Logan Bus Co., Inc. v Auerbach
2015 NY Slip Op 31766(U)
August 5, 2015
Supreme Court, Queens County
Docket Number: 703717/2014
Judge: Orin R. Kitzes
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY
COMMERCIAL DIVISION

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

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LOGAN BUS CO., INC.; BOBBY'S MATRON CO., INC.; BOBBY'S BUS CO. INC.; BUS MAINTENANCE CORP.; GRANDPA'S BUS CO., INC.; GRANDPA'S MATRON CO., INC.; JO-LO BUS CO., INC.; LIN LIS TRANSPORTATION CORP.; LITTLE LINDA BUS CO., INC.; LITTLE LINDA MATRON CO., INC.; LITTLE LISA BUS CO., INC.; LITTLE RICHIE BUS SERVICE, INC.; LITTLE RICHIE MATRON CO., INC.; LOGAN BUS SERVICE INC.; LOGAN MATRON CO., INC.; LOGAN PAYROLL SYSTEMS INC.; LOGAN TRANSPORTATION, INC.; LOGAN TRANSPORTATION SYSTEMS INC.; LORINDA ENTERPRISES, LTD.; LORINDA MATRON CO., INC.; LORISSA BUS SERVICE INC.; and LORISSA MATRON CO., INC.,

Plaintiffs,

-against-

JOEL A. AUERBACH, J. AUERBACH ASSOCIATES, LLC, JAYBACH ASSOCIATES INC., JAYBACH HOLDING CORP. And CAPACITY GROUP OF NY LLC,

Defendants.
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Index Number 703717 / 2014

Motion Date January 28, 2015

Motion Seq. No. 1

FILED
AUG - 6 2015
COUNTY CLERK
QUEENS COUNTY

The following papers numbered E8 to E30 read on this motion by defendant Capacity Group of NY LLC to dismiss the complaint on the grounds that the claims are barred by the statute of limitations and/or fail to state a cause of action upon which relief can be granted.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	E8-E21

Memorandum of Law in Support..... E19
Memorandum of Law in Opposition..... E24-E25
Reply Affidavits..... E26-E29
Memorandum of Law in Reply..... E30

Upon the foregoing papers it is ordered that the motion is denied for the following reasons:

According to the complaint, plaintiffs are transportation industry employers and defendants are insurance brokers or consultants, who plaintiffs hired to obtain workers' compensation insurance coverage. Defendants enrolled plaintiffs in the Empire State Transportation Workers' Compensation Trust (Trust), a group self-insured trust providing mandated workers' compensation coverage to employees of Trust members, which is now administered by the New York State Workers' Compensation Board (NYS WCB). Plaintiffs renewed their membership in the Trust at defendants recommendation and placement, even though defendants knew the Trust did not provide adequate coverage. On December 31, 2008, the Trust stopped issuing workers' compensation coverage. The Trust was taken over by the NYS WCB in January 2012. Thereafter, the NYS WCB determined that the trust was insolvent and had a deficit in the amount of $55,198,880 as of December 31, 2012 and assessed plaintiff's *pro rata* share of the Trust's deficiency was approximately $7,555,411.29. In or around January 2014, plaintiffs entered into an agreement with the NYS WCB to repay their *pro rata* share of the deficit in monthly installments. Plaintiffs allege that defendants knew or should have known of the Trust's mounting deficits. In or around 2012, defendant Capacity Group of NY LLC (Capacity) purchased the assets of defendants Jaybach Holding Corp., J. Auerbach Associates LLC and Jaybach Associates Inc. (collectively "Auerbach entities") related to the insurance brokerage business of defendant Jaybach Associates Inc. through an asset purchase agreement and hired defendant Joel A. Auerbach as an insurance broker. Plaintiffs allege, *inter alia*, that the acquisition was a *de facto* merger in that Capacity essentially took over the Auerbach entities, assumed the liabilities ordinarily necessary for the uninterrupted continuation of the Auerbach entities, had the same owners, managers and employees, and maintained relationships with the same insurance brokers. Plaintiffs further allege that Joel Auerbach used Capacity email address to conduct insurance brokerage business with them and that Capacity referred to Jaybach Associates Inc. as the "Exec" on customer receivable activity reports relating to workers compensation insurance coverage that were sent to them.

With respect to the Trust, the complaint further alleges, *inter alia*: that through December 31, 2011 the Trust was managed by

a Board of Trustees and a third party administrator, First Cardinal, LLC (First Cardinal), as required by Workers' Compensation Law; that First Cardinal failed to properly administer the Trust thereby breaching their fiduciary duty to plaintiff, that First Cardinal withheld information from and provided erroneous and misleading information to plaintiffs regarding the financial condition of the Trust, compliance with the NYS WCB and applicable regulations, and potential liability by becoming members of the Trust; that defendants knowingly induced and participated in the fraud and breach of fiduciary duty by acting in concert with First Cardinal; that plaintiffs reasonably relied on the representations made by First Cardinal and defendants; that First Cardinal paid additional, inflated, excessive and/or undisclosed fees and commission to defendants in exchange for defendant to place certain employers, including plaintiffs, with the Trust; and that defendants failed to properly advise plaintiffs on the suitability of the Trust to traditional insurance and research the financial viability of the Trust prior to renewing membership; that defendants were paid excessive renewal fees and commissions; and that defendants marketed the Trust by representing that it had lower premiums with less or the same risks and protections as traditional insurance despite their knowledge that the Trust had mounting deficits and risked being underfunded.

In this action, plaintiffs assert causes of action for conversion, unjust enrichment, negligent misrepresentation, fraud in the inducement, common law indemnification, breach of contract, negligence, and violations of General Business Law §§ 349 and 350.

With respect to the branch of the motion to dismiss pursuant to CPLR 3211(a)(7), "the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; *see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The court's "sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail" (*Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001], *quoting Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Leon v Martinez*, 84 NY2d at 87-88; *Tom Winter Assoc., Inc. v Sawyer*, 72 AD3d 803 [2d Dept 2010]; *Uzzle v Nunzie Court Homeowners Assn. Inc.*, 70 AD3d 928 [2d Dept 2010]; *Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703 [2d Dept 2010]). The facts pleaded are to be presumed to be true and are to be accorded

every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration (*see Morone v Morone*, 50 NY2d 481 [1980]; *Gertler v Goodgold*, 107 AD2d 481 [1st Dept 1985], *affirmed* 66 NY2d 946 [1985]).

A party seeking dismissal of a complaint under CPLR 3211(a)(1) must submit documentary evidence that " 'conclusively establishes a defense to the asserted claims as a matter of law' " (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] *quoting Leon v Martinez*, 84 NY2d at 88; *Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d 713 [2d Dept 2012]). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (*Guggenheimer v Ginzburg*, 43 NY2d at 275). This entails an inquiry into whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding it (see, *id.*; *accord*, Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:25, at 39)" (*Gershon v Goldberg*, 30 AD3d 372 [2d Dept 2006], *quoting Doria v Masucci*, 230 AD2d 764, 765 [2d Dept 1996] *lv to appeal denied* 89 NY2d 811 [1997]).

First, defendant Capacity moves to dismiss the complaint claiming that it does not have any liability for the alleged acts and/or omissions of Jaybach Associates arising out of their business operations prior to the closing date of the asset purchase. Capacity relies on Article 1, Section 1.4 of the Asset Purchase Agreement, which states that "[e]xcept as expressly set forth in Section 1.7, Buyer is not assuming any liabilities or obligations of Seller, whether known, unknown, contingent or otherwise." In addition, Capacity argues that plaintiffs' account was not included with the assets purchased because plaintiffs were not Jaybach Associates customers at the time of the purchase. Alternatively, Capacity argues that the claims are barred by the statute of limitations.

As stated by the Court of Appeals in *Schumacher v Richards Shear Co.*, 59 NY2d 239, 244-45 (1983):

> It is the general rule that a corporation which acquires the assets of another is not liable for the torts of its predecessor (19 CJS, Corporations, § 1380; 15 Fletcher's Cyclopedia Corporations [rev ed], § 7122). There are exceptions and we stated those generally recognized in *Hartford Acc. & Ind. Co. v Canron, Inc.* (43 NY2d 823, 825, supra). 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.

In this case, contrary to Capacity's claim, the complaint adequately alleges a successor liability claim as against it under the *de facto* merger exception. Underlying this doctrine is 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" (*Fitzgerald v Fahnestock & Co.*, 286 AD2d 573 [1st Dept 2001]). Plaintiffs have plead the elements of a *de factor* merger, that is "(1) continuity of ownership; (2) cessation of ordinary business and dissolution of the acquired corporation as soon as possible; (3) assumption by the successor of liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and (4) continuity of management, personnel, [] assets and general business operations" (*Id.* at 575). In addition, the moving papers fail to support the claim that plaintiffs were not clients' of Capacity at the time of the acquisition.

Second, Capacity moves to dismiss the claims for common law indemnification and violations of General Business Law for failure to state a cause of action.

With respect to the common law indemnification claim, it is "an equitable remedy that avoids unfairness by shifting losses arising from an obligor's discharge of a joint duty when failure to do so would result in unjust enrichment. A contract to reimburse or indemnify is implied where a plaintiff has discharged a duty which is duly owed, but which, as between the plaintiff and another, in fairness should have been discharged by the other. Such an implied obligation 'may arise from contractual relations or from the status of the parties as a matter of law, or it may be imposed by statute'" (*State of N.Y. Workers' Compensation Bd. v Madden*, 119 AD3d 1022, 1023-1024 [3d Dept 2014] [internal quotation marks and citation omitted]). In this case, the complaint fails to allege that plaintiff and defendants had common duties to third parties that were discharged by plaintiff, but should have been discharged by defendants. Accordingly, the common law indemnification claim is dismissed.

With respect to claim of violations of General Business Law, the elements of a cause of action under GBL § 349 are "first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff

suffered injury as a result of the deceptive act" (*Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000] [citations omitted]). A claim under General Business Law § 350 has similar elements, but is directed at false advertising. In the complaint, plaintiffs do not allege that the challenged practices were directed at consumers, but, rather, to plaintiffs, which are for-profit entities with a statutory obligation to maintain insurance for their employees. (*See Eaves v Design for Finance, Inc.*, 785 F Supp 2d 229 [SDNY 2011].) "General Business Law article 22-a, which includes section 349, is intended to protect consumers, that is, those who purchase goods and services for personal, family or household use" (*Sheth v New York Life Ins. Co.*, 273 AD2d 72, 73 [1st Dept 2000], citing *Cruz v NYNEX Information Resources*, 263 AD2d 285, 290 [1st Dept 2000].) Therefore, this cause of action must be dismissed.

Accordingly, the branch of the motion to dismiss pursuant to CPLR 3211(a)(1) and (7) is granted to extent that the common law indemnification and General Business Law claims are dismissed.

Where dismissal is sought under CPLR 3211(a)(5), "the moving defendant must establish, *prima facie*, 'that the time in which to commence an action has expired' " (*Romanelli v DiSilvio*, 76 AD3d 553, 554 [2d Dept 2010]). "The movant is required to support the motion with an affidavit or other competent proof sufficient, if uncontroverted, to establish the defense as a matter of law" (*State Higher Educ. Services Corp. v Starr*, 158 AD2d 771 [3d Dept 1990]). " 'The burden then shifts to the plaintiff to aver evidentiary facts establishing that his or her cause of action falls within an exception to the statute of limitations, or raising an issue of fact as to whether such an exception applies' " (*Texeria v BAB Nuclear Radiology, P.C.*, 43 AD3d 403, 405, 840 NYS2d 417 [2007] [citations omitted]; *see 6D Farm Corp. v Carr*, 63 AD3d 903, 905-906, 882 NYS2d 198 [2009]; *Savarese v Shatz*, 273 AD2d 219, 708 NYS2d 642 [2000])." (*Romanelli*, 76 AD3d at 554).

Capacity seeks to dismiss the claims for conversion, unjust enrichment, negligent misrepresentation, fraud in the inducement, breach of contract, and violations of General Business Law on the ground that they are barred by the statute of limitations. First, the court notes that the cause of action claims violations of General Business Law has been dismissed for the reasons set forth above. Second, the affidavit submitted by Capacity fails to address the facts relevant to support this branch of the motion. In any event, Capacity fails to establish the time of the accrual of these claims and, therefore, failed to establish the expiration of the statute of limitations. Capacity's arguments regarding accrual of the statute of limitations given the facts of this case are unavailing especially in light of the time line outlined in the

forensic accounting of the Trust, which is attached to the summons with notice.

Accordingly, the branch of the motion to dismiss pursuant to CPLR 3211(a)(5) is denied.

Dated: August 5, 2015

J.S.C.

FILED
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