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## Hydraulic IP Holdings, LLC v. Tan

Supreme Court of New York, New York County

August 16, 2024, Decided

INDEX NO. 653046/2022

### Reporter

2024 N.Y. Misc. LEXIS 5240 \*; 2024 NY Slip Op 32930(U) \*\*

**[\*\*1]** HYDRAULIC IP HOLDINGS, LLC, Plaintiff, - v - MELODY TAN, GBRANDS HOLDING, LLC, CC APPAREL, LLC, Defendant.

**Notice:** THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

**Prior History:** [Hydraulic IP Holdings, LLC v. Tan, 2023 N.Y. Misc. LEXIS 828 \(N.Y. Sup. Ct., Feb. 27, 2023\)](#)

### Core Terms

de facto merger, continuity, summary judgment, ownership, successor, question of fact, Apparel, predecessor, entities, transferred, prong

**Judges:** **[\*1]** PRESENT: HON. LYLE E. FRANK, Justice.

**Opinion by:** LYLE E. FRANK

### Opinion

#### DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87 were read on this motion to/for JUDGMENT - SUMMARY.

This action arises out of plaintiff's attempt to enforce a judgment entered against non-party Grace Apparel LLC ("Grace"). Plaintiff's complaint alleges that the operation of Grace was ceased and assets were transferred to continue operation through successor entities,

defendants GBrands Holding, LLC ("GBrands"), and CC Apparel, LLC ("CC"), to avoid Grace Apparel's creditors.

Plaintiff now moves for summary judgment, granting judgment in favor of plaintiff as against defendants GBrands and CC on the first cause of action, successor liability. Defendants oppose and cross-move for summary judgment.

### Discussion

#### Applicable Law

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." [Assaf v Ropog Cab Corp., 153 AD2d 520, 544 N.Y.S.2d 834 \[1st Dept 1989\]](#). As such, the proponent of a motion for summary judgment must tender sufficient **[\*2]** evidence to show the **[\*\*2]** absence of any material issue of fact and the right to entitlement to judgment as a matter of law. [Alvarez v Prospect Hospital, 68 NY2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 \[1986\]](#); [Winegrad v New York University Medical Center, 64 NY 2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 \[1985\]](#). Courts have also recognized that summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted.

"The *de facto* merger doctrine creates an exception to the general principle that an acquiring corporation does not become responsible thereby for the pre-existing liabilities of the acquired corporation" ([Fitzgerald v Fahnstock & Co., 286 AD2d 573, 574, 730 N.Y.S.2d 70 \[1st Dept 2001\]](#)). It is well established that courts consider the following factors to determine whether the doctrine of *de facto* merger applies: (1) continuity of ownership; (2) cessation of ordinary business and

dissolution of the acquired corporation; (3) assumption by the successor of the liabilities for the continuation of the business of the acquired corporation; and (4) continuity of personnel, physical location, general business operation. *Id.* Not all factors must be present to establish a *de facto* merger. *Id.* at 574. The First Department has held that continuity of ownership is essential to a *de facto* merger finding, **[\*3]** although insufficient on its own ([Van Nocker v A.W. Chesterton, Co. \(In re NY City Asbestos Litig.\), 15 AD3d 254, 258, 789 N.Y.S.2d 484 \[1st Dept 2005\]](#)).

The Court finds, as will be discussed below, that there are questions of fact, regarding the application of the *de facto* merger doctrine. Specifically, whether there was continuity of ownership, dissolution of the predecessor corporation, assumption of liabilities and continuity of personnel. Accordingly, both motions seeking summary judgment on the *de facto* merger cause of action are denied.

#### **[\*\*3]** a. Continuity of Ownership

The continuity of ownership "exists where the shareholders of the predecessor corporation become direct or indirect shareholders of the successor corporation as the result of the successor's purchase of the predecessor's assets" ([Van Nocker v A.W. Chesterton, Co. \(In re NY City Asbestos Litig.\), 15 AD3d 254, 256, 789 N.Y.S.2d 484 \[1st Dept 2005\]](#)).

Specifically, as to the first prong of the analysis, plaintiff contends that the continuation of ownership, is satisfied because judgment debtor was owned by Melody Tan and Blaire Garson and GBrands is now owned by Tan and Garson, while CC Apparel is owned solely by Tan. In opposition, defendants contend that there must be a transaction between the predecessor corporation and the successor corporation to establish continuity of ownership.

In opposition to plaintiff's motion and in support of its own motion, **[\*4]** defendants contend that no assets of Grace were transferred to GBrands. Defendants assert that none of Grace's inventory, customer's orders or customer's payments were transferred from Grace to GBrands. However, defendants then go on to state "with the exception of a bar code designation license from GS1 that was utilized by Grace and renewed by GBrands after Grace ceased doing business."

The Court finds that there is a question of fact based on the continuous ownership by the owners of the

judgment debtor and the defendant GBrands but only one owner, Tan, as the owner of defendant CC. Further, as to the contention that to the extent a transaction is required, between the predecessor entity and the successor entities, plaintiff contends that the transfer of the bar code license is sufficient. That no other assets, other than the bar code license have been transferred, is a question of fact as to whether that is sufficient to establish a transaction to trigger the *de facto* merger analysis. Further, the use of the same logo by Grace and GBrands also **[\*4]** creates an issue of fact. The Court finds that neither party has established entitlement to judgment as a matter of law on this issue.

#### b. **[\*5]** Dissolution

It is well settled that for the purposes of the *de facto* merger analysis, the predecessor company is not required to have been legally dissolved, if it "is shorn of its assets and has become, in essence, a shell" (*Fitzgerald*, 286 AD2d at 575).

Plaintiff contends that the testimony establishes that judgment debtor Grace ceased operating in May 2021, thus satisfying the second prong of the analyses for *de facto* merger. In opposition, defendants cite to Tan's deposition testimony, in which she testifies that there is not a continuation of Grace's business operations to the successor entities, which is specified as "importing Hydraulic-branded apparel" and that Grace has not been legally dissolved. Further, defendants contend that, through affidavits, that Grace still maintains its own books and records.

The proffered testimony is inconsistent and best suited for a finder of fact, defendants simultaneously contend that Grace is not dissolved, maintains its own corporate records and bank accounts but has not conducted business and has vacated its leased space. Here, the Court finds that there are questions of fact and neither party has established entitlement to judgment as a matter law.

#### c. Assumption of **[\*6]** Liabilities for Continuation of Business

Plaintiff cites to the Tan's testimony at her post-Judgment deposition in the Underlying Action that CC Apparel paid for various liabilities of Grace, including legal fees.

In opposition, to plaintiff's motion and in support of its own motion, defendants contend that Delaware law applies to the instant analysis, plaintiff does not oppose or dispute this contention. Further, defendants contend

that there is no agreement entered by and between **[\*\*5]** Grace and either defendant where there was an assumption of any liabilities of Grace, nor did the defendants assume any vendor contracts or leases required for the operation of the business. Defendants also contend that none of Grace's inventory, customer's orders or customer's payments were transferred or paid to either defendant.

The Court finds that there is also a question of fact as to this prong of the *de facto* merger analysis. While defendants contend that no agreements were made between Grace and the successor entities, the payment of Grace's debt by CC creates a question of fact, notwithstanding the remaining contentions of the defendants.

d. Continuity of Assets, Management and/or Business Operations **[\*7]**

Here, there is also a question about whether there is a continuity of business operations because it is undisputed Grace and the defendants have common ownership, management, and personnel. As stated above, Tan and Garson co-own Grace, and co-own GBrands and Tan is also an owner of CC Apparel. Further, Garson was the president of sales for Grace, and now is the president of sales for GBrands. Her duties were/are the same in each role. Mike Wang was an accountant for Grace, and now is an accountant for GBrands. All three entities are involved in the same industry, wholesale garments. And as the Court noted above, both Grace and GBrands have the same logo.

In addition to manufacturing garments branded with plaintiff's trademark under a license from plaintiff, Grace also manufactured private-label garments for retail stores. NYSCEF Doc. 50 at 12:18-13:3; 13:22-14:3. Defendants do not substantively address this prong in its affirmative motion, nor in opposition, however defendants contend that because plaintiff has failed to establish the first two prongs of a *de facto* merger, the remaining factors are insufficient to satisfy plaintiff's burden.

**[\*\*6]** This argument however, misses the mark both **[\*8]** in its affirmative motion and opposition, as defendants do not come forward with any evidence to establish that this factor does not apply. Rather defendants rely on the presumption that plaintiff has failed to establish the other factors thus warranting an affirmative finding in its favor. Defendants arguments amount to burden shifting and not an affirmative showing as required for summary judgment.

In sum, both plaintiff and defendants rely largely on testimony to establish entitlement to judgment as a matter of law. As the testimony is inconsistent and requires credibility determinations and because there are questions of fact as to the essential indicia of *de facto* merger, both motion and cross-motions for summary judgment on the first cause of action alleging *de facto* merger are denied.

The foregoing constitutes the Decision and Order of the Court.

**8/16/2024**

**DATE**

/s/ Lyle E. Frank

**LYLE E. FRANK, J.S.C.**

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