[*1]

Marcum LLP v Fazio, Mannuzza, Roche, Tankel, Lapilusa, LLC
2019 NY Slip Op 52010(U)
Decided on December 13, 2019
Supreme Court, Suffolk County
Emerson, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on December 13, 2019

Supreme Court, Suffolk County

Marcum LLP, Plaintiff,

against

Fazio, Mannuzza, Roche, Tankel, Lapilusa, LLC, Defendants.

14831-12

LAW OFFICES OF ANDREW PRESBERG, P.C.

Attorneys for Plaintiff

100 Corporate Plaza, Suite B102

Islandia, New York 11749

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

Attorneys for Defendants

1133 Westchester Avenue

White Plains, New York 10604

Elizabeth H. Emerson, J.

Upon the following papers numbered*1-23*read on this motion*to amend* ; Notice of Motion and supporting papers*1-13* ; Notice of Cross Motion and supporting papers; Answering Affidavits and supporting papers *14-16* ; Replying Affidavits and supporting papers*17-23* ; it is,

ORDERED that the motion by the plaintiff for leave to serve and file a second amended complaint adding PKF O'Connor Davies, LLP, f/k/a O'Connor Davies, LLP, as a party defendant is referred to a hearing, which shall be held on January 23, 2020, at 10:30 a.m., and which shall [*2]continue until completed in the Supreme Court, Courtroom 7, Arthur M. Cromarty Criminal Court Building, 210 Center Drive, Riverhead, New York 11901; and it is further

ORDERED that the parties appear for a conference with the court to prepare for the hearing on Janaury 14, 2020, at 10:30 a.m., in the Supreme Court, Courtroom 7, Arthur M. Cromarty Criminal Court Building, 210 Center Drive, Riverhead, New York 11901; and it is further

The plaintiff seeks leave to amend the complaint to add PKF O'Connor Davies, LLP, f/k/a O'Connor Davies, LLP ("PKF O'Connor"), as a party defendant and to add three new causes of action against PKF O'Connor for merger liability, defacto merger, and successor liability.

Preliminarily, the court notes that successor liability is not a separate cause of action, but merely a theory for imposing liability on a defendant based on a predecessor's conduct (**City of Syracuse v Loomis Armored US, LLC**, 900 F Supp 2d, 274, 290 [NDNY]). The doctrine of successor liability does not create a new cause of action against the successor so much as it transfers the liability of the predecessor to the successor (**Id**.). It is an exception to the general rule that, when one corporate or other juridical person sells assets to another entity, the assets are transferred free and clear of all but valid liens and security interests (**Cleo Realty Assocs., L.P. v Uptown Birds, LLC**, 135 AD3d 432, 434).

Under both New York law and traditional common law, a corporation that purchases the assets of another corporation is generally not liable for the seller's liabilities (**Long Oil Heat, Inc., v Spencer**, 375 F Supp 3d 175, 200). Successor liability, however, applies in four situations: (1) the buyer 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 was entered into fraudulently to escape such obligations (**Id**. at 200-201). The second exception subsumes the doctrine of de facto merger when a transaction, although not in form a merger, is in substance a consolidation or merger of seller and purchaser (**Id**. at 201). The hallmarks of common-law de facto merger are: (1) continuity of ownership, (2) cessation of ordinary business and dissolution of the acquired corporation as soon as possible, (3) assumption by the purchaser of the 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**; *see also*, **Matter of New York City Asbestos Litig.**, 15 AD3d 254, 256). The plaintiff seeks to impose successor liability on PKF O'Connor under the first and second exceptions.

New York courts recognize the express-or-implied-assumption exception to the general rule of nonliability (**George W. Kiney, Successor Liability in New York**, 79 NY St BJ 22, 22 [Sept. 2007]). In the few cases that have addressed this exception, courts have looked at the language of the purchase agreement to determine whether the successor has expressly assumed any liabilities of the predecessor (**Id**. at 23).

The plaintiff contends that the Business Combination Agreement between the defendant ("FMRTL") and O'Connor Davies, LLP ("O'Connor Davies"), PKF O'Connor's predecessor in interest, reveals that O'Connor Davies assumed FMRTL's liabilities. Specifically, the plaintiff relies on the following language on the recitals page:

> "WHEREAS, the Transaction is to be effected by the transfer to O'Connor Davies from [*3]FMRTL of the Assigned FMRTL Assets (as hereinafter defined) in consideration of the assumption by O'Connor Davies of the Assumed FMRTL Liabilities (as hereinafter defined) and the issuance to FMRTL of a partnership interest in O'Connor Davies that shall be simultaneously and directly distributed to certain of the FMRTL Equity Partners (as hereinafter defined)[.]"

The plaintiff also relies on language in the bill of sale that "the Buyer has agreed to assume the Assumed FMRTL Liabilities (as defined in the Business Combination Agreement) and

that the "Buyer . . . accepts and assumes from the Seller the Assumed FMRTL Liabilities." The plaintiff also contends that a reference to this litigation was included on Schedule 3(b) of the Business Combination Agreement, entitled "FMRTL Litigation."

The court finds that, contrary to the plaintiff's contentions, O'Connor Davies did not agree to assume liability for this litigation in the Business Combination Agreement. New York law holds that a whereas clause can be used to clarify the meaning of an ambiguous contract, but it cannot be used to modify or create substantive rights not found in the contract's operative clauses (**RSL Communications, PLC v Bildirici**, US Dist Ct, SDNY, Mar. 5, 2010, Sullivan, J. [2010 WL 846651] at *4 [and cases cited therein], *affd* 412 Fed Appx 337 [2nd Cir]). The Business Combination Agreement is not ambiguous, and nothing in its operative clauses imposes liability on O'Connor Davies for FMRTL litigation. The Business Combination Agreement defines Assumed FMRTL Liabilities as "all liabilities of FMRTL arising in the ordinary course and relating to the period prior to the Closing Date, plus all liabilities of FMRTL arising in the ordinary course and incurred thereafter in connection with the business of FMRTL." Thus, O'Connor Davies only assumed liability for FMRTL liabilities arising in the ordinary course of FMRTL's business. Although there is little case law on what exactly constitutes a transaction in the ordinary course of business (**Matter of Rave Communications, Inc.**, 128 BR 369, 372), the bankruptcy courts have held that it includes normal financial relations, i.e., recurring, customary credit transactions that are paid in the ordinary course of a debtor's business (*see e.g.*, **Matter of Quebecor World [USA], Inc.**, 491 BR 379, 385). Litigation is not such a recurring, customary transaction. Rather, it is extraordinary. Moreover, although a reference to this litigation was included on Schedule 3(b) of the Business Combination Agreement, it was included as part of FMRTL's representations and warranties. Article 4 of the Business Combination Agreement, entitled "Representations and Warranties of FMRTL" provides that, except as set forth on Schedule 3(b), no litigation, arbitration or administrative proceeding, claim, counterclaim, action or governmental investigation is pending or threatened against FMRTL. Thus, the reference to this litigation on Schedule 3(b) was for disclosure purposes only and did not create any assumption of liability therefor. Accordingly, the court finds that the plaintiff has failed to establish that the express-or-implied-assumption exception to the general rule of nonliability applies.

The court cannot determine, based on the record presently before it, whether the de-facto-merger exception applies. Moreover, there are questions of fact as to whether the plaintiff delayed in seeking the amendment and whether it would cause surprise or prejudice

to the defendant (**Guinta's Meat Farms, Inc. v Pina Constr. Corp.**, 80 AD3d 558, 559 [and cases cited therein]). Accordingly, a hearing is required.

DATED: December 13, 2019

*[*4]*

J. S.C.

Return to Decision List