Demkovich v Christmas Tree Shops, Inc.
2024 NY Slip Op 32062(U)
June 18, 2024
Supreme Court, Broome County
Docket Number: Index No. EFCA2021001201
Judge: Eugene D. Faughnan
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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, Binghamton, New York, on the 8th day of March 2024.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

GLORIA DEMKOVICH and
RONALD DEMKOVICH,

Plaintiffs,

vs.

CHRISTMAS TREE SHOPS, INC.,

Defendant.

DECISION AND ORDER

Index No. EFCA2021001201

APPEARANCES:

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EUGENE D. FAUGHNAN, J.S.C.

In this trip and fall case, Defendant, Christmas Tree Shops, Inc., has filed a motion for summary judgment pursuant to CPLR 3212, contending that it is not a proper party to the action.[1] The motion has been opposed by Plaintiffs Gloria Demkovich, and her husband, Ronald Demkovich. Oral argument was conducted and attorneys for both parties were present. After due deliberation, this constitutes the Court's Decision and Order with respect to the pending motion.[2]

BACKGROUND FACTS

The essential facts of this case are easily recounted. While shopping at a Christmas Tree Shops retail store in Johnson City, New York on December 28, 2020, Gloria Demkovich allegedly tripped over a pallet protruding from under a display and fell to the ground resulting in injuries. A very typical trip and fall case.

Plaintiffs commenced this action in May 2021 asserting causes of action for premises liability and loss of consortium. The Summons and Complaint named Christmas Tree Shops, Inc. as the Defendant, and pursuant to Business Corporation Law § 306, service was completed by serving the Secretary of State, on May 28, 2021. In July 2021, an Answer with affirmative defenses was filed, and a Verified Amended Answer with affirmative defenses was filed on August 3, 2021. The Verified Amended Answer (which was filed by Christmas Tree Shop, LLC) specifically raised, *inter alia*, defenses of statute of limitations, failure to join indispensable parties, and lack of personal and/or subject matter jurisdiction. The main issue on this motion is the proper party to this action. Briefly, Defendant claims that Christmas Tree Shops, Inc. stopped doing business before this accident, and the company was converted into a limited liability company, Christmas Tree Shops, LLC. Further, Christmas Tree Shops, LLC filed for Chapter 11 bankruptcy on May 5, 2023, so Defendant contends that even if the action had been

[1] As will be discussed in greater detail in the body of this Decision and Order, the named Defendant is Christmas Tree Shops, Inc., but this motion was actually filed by Christmas Tree Shops, LLC., which purports to be a successor entity to the corporation.

[2] All the papers filed in connection with the motion are included in the NYSCEF electronic case file and have been considered by the Court.

filed against the LLC (the surviving entity), or there was possible successor liability, there would be a bankruptcy stay preventing any further proceedings.

The parties have conducted discovery, including depositions of relevant witnesses. Both Plaintiffs were deposed on April 13, 2022. Defendant witnesses Valerie Pook and Frederick Reed also appeared for depositions on August 23, 2022. None of the transcripts were submitted for the Court's review, but the arguments of both parties appear to relate to corporate filings and legal status, and do not make reference to any deposition testimony. Presumably, the depositions were related to the circumstances surrounding the trip and fall, rather than the legal status of Christmas Tree Shops.

After Christmas Tree Shops, LLC filed for bankruptcy on May 5, 2023, Defendant sought a stay of this action. Plaintiffs disagree that a stay is necessary, because they believe the corporation is still the appropriate defendant, and there is no evidence that the corporation filed for bankruptcy. In support of their position that the corporation is the correct entity, Plaintiff submitted a Memorandum of Lease which was filed in the Broome County Clerk's Office on May 1, 2007, and lists the tenant as Christmas Tree Shops, Inc. The lease is for 15 years and there is no indication that it terminated prior to this accident. Plaintiffs argue that the bankruptcy stay does not apply to this action against the corporation.

LEGAL DISCUSSION AND ANALYSIS

When seeking summary judgment, "the movant must establish its prima facie entitlement to judgment as a matter of law by presenting competent evidence that demonstrates the absence of any material issue of fact." *Lacasse v. Sorbello*, 121 AD3d 1241, 1241 (3rd Dept 2014) *citing Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986) and *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985) (other citation omitted); *see Amedure v. Standard Furniture Co.*, 125 AD2d 170 (3rd Dept. 1987); *Bulger v. Tri-Town Agency, Inc.*, 148 AD2d 44 (3rd Dept. 1989), *app dismissed* 75 NY2d 808 (1990). Such evidence must be tendered in admissible form. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 (1979). Once this obligation is met, the burden shifts to the respondent to establish that a material issue of fact exists. *Dugan v. Sprung*, 280 AD2d 736 (3rd Dept. 2001); *Sheppard-Mobley v. King*, 10 AD3d 70, 74 (2nd Dept. 2004) *aff'd as mod.* 4 NY3d

627 (2005); *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324; *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853. "When faced with a motion for summary judgment, a court's task is issue finding rather than issue determination *(see, Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]) and it must view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference and ascertaining whether there exists any triable issue of fact." *Boston v. Dunham,* 274 AD2d 708, 709 (3rd Dept. 2000) (citation omitted); *American Food & Vending Corp. v. Amazon.com, Inc.*, 214 AD3d 1153 (3rd Dept. 2023). The motion "should be denied if any significant doubt exists as to whether a material factual issue is present or even if it is arguable that such an issue exists." *Haner v. De Vito*, 152 AD2d 896, 896 (3rd Dept. 1989) (citation omitted); *Lacasse v. Sorbello*, 121 AD3d 1241; *Asabor v. Archdiocese of N.Y.*, 102 AD3d 524 (1st Dept. 2013). It "is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact." *Vega v. Restani Constr. Corp.*, 18 NY3d 499, 505 (2012) (citation omitted); *Black v. Kohl's Dept. Stores, Inc.*, 80 AD3d 958 (3rd Dept. 2011).

As noted above, Defendant sought a bankruptcy stay due to the LLC filing for bankruptcy. When that issue was raised, Plaintiffs filed the lease, signed by the corporation, to underscore that the LLC's bankruptcy filing would have no impact on this case. The Note of Issue was filed on September 12, 2023, and Defendant thereafter filed this summary judgment motion.

On this motion, Defendant submitted a Certificate of Conversion dated October 23, 2020 and filed with the Massachusetts Secretary of State on October 27, 2020, showing that the corporation was converted to a limited liability company. The filing date was prior to the accident in this case. Defendant argues that the corporation no longer exists by operation of law and has no assets. Therefore, Defendant believes that the corporation is entitled to summary judgment. Defendant also posits the that the LLC assumed all the rights and obligations of the corporation, and the bankruptcy stay prevents any proceedings against the LLC.

In opposition to the motion, Plaintiffs submitted evidence from the NYS Department of State relating to Christmas Trees Shops, Inc. That documentation shows that the corporation is inactive as of March 1, 2021, which is after the date of this accident (but before the action was commenced). Thus, Plaintiffs assert that the corporation still existed in New York at the time of this accident, notwithstanding the Massachusetts filing in October 2020.

The facts give rise to two questions. First, was the corporation still in existence under New York law at the time of the accident, such that it could be a named defendant? Second, did the LLC assume all the assets and liabilities of the corporation?

The parties have not submitted any testimony or affidavits concerning the corporate filings in Massachusetts or New York. Instead, each side argues that their submission supports their position. Upon review of that evidence and the parties' arguments, the Court concludes that Defendant has not met its burden on this motion.

Although the Massachusetts filing shows that the corporation was being converted to an LLC, the Court cannot conclude that the corporation ceased to exist under New York law at the same time. First, the evidence submitted by Plaintiffs indicates that the corporation did not become "inactive" in New York until March 1, 2021. Second, the Massachusetts Certificate of Conversion also states that the conversion of the corporation shall be effective at the date and time approved by the "Division", unless a later date is specified in the surviving entity's organic laws. Defendant has not identified what "Division" is being referenced, or if that Division approved the conversion, and if so, when that occurred. In addition, no documents have been produced from the corporation or the LLC about this transaction and therefore, the Court cannot determine if the effective date may have been addressed in those documents. Indeed, there is no evidence here when the conversion was actually effective. However, even if the corporation was terminated in Massachusetts in October 2020, the New York documentation suggests the corporation continued to exist in New York until March 1, 2021.

Defendant further argues that even if the termination was not effective in New York until March 1, 2021, this case was not commenced until after that, on May 20, 2021. Therefore, Defendant argues that the corporate entity did not exist on the date of commencement and could not be sued. The Court cannot agree with Defendant's argument. Defendant's position hinges on whether the LLC succeeded to all the rights and obligations of the corporation. There is no indication in the Massachusetts Certificate that the conversion from a corporation to a limited liability company automatically and invariably involves assumption of all assets and liabilities, nor has Defendant submitted any other evidence to support that proposition.

"It is the general rule that a corporation which acquires the assets of another is not liable for the torts of its predecessor. *Schumacher v. Richards Shear Co.*, 59 NY2d 239, 244 (1983); *Dutton v. Young Men's Christian Assn. of Buffalo Niagara*, 207 AD3d 1038 (4th Dept. 2022);

State Farm Fire & Cas. Co. v. Main Bros. Oil Co., 101 AD3d 1575 (3rd Dept. 2012); *see, Ivory Dev., LLC v. Roe*, 135 AD3d 1216 (3rd Dept. 2016). The Court of Appeals has recognized four exceptions where: "(1) [the corporation] 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 at 245; *Matter of New York City Asbestos Litig.*, 217 AD3d 557 (1st Dept. 2023). The record is bereft of any evidence about the conversion from a corporation to a limited liability company. For instance, there is no documentation about any agreements between Christmas Tree Shops, Inc. and Christmas Tree Shops, LLC pertaining to the conversion; there certainly is no proof as to whether there was an assumption of liabilities; there is no evidence regarding ownership of the entities; there is a total lack of proof regarding management, personnel, assets and general business operations of either entity. *See, e.g. Dutton v. Young Men's Christian Assn. of Buffalo Niagara*, 207 AD3d 1038. On this record, Defendant has failed to show that the successor LLC is liable for the torts of the predecessor corporation. Therefore, Defendant has not made a *prima facie* case that the corporation was out of business before this accident, or that any of its liabilities have been transferred to the LLC.

Defendant asserts, without citation or explanation, that the corporation did not exist on May 20, 2021, when this action was commenced, and therefore the corporation was improperly named as a defendant in this action. Defendant seems to be conflating the concept of legal capacity to commence an action with a corporation's liabilities after ceasing operations. While it is true that once a corporation ceases to exist, it can no longer commence an action [*see, Security Pac. Natl. Bank v. Evans*, 31 AD3d 278 (1st Dept. 2006), *app dismissed* 8 NY3d (2007); Business Corporation Law § 202, Business Corporation Law § 1313 (actions by foreign corporations); *see also, MS Global Sourcing Co. v. Cue Ball Prods. LLC*, 2018 NY Misc LEXIS 2977 (Sup. Ct., New York County 2018)], it does not necessarily follow that the corporation cannot be sued. *See, Luca v. American Intl. Industries,* 2020 NY Misc LEXIS 3321 (Sup. Ct., New York County 2020); *Tri Terminal Corp. v. CITC Industries, Inc.*, 100 Misc2d 477 (Sup. Ct., New York County 1979); Business Corporation Law § 1312 (b). The dissolution or termination of a corporation does not affect any liability incurred before the dissolution or termination of the business privileges. To conclude otherwise would allow a corporation to "walk away" from

liabilities by simply ceasing operations. That cannot be permitted. Here, the accident occurred during a time when the corporation was still in existence, so Plaintiffs may maintain a tort action against the corporation. There is still potential application of successor liability (in which case the corporation's liabilities pass to the next entity), but Defendant has failed to allege any facts that could establish any of the four exceptions set forth in the *Schumacher* case, and therefore, there is no basis to conclude that the successor entity is liable for the acts of its predecessor.

CONCLUSION

Based on the preceding discussion, Defendant corporation has failed to make a *prima facie* case for summary judgment. Although the certificate of conversion was filed in Massachusetts prior to this accident date, Defendant has failed to show that the conversion was effective (in Massachusetts or New York) prior to the date of this accident. Further, the New York State records indicate that the date the corporation became inactive was after the accident. Defendant has failed to show that the corporation cannot face liability in these circumstances. After due deliberation, it is hereby

ORDERED, that Defendant's motion for summary judgment is DENIED , and it is further

ORDERED, to ensure proper compliance with the directions made herein, and to set a date for the trial of this matter, the parties are directed to appear for a **pre-trial conference on July 23, 2024 AT 10:00 AM**, which will be conducted virtually, by Microsoft Teams. Chambers will provide the link for the parties to join the conference.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

Dated: June 18, 2024
Binghamton, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice

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