



Zmos Networks, LLC Plaintiff v. Momentum Investment Partners, LLC d/b/a Avatar Associates, Larry Siebert and Ted Theodore, Defendants, 652283/2012

The plaintiff ZMOS Networks, LLC ("ZMOS") has brought the present action against defendants to recover payments of amounts that were originally owed to it by TC Asset Management f/k/a OAM Avatar ("OAM Avatar") for the amounts due. It asserts claims against defendant Momentum Investment Partners, LLC d/b/a Avatar Associates ("Momentum") on the ground that Momentum is a successor to the liabilities of OAM Avatar as a result of its continuation of OAM Avatar's business or its de facto consolidation with OAM Avatar. Plaintiff also asserts that the two individual defendants are liable for the debt of OAM Avatar because they transferred their profit from the sale of Avatar to and for their personal benefit without arranging for payment to Avatar's vendors and creditors, including plaintiff. Defendants have brought the present motion to dismiss the complaint or for summary judgment. As will be explained more fully below, the motion is denied in its entirety.

The relevant facts are as follows. ZMOS is an information technology company which provides companies with computer network implementation, maintenance support and equipment. OAM Avatar was an investment management firm which was formed in March 2003. As of January 1, 2011, Larry Siebert owned 18.59 percent of the company and Theodore M. Theodore owned 40.19 of the company. The individual defendants, Theodore and Siebert, were principals of OAM Avatar and are now employed by Momentum. Prior to 2009, ZMOS and OAM Avatar entered into an agreement for ZMOS to provide computer networking services and related equipment and hardware to OAM Avatar. Between July 2009 and August 2011, ZMOS performed various services and provided various equipment for OAM Avatar but did not pay for these services.

In or about June 2011, OAM Avatar entered into a letter of intent with Momentum to purchase certain assets of OAM Avatar. The letter of intent provided that a new entity would be formed, the corporate defendant in this action, to receive the assets from the sale. On or about September 30, 2011, OAM Avatar completed the sale of certain of its assets to Momentum. The parties signed an asset purchase agreement at that time. The agreement provided that Momentum was only purchasing certain assets of OAM Avatar and was not assuming its liabilities. Among the assets purchased by Momentum were the Avatar mark and proprietary investment processes owned by OAM Avatar. On or about November 2011, OAM Avatar changed its name to TC Asset Management LLC and on or about December 12, 2011, OAM Avatar was dissolved. After the sale, Momentum began operating under the d/b/a of Avatar Investment Management. Momentum retained certain personnel from Avatar after the sale, including Theodore and Siebert, principals of OAM Avatar who now work for and have an ownership interest in Momentum. Defendant Momentum claims that Siebert and Theodore received no ownership interest in Momentum as part of the sale of assets but Siebert and Theodore each received a 2 percent interest in Momentum, which it is alleged was part of their employment compensation upon becoming employees of Momentum after the sale and upon

the company attaining certain benchmarks. OAM Avatar has retained and continues to serve some of OAM Avatar's clients and it has retained the same offices and workspace as OAM Avatar. On its website, Momentum states that "Avatar is a leading quantitative Tactical Global Asset allocation investment management firm with a history dating back to the 1970's and that its investment methodology "was developed and honed over the firm's forty — plus year history of market change and activity." On its website, Momentum stated that it has ten employees and six of these are former employees of OAM Avatar. The company also identifies itself as Avatar upon answering the phone. In connection with the sale of OAM Avatar to Momentum, Momentum arranged for the payment of more than five million of OAM Avatar debt to OAM Avatar's secured creditors and private lenders and paid OAM Avatar \$800,000 to cover operating expenses in order to allow the business to continue without interruption.

In the present case, the court finds that defendant Momentum is not entitled to summary judgment or dismissal as there are disputed factual issues as to whether there was a defacto merger between OAM Avatar and Momentum or whether Momentum was a mere continuation of OAM Avatar. The general rule is that a corporation which acquires the assets of another is not liable for the torts or contractual obligations of its predecessor unless: "(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, Inc., 59 N.Y.2d 239, 244 (1983). See also Sweat land v Park Corp., 181 A.D.2d 243 (4th Dept 1992).

The de facto merger doctrine is an exception to the general rule that an acquiring corporation does not become responsible for the liabilities of the acquired corporation. Fitzgerald v Fitzgerald, 286 A.D.2d 573 (1st Dept 2001). The doctrine is applied when the acquiring corporation has effectively merged with the acquired corporation rather than purchasing another corporation for the purpose of holding it as a subsidiary. *Id.* at 574. The "hallmarks of a defacto 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...Not all of these elements are necessary to find a defacto merger. Courts will look to whether the acquiring corporation was seeking to obtain for itself intangible assets such as good will, trademarks, patents, customer lists and the right to use the acquired corporation's name." *Id.* at 574-575.

In Burgos v Pulse Combustion, the First Department affirmed a finding that there were issues of fact with respect to whether there was mere continuation or merger successor liability where the evidence established that the purchaser purchased almost all of the predecessor's fixed assets and intangibles, that the predecessor corporation ceased to exist soon after the sale, that the purchased corporation assumed a name nearly identical to that of the predecessor corporation, that at least one officer from the predecessor corporation was retained by the

purchasing corporation and that the same products were manufactured at the plants transferred under the purchase agreement. 227 A.D. 2d 295 (1st Dept 1996).

In the instant case, as in Burgos, plaintiff has sufficiently plead and raised issues of disputed fact as to whether there was a de facto merger as between OAM Avatar and Momentum, based on all of the relevant factors. With respect to whether there was continuity of ownership between the two companies, plaintiff has raised disputed issues of fact. Initially, defendants have conceded that both Siebert and Theodore, prior owners of OAM Avatar, have an ownership interest in the new company, Momentum, as a result of the sale. Although defendants claim that this ownership interest was acquired through employment agreements rather than as part of the sale, plaintiff is entitled to discovery as to this issue and is not required to accept the bare assertion of defendants that this is the case. Moreover, since there has been no discovery at this time, plaintiff has been unable to ascertain whether OAM Avatar had any investor owners who also have an interest in Momentum at the present time. Plaintiff is entitled to discovery as to the identity of the remaining shareholders of Momentum and whether any of the interests provided in the new company given to the creditors of the old company was actually given to any of the shareholders of the former company.

With respect to the factor of whether there was a cessation of ordinary business and dissolution of the acquired company as soon as possible, that factor is present here as OAM Avatar ceased its business activities upon the sale and was dissolved about one and a half months after the sale. There is also some evidence in this case which establishes assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation. Defendants have admitted that part of the consideration for the purchase of OAM Avatar's assets was \$800,000 which was an advance to OAM Avatar prior to the sale to fund operating requirements. Moreover, Momentum secured the discharge of indebtedness of more than \$5 million owed to secured private creditors of OAM Avatar. There is also evidence that there is some continuity of management, personnel, physical location, assets and general business operations. Momentum kept on six employees of OAM Avatar after the sale, as well as Theodore and Siebert. Momentum has the same exact office location of OAM Avatar and is engaged in the same type of business, as evidenced by the comments on its current web site. It also purchased and is using the trademark of the former business. Based on a consideration of the foregoing factors, the court finds that there are disputed issues of fact as to whether there has been a defacto merger of OAM Avatar and Momentum.

The court also finds that defendants are not entitled to summary judgment or dismissal of plaintiff's claim that Momentum is a mere continuation of OAM Avatar. There is a separate exception to the rule that an acquiring corporation does not become responsible for the liabilities of an acquired corporation where the purchasing corporation is a mere continuation of the selling corporation. Schumacher, 59 N.Y.2d at 244. In NTL Capital, LLC v Right Track Recording LLC, the First Department found that the complaint sufficiently pleaded the mere

continuation exception to the rule against successor liability by showing that the acquiring company had acquired the purchased company's "business location, employees, management and goodwill." 73 A.D.3d 410,411 (1st Dept 2010).

In the present case, as in NTL, plaintiff has sufficiently plead that Momentum acquired OAM Avatar's business location, employees, management and goodwill. The court also finds that plaintiff is entitled to discovery with respect to its allegation that Momentum is a mere continuation of OAM Avatar and that Momentum is not entitled to summary judgment dismissing this claim.

The next issue this court must address is whether plaintiff has sufficiently plead that Siebert and Theodore are liable for the debts of OAM Avatar. The court finds that defendants have failed to establish that the fifth cause of action, which is a fraudulent conveyance claim against the individual defendants, should be dismissed at this juncture in the litigation. Their only arguments as to why this claim should be dismissed is that there is no factual basis for the allegation in the complaint that there was a transfer of profits from the sale of OAM Avatar to Siebert or Theodore. However, the court finds that it would be premature to make a factual determination as to whether the individual defendants received compensation for the sale in the absence of any discovery having taken place.

Defendants also move to dismiss or for summary judgment dismissing plaintiff's seventh cause of action, which is a fraudulent conveyance claim asserted against Momentum. Defendants argue that this claim should be dismissed on the ground that plaintiff does not yet have a judgment against OAM Avatar and plaintiff does not allege and cannot prove that the transfer was made without fair consideration. Initially, the Debtor and Creditor Law ("DCL") specifically defines a creditor as a person who has a claim "whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent." DCL section 270. With respect to the argument that the complaint does not allege a lack of fair consideration, section 276 of the DCL, which is the provision plaintiff alleges it is proceeding under, does not require an allegation of lack of fair consideration to state a claim. Rather, it states that "Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud either present or future creditors, is fraudulent as to both present and future creditors."

Based on the foregoing, the motion to dismiss or for summary judgment is denied. This constitutes the decision and order of the court.

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