Ostrolenk Faber LLB v Taub
2021 NY Slip Op 32846(U)
December 8, 2021
Supreme Court, New York County
Docket Number: Index No. 657300/2019
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **IAS MOTION 38EFM**

Justice

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INDEX NO.	657300/2019
MOTION DATE	04/07/2020
MOTION SEQ. NO.	002

OSTROLENK FABER LLP,

Plaintiff,

- v -

SAMUEL TAUB, MVI SYSTEMS, LLC, MVI INDUSTRIES, LLC, SHRAGIE ARANOFF, and JONATHAN EHRENFELD,

Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 53, 54, 55, 56, 57, 58, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 83

were read on this motion to/for DISMISSAL.

LOUIS L. NOCK, J.

Upon the foregoing documents, the motion of defendants MVI Industries, LLC ("MVI Industries") and Jonathan Ehrenfeld ("Ehrenfeld") to dismiss the amended complaint is granted in part, in accord with the following memorandum decision.

Background

Plaintiff Ostrolenk Faber LLP ("Plaintiff") commenced this action to recover sums purportedly owed by defendants for legal services rendered. Defendant MVI Systems, LLC ("MVI Systems") is a Delaware limited liability company that transacts business in New York (NYSCEF Doc No. 28, amended complaint ¶ 11).[1] MVI Industries is a Delaware limited liability company with a principal place of business in Brooklyn, New York (*id.* ¶ 12). Defendant Samuel Taub ("Taub") is the principal, CEO, Chairman and founder of both MVI

[1] The facts as recited here are as set forth in the motion to dismiss and, except where otherwise noted, are as accepted as true for the purposes of this motion, as required on a motion to dismiss.

defendants (*id.* ¶ 10), while defendant Shragie Aranoff ("Aranoff") is the President, COO and co-founder of both MVI entities (*id.* ¶ 13), and defendant Jonathan Enhrenfeld ("Enhrenfeld") is a principal of MVI Industries (*id.* ¶ 14).

As alleged in the amended complaint, in or about October 2017, Taub and MVI Systems retained Plaintiff to represent them in connection with certain patent and trademark rights, for which Plaintiff was paid for its services (*id.* ¶¶ 20-22). In or about November 2018, Taub and MVI Systems retained Plaintiff to represent them in a patent application, for which Plaintiff's invoices were only partially paid (*id.* ¶ 23). In or about May 2019, Taub and MVI Systems retained Plaintiff to defend them in two federal litigations captioned *Gateguard, Inc. v MVI Systems LLC and Samuel Taub*, Case No. 19-cv-02472 (RA) (SDNY) (the "Gateguard litigation") and *Runs Like Butter, Inc. v MVI Systems LLC, Samuel Taub, and MVI Industries, LLC*, Case No. 19-cv-24325 (ARR) (JO) (EDNY) (the "Runs Like Butter litigation"). The attorney in charge of these representations was Max Moskowitz ("Moskowitz"), Plaintiff's Managing Partner (*id.* ¶ 25).

Unbeknownst to Plaintiff, in August 2019, MVI Systems and MVI Industries entered into an asset purchase agreement whereby MVI Systems sold certain assets to MVI Industries for $241,000 (the "asset purchase") (*id.* ¶¶ 27-28). The purchased assets included intellectual property, demonstration and sample products, accounts receivable, inventory, business goodwill, customer, distributor and dealer contracts and agreements, customer sales records, office equipment, business licenses and permits (*id.* ¶ 29). The asset purchase agreement also "allocated $125,000 of the $241,000 purchase price for intellectual property rights," and MVI Industries received certain intellectual property, including "at least one U.S. patent, one pending U.S. patent application, two pending U.S. trademarks and two unregistered tradenames" (*id.* ¶

30-31). The complaint alleges, upon information and belief, that the $241,000 purchase price was not fair consideration and that the actual value of MVI Systems' assets at the time of the purchase was approximately $3,000,000 (*id.* ¶¶ 32-33). The complaint further alleges that "an investor group including and headed by Ehrenfeld infused MVI Industries with a sum of money many times the amount of the nominal $241,000 paid to purchase all the assets of MVI Systems, and that amount was orders of magnitude below the real mark value of MVI Systems' actual value" (*id*. ¶¶ 32-34).

As alleged, Ehrenfeld "is and was one of the main original founders and investors in the originally formed entity, MVI System" (*id.* ¶ 74). Purportedly, the original product and business model of MVI Systems did not gain adequate traction, which led MVI Systems, in early 2019, to update its product and business model (*id.* ¶¶ 76-77). The changes were a "hit" with customers, but the business was in dire need of new funds (*id*. ¶ 78). As alleged upon information and belief, "Ehrenfeld was the moving force and impetus in the quest for raising the direly needed new funds" and the "mastermind . . . on both sides of the transaction" (*id.* ¶¶ 79-80). He purportedly "controlled the transaction, with little say on the part of Taub and Aranoff, given their lack of access to the urgently needed funds" (*id*. ¶ 80). Ehrenfeld, "either personally or through venture capital entities that he controlled" retained and paid for attorneys from another law firm, Neuberger Quinn Gielen Rubin Gibber P.A. ("NQGRB"), to draft the asset purchase agreement and effectuate the sale, which was concealed from Plaintiff (*id*. ¶¶ 82).

Plaintiff first learned that the asset purchase had taken place on September 5, 2019, at a hearing before United States Magistrate Judge James Orenstein on a motion in the Runs Like Butter litigation (*id.* ¶ 87). Taub had purportedly "called the owner of plaintiff Runs Like Butter and threatened him that, if he does not settle that litigation, Runs Like Butter will collect nothing

because MVI Systems is being 'liquidated'" (*id.* ¶ 88). Counsel to Runs Like Butter then contacted Moskowitz, who discussed the matter with Taub (*id.* ¶ 89). Taub advised Moskowitz that he had been "bluffing" when he made the representation regarding liquidation and reassured Moskowitz that "MVI Systems is still in business and will continue doing business, except under a 'new name'" (*id.*). It is unclear from the pleadings whether Moskowitz had this discussion with Taub on September 5, 2019 or at an earlier time.

The hearing before Magistrate Judge Orenstein was on a motion by the plaintiff Runs Like Butter "seeking to appoint a receiver for MVI Systems and charging that the formation of the new company was a 'fraud' designed to deprive [] Runs Like Butter from recovering on any expected judgment" (*id.* ¶ 90). At the hearing, the complaint alleges that Magistrate Judge Orenstein ordered Moskowitz to call Taub and find out the name of the "new entity" (*id.*). Moskowitz called Taub and "thereby came to know of the (secret) formation by the instant defendants by the name of MVI Industries" (*id.*) Plaintiff alleges that, at the same hearing, Magistrate Judge Orenstein "stated to [] Moskowitz that it appeared to him that Moskowitz may have been involved with the fraudulent and ill-conceived formation of MVI Industries and, therefore, Moskowitz would have to be disqualified from continuing to represent MVI Systems in the Runs Like Butter Case, which Moskowitz immediately and totally disavowed to Judge Orenstein" (*id.*).

Magistrate Judge Orenstein then ordered expedited discovery regarding the formation of MVI Industries (*id.* ¶ 91). A deposition of Taub was held in which "Taub stated that to his understanding the new entity MVI assumed all liabilities of and was just a successor to the old entity MVI Systems," and "explained that the about $241,000 paid to [] MVI Systems was carefully set to pay back wages/salaries owed the employees of MVI Systems including Taub,

and to pay off certain vendors, ostensibly those needed for and who would continue with the new entity MVI Systems" (*id.* ¶¶ 92-93). Taub was also asked about the allocation of the purchase price "to certain assets categories, such as 'good will,' value of IP," etc. (*id.* ¶ 94). "Taub responded that he is clueless as to how Ehrenfeld's lawyers came up with those numbers" (*id.*) The amended complaint alleges that NQBRG and/or Ehrenfeld "plucked these numbers from thin air, to give the asset purchase Agreement an appearance of being an arm's length agreement" (*id.*).

During this time period, Moskowitz "became concerned that he was deceived by Taub and Aranoff about the 'nature' of the new 'investment' and [Plaintiff's] ability of being paid" (*id.* ¶ 95). "Moskowitz was then informed that the legal entity MVI Systems was basically closed, only a shell thereof remaining with a bank account containing less than $1,000 and nothing else," and that "the new entity is the successor company and the business is continuing seamlessly at the same business address, with the same employees, with the same IP (trademark and patents), and with the same web portal and domain name" (*id.* ¶ 96). As of the filing of the amended complaint, the current web address of MVI Industries was www.mvisystems.com, Taub and others continued to use email addresses at the @mvisystems.com domain name, and MVI Industries continues to use and advertise the same telephone numbers that MVI Systems used before the asset purchase (*id.* ¶ 97).

After learning about the asset purchase, Moskowitz "asked and was granted permission by Taub to alter the 'client name' on [Plaintiff's] internal client records and on the outstanding and future invoices to MVI Industries," and all invoices after this point were addressed solely to MVI Industries (*id.* ¶¶ 98-99). Moskowitz was informed that Taub is the CEO of MVI Industries (*id.* ¶ 100) and was informed by Taub and Aranoff that the new investors had earmarked some of

the invested funds to pay Plaintiff's invoices (*id.* ¶ 101). "Subsequent to September 4, 2019, and commensurate with the foregoing, [Plaintiff] received a $10,000 wire transfer that originated from MVI Industries that was applied to old, unpaid MVI Systems invoices, without protest" (*id.* ¶ 102). Shortly before September 23, 2019, an attorney named David Stein contacted Moskowitz and informed him that "he, Mr. Stein, is the only attorney authorized to speak and act on behalf of MVI Industries" (*id.* ¶ 103). Shortly thereafter, Plaintiff was replaced as the MVI counsel in the Gateguard and Runs Like Butter litigations (*id.* ¶ 103).

Plaintiff alleges that Defendants stopped paying its invoices in or about May 2019, but continued to receive services from Ostrolenk through October 2019 in the amount of $46,855.75 in the Gateguard litigation, $54,846.09 in the Runs Like Butter litigation, and approximately $1,600 in services on other patent and trademark matters (*id.* ¶¶ 38-39). Plaintiff asserts that it sent several invoices to Defendants for these services and received no objections to any invoices (*id.* ¶¶ 41-73). On September 16, 2019, Taub informed Moskowitz by email that "as of August 21, 2019, MVI Systems LLCs' new entity name is MVI Industries, LLC" (*id.* ¶ 72; NYSCEF Doc No. 41 at 3). Moskowitz then asked Taub to confirm "that MVI Industries will be responsible for [Plaitniff's] invoices, past and future" (*id.* ¶ 73; NYSCEF Doc No. 41 at 2), to which Taub responded, "I can confirm that the new entity is responsible for the invoices" and "MVI Industries will be responsible for [Plaintiff's] invoices, past and future" (*id.* ¶ 73; NYSCEF Doc No. 41 at 2).

Plaintiff commenced this action by filing a summons and complaint on December 9, 2019. Defendants MVI Industries, Ehrenfeld, and Michael Hannon s/h/a Mark Hannon ("Hannon") filed a pre-answer motion to dismiss on January 21, 2020 (NYSCEF Doc No. 48). On January 27, 2020, Plaintiff filed an amended complaint (NYSCEF Doc Nos. 28-41). On

January 30, 2020, the parties signed and filed a stipulation which provides that Plaintiff would respond to the motion to dismiss by filing the amended complaint, referenced by its NYSCEF docket numbers, and that the amended complaint would not name Hannon as a defendant in the action (NYSCEF Doc No. 48). The stipulation also provides that Plaintiff "shall refile/correct its Amended Complaint on or before Friday, January 31, 2020" (*id.*). The stipulation was so-ordered and filed by this court on Friday, January 31, 2020 (NYSCEF Doc No. 49). On Monday, February 3, 2020, Plaintiff uploaded a "corrected" version of the amended complaint that added an eighth cause of action (NYSCEF Doc No. 28).

The "corrected" amended complaint interposes causes of action for (1) successor liability against MVI Industries and MVI Systems, (2) account stated against MVI Systems, MVI Industries and Samuel Taub, (3) breach of contract against MVI Systems, MVI Industries and Samuel Taub, (4) unjust enrichment against all defendants, (5) fraudulent inducement against all defendants, (6) to set aside fraudulent conveyance pursuant to Debtor and Creditor Law ["DCL"] § 278, against all defendants,[2] (7) fraudulent conveyance (violation of DCL §§ 273-276), and (8) attorneys' fees pursuant to DCL § 276 [a]) (*id.*).[3]

Defendants MVI Industries and Ehrenfeld (together, the "Movants") now move pursuant to CPLR 3211 (a) (7) and (8) to dismiss the amended complaint in its entirety. Movants argue that Plaintiff only performed legal services for Taub and MVI Systems, that the asset purchase was a valid arms-length purchase, and, therefore, that the Movants are not liable for the debts to Plaintiff. Movants also argue that Plaintiff should be estopped from asserting its fraudulent

[2] Although the sixth cause of action is titled "Fraud," the conveyance of the basis of the claim and the cause of action seeks relief under DCL § 278. As such, the court will treat the cause of action as one for relief pursuant to DCL § 278).

[3] Certain changes to the Debtor and Creditor Law were implemented by the legislature and went into effect on April 4, 2020. The law herein cited refers to the text of the statute as it was prior to the amendment, when the events which gave rise to this action occurred.

conveyance claims because, during the course of its representation of MVI Industries in the prior federal actions, Plaintiff represented to the federal court that the purchase was not fraudulent and "was nothing more than a legitimate and ordinary business transaction" (NYSCEF Doc No. 58 at 8, mem in support). Movants also argue that the amended complaint improperly added the eighth cause of action for attorneys' fees and that the amended complaint should be dismissed against Ehrenfeld for lack of personal jurisdiction due to defective service of the amended summons and complaint. Finally, Movants argue that all of the causes of action asserted should be dismissed because they fail to state a cause of action. Plaintiff opposes the motion.

Standard of Review

On a motion to dismiss brought under CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted]). Ambiguous allegations must be resolved in the plaintiff's favor (*see JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). "The motion must be denied if the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 West 232 Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018]), but a pleading consisting of "bare legal conclusions" is insufficient (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied sub nom Spiegel v Rowland*, 552 US 1257 [2008]) and "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions

that are unsupportable based upon the undisputed facts" (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]).

Discussion

A. Amendment

Movants first seek to dismiss the complaint on the grounds that the "corrected" amended complaint was not authorized and was untimely. Pursuant to CPLR 3025(a), a party may amend their pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it. After this time, a party by amend their pleading by leave or court or by stipulation of all parties. Leave to amend a pleading "should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit" (*Y.A. v Conair Corp.*, 154 AD3d 611, 612 [1st Dept 2017]). Here, the parties entered into a stipulation allowing an amended complaint, and Plaintiff has demonstrated that it provided a copy of the proposed "corrected" amended complaint before the date of the stipulation. Therefore, the court will accept the "corrected" amended complaint, *nunc pro tunc*, despite the short delay in filing same.

B. Personal Jurisdiction

CPLR § 3211 (a) (8) provides for dismissal where the court does not have personal jurisdiction over a defendant (CPLR § 3211 [a] [8]). If a defendant moves to dismiss on the basis of lack of personal jurisdiction, the plaintiff must come forward with sufficient evidence to demonstrate jurisdiction (*Coast to Coast Energy, Inc. v Gasarch*, 149 AD3d 485, 486 [1st Dept 2017]). An affidavit filed in this action indicates that Ehrenfeld was served pursuant to CPLR 308 (2) on December 16, 2019 by substitute service upon Taub, a person of suitable age and

discretion, at 2607 Nostrand Avenue, Brooklyn 11210, the corporate office of MVI Industries (NYSCEF Doc No. 22). A second affidavit of service filed on August 10, 2020, indicates that Ehrenfeld was personally served pursuant to CPLR (1) on August 7, 2020, at an address located in Pikesville, Maryland (NYSCEF Doc No. 75).

CPLR § 308 (2) permits personal service on a natural person "by delivering the summons within the state to a person of suitable age and discretion at the actual place of business" and by mailing the summons by first class mail to the defendant at their "actual place of business in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other" (CPLR 308 [2]). "A person's 'actual place of business' must be where the person is physically present with regularity, and that person must be shown to regularly transact business at that location" (*Rosario v NES Medical Services of New York, P.C.*, 105 AD3d 831, 833 [2d Dept 2013]). CPLR 308 (2) "requires strict compliance and the plaintiff has the burden of proving, by a preponderance of the credible evidence, that service was properly made" (*id.*).

A process server's sworn affidavit of service ordinarily constitutes *prima facie* evidence of proper service pursuant to the CPLR and raises a presumption that a proper mailing occurred (*see Strober King Bldg. Supply Centers, Inc. v Merkley*, 697 NYS2d 319, [2nd Dept 1999]). A mere claim of improper service without more is insufficient to rebut an affidavit of service. A sworn affidavit alleging the particulars concerning why service is improper is required (*see Hinds v 2461 Realty Corp.*, 169 AD2d 629 [1st Dept 1991]). Where defendant swears to specific facts to rebut the statements in the process server's affidavit, a traverse hearing is warranted (*NYCTL 1998-1 Trust v Rabinowitz*, 7 AD3d 459 [1st Dept 2004]). Movants argue

that the action should be dismissed as against Ehrenfeld for lack of personal jurisdiction due to improper service because, although he is a principal of MVI Industries, he resides in Maryland and does not regularly transact business from the company's corporate office. In support of this motion, Ehrenfeld submits an affidavit in which he attests that he is a member of MVI Industries, but he does not conduct business of the company's corporate office, does not receive personal mail there, and does not hold himself out as doing business there (NYSCEF Doc No. 57 ¶¶ 3-6). In light of Ehrenfeld's status as a member of MVI Industries, these assertions strain credulity and lack specificity, and are in any event inconsequential because Ehrenfeld was personally served on August 7, 2020, which he does not contest (NYSCEF Doc No. 75).[4] Therefore, this portion of the motion to dismiss is denied.

C. Successor Liability

Relying on the factual allegations otherwise set forth in the amended complaint, Plaintiff's first cause of action for successor liability against MVI Systems, MVI Industries, and Taub alleges that "MVI Industries was created to acquire and replace MVI Systems as the operating company of the same business, working with the same products, substantially the same directors and principals, IP assets, good will, employees and every aspect (down to contact phone numbers, website address, and email addresses) involving the originally formed entity" (*id.* ¶¶ 118-119). Movants argue that the first cause of action should be dismissed because the amended complaint does not allege continuity of ownership and otherwise fails to plead a cause of action (NYSCEF Doc No. 58 at 19-21, mem in support). Plaintiff opposes and argues that it

[4] The 120-day deadline to serve Ehrenfeld was tolled through March 20, 2020 until November 4, 2020 by various Executive Orders issued by Governor Andrew Coumo in the wake of the COVID-19 pandemic (*see* Executive Order No. 202.8 [9 NYCRR 8.202.8], *et al.*). In any event, an extension of the time to serve would be warranted because Plaintiff has made diligent effort to serve Ehrenfeld, the statute of limitations on Plaintiff's claim has not expired, and Ehrenfeld would suffer no prejudice as a result.

has pled facts sufficient to sustain a cause of action for successor liability on the theory of "mere continuation" or "de facto merger" (NYSCEF Doc No. 61 at 20-21, mem in opp).

Generally, a corporation that acquires the assets of another is not liable for the torts of its predecessor (*Schumacher v Richards Shear Co.*, 59 NY2d 239, 244 [1983]). The Court of Appeals has acknowledged that recognized exceptions to this rule exist and 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 (*id.*). The second exception has been referred to by New York courts as the "de facto merger" exception (*see In re New York City Asbestos Litigation*, 15 AD3d 254, 255-256 [1st Dept 2005]).

> A transaction structured as a purchase-of-assets may be deemed to fall within this exception as a "de facto" merger, even if the parties chose not to effect a formal merger, if the following factors are present: (1) continuity of ownership; (2) cessation of ordinary business operations and the dissolution of the selling corporation as soon as possible after the transaction; (3) the buyer's assumption of the liabilities ordinarily necessary for the uninterrupted continuation of the seller's business; and (4) continuity of management, personnel, physical location, assets and general business operation.

(*Id.* at 256; *see also Fitzgerald v Fahnestock & Co.*, 286 AD2d 573, 575 [1st Dept 2001].) A de facto merger finding does not necessarily require the presence of each of these factors, although continuity of ownership is "a necessary element of any de facto merger finding" (*In re New York City Asbestos Litigation*, 15 AD3d at 256 [1st Dept 2005]). In determining whether a de facto merger exists, 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" (*Fitzgerald v Fahnestock*, 286 AD2d at 575). "The concept upon which this doctrine is based is 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" (*id.* [internal quotation omitted]).

The Amended Complaint alleges, *inter alia*, that the asset purchase constitutes a "mere purchase" or a "de facto merger" because Ehrenfeld, Taub, and Aranoff are all principals of both entities, (NYSCEF Doc No. 28 ¶¶ 10, 13, 74, 80), MVI Systems is functionally closed and unfunded, now maintaining a bank account containing less than $1,000 (*id.* ¶ 96), the assets valued at approximately $3,000,000 were purchased for $241,000, which was not fair consideration (*id.* ¶¶ 33-34), MVI Industries assumed the patents, trademarks, good will of MVI Systems (*id.* ¶¶ 29-30) and continued to operate the business with the same management (NYSCEF Doc No. 28 ¶¶ 10, 13, 74, 80), physical location, employees, customers, website, and telephone number (*id.* ¶¶ 96-97). These extensive and specifically pled allegations are sufficient to plead a cause of action for successor liability under, at a minimum, the de facto merger and mere continuation exceptions.

Movants' contention that Plaintiff has not pled a cause of action for de facto merger because it has not pled the necessary element of continuity of ownership, which cannot exist where the asset purchase was for cash is unavailing (NYSCEF Doc No. 58 at 18-21, mem in support). In the relevant cases cited by Movants, including *Oorah, Inc. v Covist Communications, Inc.* (139 AD3d 444, 445 [1st Dept 2016]) and *Matter of New York City Asbestos Litig.* (15 AD3d 254, 256 [1st Dept 2005]), the Appellate Division, First Department, concluded that continuity of ownership was absent not only because the transactions were cash purchases, but also because plaintiff did not allege that the shareholders of the predecessor corporation become shareholders of the successor corporation in those actions (*Oorah*, 139 AD3d at 445) and because neither the predecessor corporation nor any of its shareholders had

become a shareholder of the successor corporation (*Asbestos Litig.*, 15 AD3d at 256). Conversely, in this action Plaintiff has pled continuity of ownership by pleading that Ehrenfeld, Taub, and Aranoff are all principals of both entities (NYSCEF Doc No. 28 ¶¶ 10, 13, 74, 80). Furthermore, the notion that there can be no continuity of ownership between seller and buyer where the transaction was a cash purchase is premised on the buyer paying a bona fide, arms-length purchase price for the assets, such that there is no unfairness to creditors because the purchase price would take the place of the purchased assets as a resource for satisfying the seller's debts (*see e.g., Matter of TBA Global, LLC v Fidus Partners, LLC*, 132 AD3d 195, 210 [1st Dept 2015] ["By contrast, where a buyer pays a bona fide, arms-length price for the assets, there is no unfairness to creditors in . . . limiting recovery to the proceeds of the sale—cash or other consideration roughly equal to the value of the purchased assets would take the place of the purchased assets as a resource for satisfying the seller's debts"] [internal quotation omitted]). Where the consideration is inadequate and the ownership between buyer and seller is continuous, the sale is unfair to creditors and the owners are unjustly enriched. Thus, the mere existence of a cash transaction does not bar a finding that continuity of ownership exists, particularly on a motion to dismiss where the factual record regarding the details of the asset purchase has not been established. Therefore, for the purposes of this motion to dismiss, where the court must accept the facts as alleged in the complaint and accord the Plaintiff every possible favorable inference (*Leon v Martinez*, 84 NY2d at 88), continuity of ownership has been adequately pled.

Movants also argue that the asset purchase alleged in the amended complaint does not satisfy the "mere continuation" exception because MVI Systems continued to exist after the transaction was completed (NYSCEF Doc No. 58 at 18, n 3, mem in support). On the contrary, the Appellate Division, First Department, has rejected this argument and held that "[s]o 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 v Fahnestock*, 286 AD2d at 575). The Appellate Division, First Department, has also identified several factors as evidence tending to support successor liability by a mere continuation, including (1) the successor corporation purchased all or substantially of all of the predecessor corporation's assets, (2) the predecessor corporation ceased to exist or existed only as a shell after the purchase, (3) the successor corporation assumed a name nearly identical to that of the predecessor corporation, (4) the officers of the predecessor corporation were retained by the successor, and (5) the successor corporation continued the same business (*Burgos v Pulse Combustion*, 227 AD2d 295, 295-296 [1st Dept 1996]; *Fitzgerald v Fahnestock*, 286 AD2d at 575). The factual allegations set forth in the amended complaint are sufficient to state a cause of action under the mere continuation exception under this standard. Therefore, the motion to dismiss the first cause of action is denied.

D. Fraudulent Conveyance

Movants next move to dismiss the fifth, sixth, and seventh causes of action for, respectively, fraudulent inducement, to set aside the fraudulent conveyance under DCL § 278, and fraudulent conveyance under §§ 273-276. The fifth cause of action for fraudulent inducement alleges that Defendants "intentionally and knowingly made false representations about the business and status of MVI Systems in order to induce Ostrolenk to perform legal services for the Defendants' benefit" (NYSCEF Doc No. 28 ¶ 147). However, it is well settled that a law firm cannot sue a former client for fraudulent inducement to procure legal services because "[t]he public policy of New York which permits a client to terminate the attorney-client relationship freely at any time, notwithstanding the existence of a particularized retainer

agreement between the parties, would be easily undermined if an attorney could hold a client liable for fraud on the theory that the client misrepresented his or her true intent when the retainer was executed" (*Demov, Morris, Levin & Shein v Glantz,* 53 NY2d 553, 557 [1981]). Corporate officers also cannot be held liable for fraudulent inducement to procure legal services (*Kaplan v Heinfling*, 136 AD2d 34, 39 [1st Dept 1988]). The fifth cause of action for fraudulent inducement is, therefore, dismissed as a matter of public policy.

The sixth and seventh causes of action interpose, respectively, causes of action to set aside the fraudulent conveyance pursuant to DCL § 278 and for fraudulent conveyance under §§ 273-276. Relying on theories of quasi estoppel or estoppel against inconsistent positions, Movants argue that Plaintiff should be estopped from asserting these claims against them because counsel to the Plaintiff represented to federal court in the Runs Like Butter litigation that the transaction was not a fraud. In support of its position, Movants submit a letter dated September 19, 2019, written by Moskowitz, in his capacity as counsel to MVI Systems, to Magistrate Judge Orenstein in reference to the Runs Like Butter litigation (NYSCEF Doc No. 55). The letter opposes the disclosure of certain business records and makes reference to "an email . . . to the venture capital company that eventually invested one million dollars in MVI and resulted in the re-forming of MVI Systems into MVI Industries" (*id.*). Moskovits states, *inter alia*, that "[i]t makes no sense at all to characterize Mr. Taub's efforts to raise capital for his company . . . as a 'fraud' . . . that has never been defined and indeed never happened" . . . Mr. Taub did not engage in any fraud and Plaintiff did not cite a scintilla of evidence pointing to anything constituting a legal 'fraud'" (*id.*).

The doctrine of estoppel against inconsistent positions, also known as the doctrine of judicial estoppel, "prevents *a party* who assumed a certain position in a prior proceeding and

secured a ruling in his or her favor from advancing a contrary position in another action, simply because his or her interests have changed" (*Becerril v City of New York Dept. of Health & Mental Hygiene*, 110 AD3d 517, 519 [1st Dept 2013] [emphasis added]). The doctrine "rests upon the principle that a litigant should not be permitted to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise" (*id.*). To the extent that Movants rely on this doctrine, their position is unfounded because Plaintiff was not a litigant in the Runs Like Butter action and the doctrine is inapplicable.

Movants' reliance on the more flexible doctrine of "quasi estoppel" is similarly unpersuasive at this stage of the litigation. The complaint alleges that the asset purchase was concealed from Plaintiff (NYSCEF Doc No. 28 ¶¶ 5, 35) and that it did not learn the details regarding the formation of MVI Industries until after the expedited discovery undertaken in the Runs Like Butter litigation (*id.* ¶¶ 92-96). The timeline of events regarding the federal proceeding and Plaintiff's knowledge of the transfer are unclear from the record before the court. Although Movants have not moved pursuant to CPLR 3211(a)(1) to dismiss on the basis of documentary evidence (*see* NYSCEF Doc No. 53, Notice of Motion), they nevertheless move this court to dismiss the sixth and seventh causes of action on the basis of a single letter filed in the Runs Like Butter litigation, without the benefit of any discovery in this action and submitted without context regarding its application in the underlying federal proceeding. Dismissal under CPLR 3211 (a) (1) is warranted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Pre-answer dismissal of this action on the grounds of quasi estoppel based entirely upon the September 19, 2019 letter is not appropriate at this stage of the litigation because questions of fact exist regarding what knowledge Plaintiff had of

the transaction at the time of the federal court proceeding and regarding the context in which Moskowitz sent the September 19, 2019 letter. Therefore, this portion of the motion is denied.

Sections 273, 274, and 275 of the DCL set forth the legal basis for constructive fraudulent conveyance made without fair consideration where (i) the transferor who is insolvent or will be rendered insolvent by the transaction in question (DCL § 273), (ii) the transferor is engaged in or about to engage in a business for which capital is unreasonably small (DCL § 274), or the transferor believes that it will incur debt beyond its ability to pay (DCL § 275). "Fair consideration" is given for property "when in exchange for such property . . . as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied," or when such property "is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property . . ." (DCL § 272 [a-b]). Whether "fair consideration" has been exchanged must be determined based on the particular facts of each case (*Commodity Futures Trading Commission v Walsh*, 17 NY3d 162, 175 [2011], *quoting* Debtor and Creditor Law § 272 [a]). Claims for fraudulent conveyance actions under sections 273-275 and are not subject to the heightened pleadings standard of CPLR § 3016 [b], because they are based on constructive fraud, not actual fraud (*Ridinger v W. Chelsea Dev. Partners LLC*, 150 AD3d 559, 560 [1st Dept 2017]; *see Gateway I Group, inc. v Park Ave. Physicians, P.C.*, 62 AD3d 141, 149-50 [2d Dept 2009]). The factual allegations that the asset purchase, which was orchestrated and financed, in part, by Ehrenfeld (NYSCEF Doc No. 28 ¶¶ 33, 79-82, 94), was made for inadequate consideration because assets with value of over $3,000,000 were sold for $241,000 (*id.* ¶¶ 33-34), leaving MVI Systems with inadequate capital (*id.* ¶ 5, 96) while it continued to incur debts (*id.* ¶¶ 38-40) are sufficient to state causes of action for constructive fraudulent conveyance under DCL §§ 273-275 (*see Brennan v 3250 Rawlins*

Ave. Partners, LLC, 171 AD3d 603, 604 [1st Dept 2019]). Whether the consideration was adequate is a question of fact to be determined at trial (*Commodity Futures Trading*, 17 NY3d at 175).

Plaintiff has not, however, stated a cause of action for actual fraud under DCL § 276 or attorneys' fees under DCL § 276-a. Debtor and Creditor Law § 276 provides that "[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." A plaintiff that successfully establishes actual intent to defraud is entitled to a reasonable attorney's fee under Debtor and Creditor Law § 276–a (*5706 Fifth Ave., LLC v Louzieh*, 108 AD3d 589, 590 [2d Dept 2013]). These sections address conveyances made with an actual intent to defraud, and thus does not require proof of unfair consideration or insolvency (*Wall St. Assocs. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999]), but they must be pled with particularity (CPLR § 3016 [b]). The requisite intent to hinder, defraud, or delay "may be inferred from the circumstances surrounding the allegedly fraudulent transfer," and a party pleading a claim under these sections may rely on "badges of fraud" to support its claim (*Matter of Uni-RTY Corp. v New York Guangdong Fin., Inc.*, 117 AD3d 427, 428 [1st Dept 2014]). Badges of fraud, or "circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent," include (1) a close relationship among the parties to the transaction, (2) a questionable transfer or transfers not in the usual course of business, (3) the inadequacy of the consideration, (4) the transferor's knowledge of the creditor's claims or claims so likely to arise as to be certain, and the transferor's inability to pay them, and (5) the retention of control of property by the transferor after the conveyance (*Wall St. Assocs., supra*). Plaintiff's allegations regarding intent and the alleged badges of fraud

are not pled with the requisite particularity because they are made largely upon information and belief and the source of information was not disclosed (*see Brennan*, 171 AD3d at 605; *RTN Networks, LLC v Telco Group, Inc.*, 126 AD3d 477, 478 [1st Dept 2015]). Therefore, that portion of the seventh cause of action that asserts a cause of action under DCL § 276 and the eight cause of action for attorneys' fees under DCL § 276-a are dismissed without prejudice.

Finally, the sixth cause of action seeks to set aside the asset purchase pursuant to DCL § 278 (NYSCEF Doc No. 28 ¶¶ 155-159). Where a fraudulent conveyance has been established, DCL § 278 provides that the judgment creditor may "[h]ave the conveyance set aside" or disregarded and the property attached or levied upon "as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase" (DCL § 278 [1]). Because Plaintiff has stated a claim for relief under DCL §§ 273-275, its cause of action pursuant to section 278 may be maintained. Therefore, this portion of the motion to dismiss is denied.

E. Account Stated

An account stated exists when a party to a contract receives bills or invoices and does not protest within a reasonable time (*see Bartning v Banning,* 16 AD3d 249, 250 (1st Dept 2005]). The amended complaint alleges, in detail, that Plaintiff sent several invoices for legal services rendered to MVI Systems and MVI Industries by delivering the invoices to Taub, the CEO of both entities, that there was no objection to the invoices for a period of weeks or months, and that the invoices remain unpaid (NYSCEF Doc No. 28 ¶¶ 41-73). This is sufficient to state a cause of action for an account stated. Movants' assertion that Plaintiff had a duty to inquire whether Taub lacked authority to bind MVI Industries is meritless because Taub is the CEO of MVI

Industries, which Movants do not deny. Therefore, this portion of the motion to dismiss is denied.

F. Breach of Contract and Unjust Enrichment

To state a cause of action for breach of contract, a plaintiff must plead the existence of a contract between the parties, plaintiff's performance, the defendant's breach, and damages (*Belle Lighting LLC v Artisan Construction Partners LLC*, 178 AD3d 605, 606 [1st Dept 2019]). Where parties are not in privity but have a quasi-contractual relationship, an equitable claim for unjust enrichment may be interposed (*Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 [1987]). Unjust enrichment arises when a defendant was enriched at plaintiff's expense and it is against equity and good conscience that defendant retain what is sought to be recovered (*Travelsavers Enterprises, Inc. v Analog Analystics, Inc.*, 149 AD3d 1003 [2d Dept 2017]). As discussed hereinabove, the Amended Complaint adequately states a claim for breach of contract by virtue of successor liability as against MVI Industries. Because there is a *bona fide* dispute regarding whether a contract exists, Plaintiff is also permitted to plead unjust enrichment in the alternative (*Lax v Design Quest, N.Y. Ltd.*, 118 AD3d 490, 491 [1st Dept 2014]). Therefore, the motion to dismiss these causes of action is denied.

Accordingly, it is

ORDERED that the motion to dismiss is granted in part, and the fifth cause of action, that portion of the seventh cause of action that asserts a cause of action under DCL § 276, and the eight cause of action are dismissed; and it is further

ORDERED that the parties are directed, within 10 days of the filing of this decision and order, to meet and confer regarding discovery and submit a proposed preliminary conference order, in a form that substantially conforms to the court's form Commercial Division Preliminary

Conference Order located at https://www.nycourts.gov/LegacyPDFS/courts/1jd/supctmanh/PC-CD.pdf, to the Principal Law Clerk of this Part (Part 38) at lfurdyna@nycourts.gov; and it is further

ORDERED that a preliminary conference will be held on January 4, 2022 at 11:00 a.m., by Microsoft Teams appearance to be arranged by the court.

This will constitute the decision and order of the court.

ENTER:

12/8/2021
DATE

LOUIS L. NOCK, 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**	