuity of ownership was adequately pled even though the executives of

New Tap acquired ownership interests in Tap through Tap Holdings and not Tap itself (*id.* at 184). The court reasoned, "the question whether a *de facto* merger exists is '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'" (*id.* at 176, quoting *Nettis v Levitt*, 241 F 3d 186, 194 [2d Cir 2001] [internal quotation marks and citation omitted]).

The alleged transactions in *Tap* are analogous to the transactions at issue in this case except in one critical respect: in *Tap*, the executives and owners of Tap acquired equity in New Tap albeit indirectly equivalent to or in excess of their equity in Tap (*Tap Holdings, LLC*, 109 AD3d at 172), however, in the case at bar, there are no such allegations. Instead, 47 East alleges that the Versa Parties' acquisition of sole voting and ownership rights to Worldwide's class A common stock and subsequent transfer of Worldwide's business to Domus are indicia of continuity of ownership. The problem with 47 East's argument, however, is that for purposes of the *de facto* merger doctrine, continuity of ownership requires a showing that the shareholders of the predecessor corporation became direct or indirect shareholders of the successor corporation (*Matter of New York City Asbestos Litig.*, 15 AD3d 254, 256 [1st Dept 2005]). Here, no such continuity of ownership interest is alleged. 47 East cites no authority for the proposition that the acquisition of voting and ownership rights to Worldwide's class A common stock and the transfer of Worldwide's business to Domus satisfy the element of continuity of ownership in the absence of proof that shareholders of the predecessor corporation became shareholders of the successor corporation.

Because the Amended Complaint fails to set forth factual allegations sufficient to support the inference that there was continuity of ownership (*i.e.*, that historic owners of Worldwide became owners of the Versa Parties), the motion to dismiss is granted as to 47 East's successor liability claims under the *de facto* merger doctrine.

With respect to 47 East's claims based on the mere continuation doctrine, issues of fact preclude awarding summary judgment.

Mere Continuation

47 East also asserts successor liability under the theory that Domus is a mere continuation of Worldwide. To invoke the mere continuation exception to the rule against successor liability, a plaintiff must establish that the acquiring corporation has obtained the business location, employees, management, and good will of the acquired corporation (*NTL Capital, LLC v Right Track Recording*, LLC (73 AD3d 410, 411 [1st Dept 2010], citing *Societe Anonyme Dauphitex v Schoenfelder Corp.*, 2007 WL 3253592, *5–6, 2007 US Dist LEXIS 81496, *14–16 [SD NY 2007]). 47 East alleges that Worldwide's senior management, physical locations, goodwill and other assets, and general business operations were all transferred to the Versa Parties, and that Domus is therefore a mere continuation of Worldwide (NYSCEF Doc. No. 231, at 18-19).

In support of its motion for partial summary judgment, 47 East submits evidence establishing (i) that there was some degree of continuity of senior management (Singh Aff., Exhibit 29, Dembiec Tr. 1-13), (ii), that BridgeStreet continued to operate out of the same locations after the Foreclosure, with Worldwide personnel continuing to work out of BridgeStreet's offices (*id.*,

Exhibit 37, DOM00067, Schedule 5.4; Singh Aff., ¶ 12), (iii) that Domus acquired the goodwill and other assets of BridgeStreet (*id.*, Exhibit 37, DOM000608-633), (iv) that Worldwide's business operations were transferred to the Versa Parties in their entirety and that they continued unchanged under the ownership of the Versa Parties (*id.*, Exhibit 29, Dembiec Tr. 233), and (v) that the Versa Parties dissolved Worldwide by filing a Certificate of Dissolution with the Delaware Secretary of State (*id.*, Exhibit 26).

With respect to the continuity of Worldwide's business operations, 47 East submits the following letter sent by Worldwide to the customers of its operating subsidiaries:

> We are writing to inform you of important information regarding business changes at BridgeStreet Worldwide, Inc. ("BridgeStreet") . . . . We are contemplating transferring the assets of BridgeStreet to Domus BWW Funding, LLC and/or certain of its affiliates (collectively, "Domus"), ***which plans to continue BridgeStreet's operations following this transaction***.
>
> BridgeStreet appreciates your business, and ***we look forward to continuing to provide our services to you in the future under the new ownership*** (*id.*, Exhibit 18, DOM016188 [emphasis added]).

This letter establishes the intent of Domus to continue the operations of Worldwide and its operating subsidiaries following the Foreclosure and dissolution of Worldwide. 47 East has made a *prima facie* showing that the Versa Parties completely absorbed Worldwide's business operations.

In support of their motion to dismiss and in opposition to 47 East's motion for partial summary judgment, the Versa Parties argue that there is no continuity of ownership, management, and location, and therefore the mere continuation claim fails. The Versa Parties submit evidence that (i) Worldwide was located in Virginia whereas Domus is located in Pennsylvania (Kennedy Aff,

¶¶ 2-3), (ii) Domus's corporate structure differed in that Worldwide had six directors before the Foreclosure (Schenker Aff., ¶ 4), and Domus had no directors and was managed by Versa (Kennedy Aff., ¶ 5), and (iii) Domus's senior management differed from Worldwide's and none of Domus's officers were previously officers of Worldwide (Schenker Aff., ¶ 5; Kennedy Aff., ¶¶ 8-10), although three Worldwide Officers did become officers of a Domus affiliate (Kennedy Aff., ¶ 10).

While the Amended Complaint sufficiently pleads the elements of 47 East's successor liability claims under the mere continuation doctrine, there are issues of fact precluding summary judgment at this stage. Specifically, there are issues of fact regarding the location of the business before and after the Foreclosure and the degree to which there was continuity of employees and management. Accordingly, 47 East's motion for partial summary judgment is denied.

Fraudulent Conveyance

New York Debtor & Creditor Law § 273 provides: "[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." Moreover, Debtor & Creditor Law § 276 provides: "[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." For purposes of a fraudulent conveyance claim, "fair consideration" means an exchange of a fair equivalent conveyed in good faith (NY Debtor & Creditor Law § 272 [a]).

47 East alleges that the Versa Parties "acquired [Worldwide's] assets for less than fair consideration through a rigged consensual foreclosure" with the intent to hinder, delay, or default present or future creditors in violation of, *inter alia*, New York Debtor and Creditor Law §§ 273 and 276 (Amended Complaint, ¶¶ 79-86). The Amended Complaint further alleges that conveyance of Worldwide's assets to the Versa Parties rendered Worldwide insolvent and left it with insufficient assets to cover its obligations, including its obligations to 47 East under the Guaranty (*id.*, ¶ 82).

The allegations in the Amended Complaint, taken as true, are sufficient to state a cause of action for fraudulent conveyance under § 273 (i.e., the documentary evidence does not utterly refute the allegation that Domus acquired Worldwide's assets for less than fair consideration), but fail to allege facts sufficient to establish fraudulent intent as required under § 276. Therefore, the motion to dismiss the fourth cause of action is granted as against Versa solely as it relates to the claim under § 276 and is otherwise denied.

Tortious Interference

To prevail on a cause of action for tortious interference with contract, a plaintiff must establish: (i) the existence of a valid contract between the plaintiff and a third party, (ii) the defendant's knowledge of the contract, (iii) that the defendant intentionally procured the third-party's breach of the contract without justification, (iv) an actual breach of the contract, and (v) damages resulting from the breach (*Lama Holding Co. v Smith Barney, Inc.*, 88 NY2d 413, 424 [1996]).

The allegations in the Amended Complaint regarding the Versa Parties' knowledge of the Guaranty and its intent to procure the breach thereof are vague and conclusory and are, therefore, insufficient to sustain the cause of action for tortious interference. To wit, 47 East alleges that the Versa Parties were aware of the Guaranty entered into by Worldwide for the benefit of 47 East and "intentionally and improperly procured the breach of the Guaranty by taking control of [Worldwide], stripping it of all assets, and causing it to dishonor the Guaranty" (Amended Complaint, ¶¶ 87-89). 47 East further alleges that it sustained economic injury, including all damages awarded in the BridgeStreet Action, as a result of the Versa Parties' alleged tortious interference (*id.*, ¶ 90). Taking these allegations as true – they are vague and conclusory and are, therefore, insufficient to sustain the cause of action for tortious interference. Significantly, there are no factual allegations that support the inference that the Versa Parties acted with the intent to breach the Guaranty. To the contrary, the allegations in the Amended Complaint demonstrate that there was no reason to believe that a claim under the Guaranty would arise at the time of the Foreclosure. Accordingly, the motion to dismiss the fifth cause of action is granted.

Fraudulent Concealment

The elements of a cause of action for fraudulent concealment are "concealment of a material fact which defendant was duty-bound to disclose, scienter, justifiable reliance, and injury (*Mitschele v Shultz*, 36 AD3d 249, 254-55 [1st Dept 2006]). As with any action based on fraud, the circumstances constituting the wrong must be alleged with particularity (CPLR § 3016 [b]).

47 East alleges that the Versa Parties had knowledge of the material facts concerning the Guaranty and the fact that they were stripping Worldwide of all assets and dissolving the

company and had a duty to disclose this information to 47 East (Amended Complaint, ¶ 92). 47 East further alleges that the Versa Parties failed to disclose this information to 47 East "with the intent that 47 East would enter into the Addendum and continue to lease the Building the BridgeStreet" (*id.*, ¶ 93). More specifically, the Amended Complaint alleges that the transfer of substantially all of Worldwide's assets occurred only four days after the execution of the First Addendum, and that 47 East justifiably relied on the information provided by the Versa Parties and was damaged as a result of their concealment of information, including the damages awarded in the BridgeStreet Action (*id.*, ¶¶ 93-94). However, and significantly, the Amended Complaint fails to allege any facts to support the inference that the Versa Parties had a duty to disclose any information concerning the Guaranty or the dissolution of Worldwide. In addition, the documentary evidence illustrates that the foreclosure occurred in March 2014, prior to the commencement of the OAG's investigation into the Building's 421-a tax abatement and prior to the resulting AOD and repayment of past tax benefits giving rise to the claim on Worldwide's Guaranty. Thus, the documentary evidence utterly refutes the Amended Complaint's conclusory allegations of any intent to deceive by the Versa Parties, as there was no known claim against Worldwide at the time of the foreclosure. Accordingly, the sixth cause of action is dismissed.

Fraudulent and/or Negligent Misrepresentation

To state a cause of action for fraudulent misrepresentation, "a plaintiff must allege 'a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011], quoting *Lama Holding Co.*, 88 NY2d at 421). A

cause of action alleging fraud must state with specificity the circumstances constituting the wrong (CPLR § 3016 [b]). Moreover, in a cause of action for negligent misrepresentation, a plaintiff must allege "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]).

47 East alleges that the Versa Parties "made representations of material fact, with knowledge of the falsity of those representations, by assuring 47 East that the Guaranty would remain in full force and effect" (Amended Complaint, ¶ 96). 47 East further alleges that such representations were made only days before the Versa Parties stripped Worldwide of substantially all of its assets, and that such representations were either the result of negligence or gross negligence (*id.*, ¶¶ 96-97), or that they were made with the intent that 47 East would rely on them and enter into the First Addendum and continue leasing the Building to BridgeStreet (*id.*, ¶ 98). 47 East claims that it justifiably relied on the Versa Parties' alleged misrepresentations and was damaged as a result, including in the amount of the damages awarded in the BridgeStreet Action (*id.*, ¶ 99).

The allegations in the Amended Complaint fail to meet the heightened pleading requirement under CPLR § 3016 (b). Specifically, the Amended Complaint fails to allege with particularity what assurances were made and to whom they were communicated. As to the negligent misrepresentation claim, the Amended Complaint fails to allege a special or privity-like relationship between the Versa Parties and 47 East that would impose a duty to disclose any

information regarding the foreclosure or the Guaranty. Accordingly, the seventh cause of action is dismissed.

Piercing the Corporate Veil

The Versa Parties' argue that the veil piercing claims must be dismissed because the Amended Complaint fails to allege that they abused the corporate form with the intent to defraud 47 East. The court disagrees.

Piercing the corporate veil generally requires a showing that: "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked, (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 and Fin.*, 82 NY2d 135, 141 [1993]). Complete domination of the corporation is an essential element, but it is insufficient without more, as "[t]he party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party" (*id.* at 141-42). Whether piercing the corporate veil is appropriate in a given case is a fact-specific inquiry, and "the New York cases may not be reduced to definitive rules" (*id.*). In general, however, "the courts will disregard the corporate form . . . whenever necessary to prevent fraud or achieve equity" (*Walkovsky v Carlton*, 18 NY2d 414, 417 [1966] [internal citation and quotation marks omitted]).

Allegations of actual fraud are not required to satisfy the wrongdoing requirement (*Baby Phat Holding Co., LLC v Kellwood Co.*, 123 AD3d 405, 407 [1st Dept 2014] ["While fraud certainly

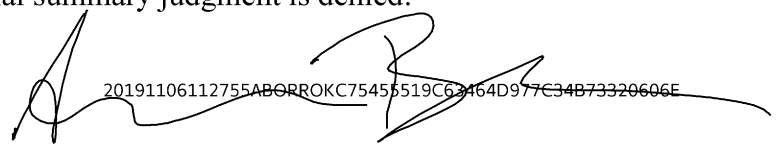
satisfies the wrongdoing requirement, other claims of inequity of malfeasance will also suffice."]). As the Appellate Division has observed, "[a]llegations that corporate funds were purposefully diverted to make it judgment-proof or that a corporation was dissolved without making appropriate reserves for contingent liabilities are sufficient to satisfy the pleading requirement of wrongdoing" (*id.*, at 407-08, citing *Grammas v Lockwood Assoc., LLC*, 95 AD3d 1073, 1075 [2d Dept 2012]).

In the Amended Complaint, 47 East alleges that the Versa Parties dominated and controlled Worldwide and continued to operate Worldwide's business as BridgeStreet Global Hospitality as the alter ego of the Versa Parties (Amended Complaint, ¶ 101). 47 East further alleges that the Versa Parties abused the corporate form of Worldwide for their own benefit, defrauding its creditors, including 47 East, through its conduct, and causing economic injury to 47 East by rendering Worldwide unable to satisfy its obligations under the Guaranty (*id.*, ¶¶ 102-103). 47 East therefore argues that the corporate veil of Worldwide should be pierced and the Versa Parties should be held liable for all amounts owed to 47 East under the Guaranty, including all damages awarded in the BridgeStreet Action (*id.*, ¶ 104). These allegations taken as true are sufficient to satisfy the pleading requirements at this stage of the pleadings. Therefore, the motion to dismiss is denied with respect to the eighth cause of action.

Accordingly, it is

ORDERED that the defendants' motion to dismiss is granted to the extent that the fourth cause of action is dismissed as against Versa only and the fifth, sixth, and seventh causes of action are dismissed as against both Versa and Domus, and is otherwise denied; and it is further

ORDERED that the plaintiff's motion for partial summary judgment is denied.



11/6/2019
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE