SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

749

CA 24-00352

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, NOWAK, AND DELCONTE, JJ.

THE CINCINNATI INSURANCE COMPANY,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH J. DOMINGUEZ, KJ MECHANICAL OF
WNY, INC., DEFENDANTS,
AND DIRECT HVAC SERVICES INC., INDIVIDUALLY AND
DOING BUSINESS AS KJ MECHANICAL OF WNY, INC.,
DEFENDANT-APPELLANT.

LAW OFFICE OF SANTACROSE, FRARY, TOMKO, DIAZ-ORDAZ & WHITING, BUFFALO (RICHARD S. POVEROMO OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICES OF ROBERT A. STUTMAN, P.C., NEW YORK CITY (DANIEL HOGAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank A. Sedita, III, J.), entered February 15, 2024. The order denied the motion of defendant Direct HVAC Services Inc., individually and doing business as KJ Mechanical of WNY, Inc., for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this subrogation action, plaintiff insurer seeks damages arising from a fire it alleges was caused by the negligent design and installation of an exhaust system by defendant KJ Mechanical of WNY, Inc. (KJ Mechanical). In its complaint, plaintiff further alleges, inter alia, that defendant Direct HVAC Services Inc., individually and doing business as KJ Mechanical of WNY, Inc. (Direct HVAC), is liable for those damages as the successor of KJ Mechanical by de facto merger. Direct HVAC appeals from an order denying its motion for summary judgment dismissing the complaint against it. We affirm.

Generally, a business entity that acquires the assets of another business entity may be held liable for the torts of its predecessor only if: "(1) it expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations" (*Schumacher v Richards Shear Co.*, 59 NY2d 239, 245 [1983]). The second *Schumacher* exception for

consolidations and mergers includes de facto mergers, in which " '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' " (*Simpson v Ithaca Gun Co. LLC*, 50 AD3d 1475, 1476 [4th Dept 2008], *lv denied* 11 NY3d 709 [2008]). "The premise that a successor corporation may be responsible for the liabilities of a predecessor corporation is 'based on the concept that a successor that effectively takes over a company in its entirety should carry the predecessor's liabilities as a concomitant to the benefits it derives from the good will purchased' " (*id.*, quoting *Grant-Howard Assoc. v General Housewares Corp.*, 63 NY2d 291, 296 [1984]). "Traditionally, courts have considered several factors in determining whether a de facto merger has occurred: (1) continuity of ownership; (2) a cessation of ordinary business and dissolution of the predecessor as soon as practically and legally possible; (3) assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the predecessor; and (4) a continuity of management, personnel, physical location, assets, and general business operation" (*Sweatland v Park Corp.*, 181 AD2d 243, 245-246 [4th Dept 1992]; *see also R&D Elecs., Inc. v NYP Mgt., Co., Inc.*, 162 AD3d 1513, 1516 [4th Dept 2018]).

Direct HVAC contends that Supreme Court erred in denying its motion inasmuch as it met its burden of establishing that there was no de facto merger here due to the lack of continuity of ownership. We reject that contention. " 'Public policy considerations dictate that, at least in the context of tort liability, courts have flexibility in determining whether a transaction constitutes a de facto merger. While factors such as shareholder and management continuity will be evidence that a de facto merger has occurred . . . , those factors alone should not be determinative' . . . Instead, the court should analyze each situation on a case-by-case basis and . . . the presence or absence of continuity of ownership is not determinative" (*Lippens v Winkler Backereitechnik GmbH* [appeal No. 2], 138 AD3d 1507, 1510 [4th Dept 2016]).

We also reject Direct HVAC's contention that there was no de facto merger here merely because KJ Mechanical, despite ceasing operations, was not formally dissolved through the office of the secretary of state. A de facto merger does not require the "legal dissolution" of the predecessor company "[s]o long as the acquired corporation is shorn of its assets and has become, in essence, a shell" (*Fitzgerald v Fahnestock & Co.*, 286 AD2d 573, 575 [1st Dept 2001]; *see Matter of AT&S Transp., LLC v Odyssey Logistics & Tech. Corp.*, 22 AD3d 750, 753 [2d Dept 2005]).

Finally, we conclude that the court properly determined that Direct HVAC failed to meet its burden on the motion inasmuch as its own submissions raised triable issues of fact whether KJ Mechanical ceased ordinary business operations, Direct HVAC assumed liabilities necessary for the uninterrupted continuation of KJ Mechanical's business, and there was a general continuity of KJ Mechanical's business operations, particularly in light of the affirmative representation made by Direct HVAC on invoices sent to KJ Mechanical's

customers, including plaintiff's insured, claiming that the two had "merged" (*see Hoover v New Holland N. Am., Inc.*, 71 AD3d 1593, 1594 [4th Dept 2010]; *see also Fitzgerald*, 286 AD2d at 575).

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court