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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

MONITOR HOLDING CORP.,

Plaintiff,

-against-

I.B. DISTRIBUTING CORP.; THE GIANT BEVERAGE COMPANY, INC.; FRANK IEMMITI; ANTHONY IEMMITI; VICTOR IEMMITI; and SALVATORE IEMMITI,

Defendants.

TRIAL/IAS, PART 41
NASSAU COUNTY
INDEX NO.: 10-017963

MOTION SUBMISSION
DATE: 12-20-11

MOTION SEQUENCE
NO. 1

The following papers read on this motion:

Notice of Motion, Affirmation, and Exhibits	X
Affirmation in Opposition	X
Memorandum of Law in Support	X
Reply Memorandum of Law in Support	X

Motion by defendants The Giant Beverage Company, Inc ("Giant"), Frank Iemmiti, Anthony Iemmiti, and Salvatore Iemmiti, for judgment dismissing the complaint pursuant to CPLR 3211(a)(1), (a)(7), (a)(8), and CPLR 3016(b) is granted as to the fourth, tenth, and the eleventh causes of action against the individual defendants, and the ninth cause of action against Giant. The first, second, third, fifth, sixth, seventh, eighth, and the eleventh causes of action against IB and/or Giant, are severed and continued.

At the outset the Court notes that defendant Victor Iemmiti died on Nov. 5, 2009, before the commencement of this action. All parties agree that dismissal of the entire complaint as to this defendant, for lack of personal jurisdiction, is warranted and therefore is granted.

This action arises out of a breach of a 10-year lease between plaintiff, the landlord, and defendant IB, the tenant. IB was a beverage distributor in Elmhurst, New York; it went out of business in December, 2009. In a non-payment proceeding in Queens, plaintiff obtained a default judgment against IB in the amount of $58,519.00, representing rent owed through November, 2009. Plaintiff seeks to collect this judgment, as well as an additional $267,219, representing rent owed through the end of the lease, from IB, the three remaining Iemmiti brothers who were the shareholders of IB and are alleged to be the shareholders of Giant, as well as from Giant.

Giant, a beverage distributor in Staten Island, was incorporated on October 10, 2007. It is owned by non-parties Frank Iemmiti and Anthony Iemmiti, two brothers who are the sons of defendant Anthony Iemmiti, and the nephews of defendants Frank and Salvatore Iemmiti.

In its complaint plaintiff alleges eleven causes of action, including a claim against IB for additional rent due, seven claims for fraudulent conveyances

pursuant to various provisions of the Debtor and Creditor Law, a claim against Giant for successor liability, a claim against the individual defendants seeking to pierce the corporate veil of IB and/or Giant, and one hybrid pierce the veil/fraudulent conveyance claim. On this motion the three remaining individual defendants and Giant seek dismissal of the entire complaint.

CPLR 3211 Standard

On a motion to dismiss pursuant to CLR 3211, the facts as alleged must be accepted as true, the pleader must be accorded the benefit of every favorable inference, and the court must determine only whether the facts as alleged fit within any cognizable theory (*Samiento v World Yacht Inc.*, 10 NY3d 70, 79 [2008]; *Arnav Industries, Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, LLP*, 96 NY2d 300, 303 [2001]).

Where documentary evidence definitively contradicts the plaintiff's factual allegations and conclusively disposes of the plaintiff's claim, dismissal pursuant to CPLR 3211(a)(1) is warranted (*Snyder v Voris, Martini & Moore, LLC,* 52 AD3d 811 [2nd Dept 2008]; *M Fund Inc. v Carter*, 31 AD3d 620 [2nd Dept 2006]; *Berardino v Ochlan*, 2 AD3d 556 [2nd Dept 2003]). Judicial records, and documents reflecting out-of-court transactions such as deeds, mortgages, and contracts, would qualify as "documentary evidence" (*Fontanetta v Doe*, 73 AD3d

78, 84-85 [2nd Dept 2010]). An affidavit does not constitute "documentary evidence" for the purposes of CPLR 3211(a)(1) (*HSBC Bank USA v Pugkhem*, 88 AD3d 649, 651 [2nd Dept 2011]).

The criterion on a motion pursuant to CPLR 3211(a)(7) is whether the pleader has a cause of action (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

The Ninth Cause of Action for Successor Liability

The complaint herein is largely based on the following allegations by plaintiff: that Giant is a successor in interest and alter ego of IB (complaint, par. 13); defendant Giant is a mere continuation of the business of IB (complaint, par 15); and there was a *de facto* merger of the business of IB into the business of Giant (complaint, par. 16). Defendants argue that these allegations have no factual basis.

The general rule is that a successor corporation is not liable for the torts of the predecessor. However exceptions to the rule are found where: (1) there is express or implied assumption of the predecessor's liability; (2) there has been consolidation or merger of the seller and the purchaser; (3) the purchasing corporation is a mere continuation of the selling corporation; and (4) the transaction is entered into fraudulently to escape obligations of the predecessor (*Schumacher v Richards Shear Co.*, 59 NY2d 239, 245 [1983]).

The analysis for the "mere continuation" exception should be flexible and ask "whether in substance it was the intent of the successor to absorb and continue the operation of the predecessor," with consideration given to the factors of "management, personnel, physical location, good will and general business operation" (*Kaur v American Transit Ins. Co*, 86 AD3d 455, 458 [1st Dept 2011]).

The hallmarks of a *de facto* merger include: continuity of ownership; cessation of ordinary business and dissolution of the acquired corporation as soon as possible; assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and, continuity of management, personnel, physical location, assets and general business operation (*Washington Mutual Bank, FA v SIB Mortgage Corp.*, 21 AD3d 953, 954 [2nd Dept 2005], quoting *Fitzgerald v Fahnestock & Co.*, 286 AD2d 573, 574 [1st Dept 2001]).

The court should disregard form, and consider the substance of the transaction (*AT&S Transp., LLC v Odyessey Logistics and Technology Corp.*, 22 AD3d 750 [2nd Dept 2005]).

What the record shows is that IB was incorporated in 1983, and went out of business in 2009. It was located in Elmhurst, Queens. Giant was incorporated in 2007 in Staten Island, while IB was still operating. The four brothers who

incorporated and owned IB are not owners of Giant. Rather, Giant's owners are two brothers, who happen to be related to the four owners of IB. The two corporations do not share personnel or a work site.

The only item that IB admits transferring to Giant was its phone line, which was discontinued in 2010. Indeed plaintiff submits a dvd of a call made to IB's phone number, where the call is answered by a recording stating that the answering party is answering on behalf of IB and Giant. Plaintiff also questions the transfer of a large refrigeration unit from IB to Giant, and the employment by Giant of IB's former general manager, Dennis. The question presented is whether these facts rise to the level of stating a claim against Giant for implied assumption of successor liability, mere continuation of IB as Giant, or a *de facto* merger of IB into Giant.

There has been no continuity of ownership here, a factor which is essential to merger (*Washington Mutual Bank, FA* at 954; *In re New York City Asbestos Litigation*, 15 AD3d 254, 258 [1st Dept 2005]; see also *Kretzner v Firesafe Products Corp.*, 24 AD3d 158 [1st Dept 2005]). The mere hiring of several, or even many, of a corporation's employees is insufficient to show continuity of management (*Kretzmer* at 159; *Washington Mututal Bank* at 953). Overall, the substance of this dispute is that IB and Giant were two separate corporate entities

in different locations, that were both involved in beverage distribution. IB failed, while Giant is a viable business, and the owners of the two entities happen to be related. This scenario does not fall within the parameters of any of the exceptions to the rule against successor liability. It does not provide a legal basis for IB's former landlord to seek IB's former rent payments from Giant, and consequently plaintiff has no cause of action against Giant for implied assumption of successor liability, mere continuation of IB as Giant, and/or *de facto* merger. Therefore, the ninth cause of action must be dismissed.

The Fourth, Tenth and Eleventh Causes of Action for Fraud Wherein the Plaintiff Seeks to Pierce the Corporate Veil

In general, a party seeking to pierce the corporate veil must establish that "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff's injury" (*AHA Sales, Inc. v Creative Bath Products Inc.*, 58 AD3d 6, 23-24 [2nd Dept 2008] quoting *Matter of Goldman v Chapman*, 44 AD3d 938, 939 [2nd Dept 2007], lv app den 10 NY3d 702 [2008] and *Matter of Morris v New York State Dept. of Taxation and Finance*, 82 NY2d 135, 141 [1993]).

Factors to be considered in determining whether the owner has abused the privilege of doing business in the corporate form include whether there was a failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use (*East Hampton Union Free School District v Sandpebble Builders Inc.*, 66 AD3d 122, 127 [2nd Dept 2009], affd 16 NY3d 775 [2011], quoting *Millennium Construction, LLC v Loupolover*, 44 AD3d 1016, 1017 [2nd Dept 2007]; *AHA Sales Inc* at 24). Failure to plead sufficient specific factual allegations that the individuals so dominated and controlled the subject corporation as to warrant piercing the corporate veil, will result in dismissal of such a claim (*East Hampton Union Free School District v Sandpebble Builders Inc,* 16 NY3d 775 [2011]; *AHA Sales Inc.*; *Albstein v Elany Contracting Corp*, 30 AD3d 210 [1st Dept], lv app den 7 NY3d 712 [2006]). There is no independent cause of action to pierce the corporate veil (*Fiber Consultants Inc v Fiber Optek Interconnect Corp*, 15 AD3d 528 [2nd Dept], lv app dsmd 4 NY3d 882 [2005]).

In the fourth, tenth and eleventh causes of action, plaintiff seeks to hold the individual defendants liable for the alleged conveyance of "assets" by IB to Giant. To the extent that plaintiff seeks to pierce Giant's corporate veil in these causes of action, such allegations are based upon the incorrect factual predicate that the

individual defendants are the shareholders and officers of Giant. On this record, plaintiff has no such cause of action against the individual defendants in connection with piercing Giant's corporate veil.

To the extent that plaintiff seeks to pierce IB's corporate veil in these causes of action, such claims must be dismissed as plaintiff has failed to plead sufficient specific factual allegations that the individual defendants so dominated IB, and abused the privilege of operating in the corporate form, as to warrant piercing IB's corporate veil. There are no allegations in the record of failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, or the use of IB's corporate funds for the use of the individual defendants.

Based on the foregoing the motion to dismiss the fourth, tenth and eleventh causes of action against the individual defendants must be granted.

Plaintiff alleges the eleventh cause of action against Giant, as well as the individual defendants. To the extent that this cause of action is supplemented by the opposition papers, it states a cause of action against Giant pursuant to Debtor and Creditor Law 276 and 276-a, and therefore dismissal of the eleventh cause of action against Giant is denied.

The Fraudulent Conveyance Causes of Action

In the second, third, fifth, sixth, and seventh causes of action, consecutively, plaintiff alleges violations of Debtor and Creditor Law §§273, 276, 278, 273-a, 274, and 275. In the eighth and eleventh causes of action plaintiff seeks attorneys' fees pursuant to Debtor and Creditor Law §276-a. The gravamen of plaintiff's claims is that all of the assets of IB were conveyed by IB and its four shareholders to Giant without fair consideration.

The allegations of these claims pursuant to the Debtor and Creditor Law are tailored to the language of the statute. They contain only legal conclusions and no specific factual allegations (*NTL Capital LLC v Right Track Recording LLC*, 73 AD3d 410 [1st Dept 2010]). While speculative and conclusory allegations do not state a cause of action under the Debtor and Creditor Law (*Riback v Margulis*, 43 AD3d 1023 [2nd Dept 2007]), the plaintiff is not required to plead violations of the Debtor and Creditor Law with the heightened particularity required by to CPLR 3016(b) (*Gateway I Group, Inc v Park Avenue Physicians, PC*, 62 AD3d 141 [2nd Dept 2009]).

Viewing the allegations of the complaint in the light most favorable to the plaintiff, and supplementing the complaint with the affidavit in opposition of Peter

Kliegman, the subject of the fraudulent conveyance claims appears to be a phone line and a refrigeration unit. These were assets of IB, and plaintiff alleges, *inter alia*, that they were transferred to Giant without consideration. Under these circumstances, dismissal of the second, third, fifth, sixth, seventh, eighth, and eleventh causes of action for failure to state a cause of action must be denied.

In denying the dismissal motion as to the fraudulent conveyance claims, the Court notes that the remedy for a violation of the Debtor and Creditor Law is tied to the value of the item allegedly wrongfully transferred. On this record, the value of the phone number of a corporation that is going out of business and a second-hand refrigeration unit is unclear.

Finally plaintiff's attempt to seek discovery to sustain its successor liability and pierce the corporate veil claims is unavailing. The policy inherent in allowing individuals to conduct business in the corporate form would be seriously threatened if an insufficient cause of action were allowed to survive in the hope that something will turn up (*East Hampton Union Free School District* at p. 129). Discovery may proceed, but only as to the fraudulent conveyance claims, and only from IB and Giant.

Dated: February 22, 2012

STEVEN M. JAEGER, A.J.S.C.