

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
No. 21-CV-620

AJAX MOVING and STORAGE, LLC,
Plaintiff,

v.

SUBWAY REAL ESTATE CORP.,
Defendant.

RULING ON AJAX'S MOTION TO SUBSTITUTE

This case arises out of a commercial lease between lessor Jeffrey Jacobs and lessee Subway Real Estate Corp. Subway operated a Subway restaurant in the leased premises. In 2020, with restaurants shut down due to the pandemic, Subway apparently declared force majeure, determined not to reopen, and quit paying rent. Mr. Jacobs contested the failure to pay rent. With no lease payments forthcoming, Mr. Jacobs assigned his rights under the lease to Plaintiff Ajax Moving and Storage, LLC., and Ajax filed this collection case in 2021. No Subway entity ever appeared, and a final, default judgment entered in Ajax's favor. Ajax later first learned that in 2018, Defendant Subway Real Estate Corp. (Corporation) "converted" to an LLC under Delaware law, in the process changing its name to Subway Realty LLC (LLC). Ajax then filed the motion under consideration to "substitute" LLC for Corporation for purposes of the final judgment pursuant to Rule 25. It has not sought to reopen the judgment under Rule 60(b).

When it initiated this case, Ajax purported to serve the complaint and summons on Corporation through the Secretary of State. Ajax now concedes that Corporation's registration with the Vermont Secretary of State's office had been withdrawn in 2018 shortly after it converted to an LLC, but it asserts that when it initiated this litigation that it was neither aware of the conversion nor of Corporation's registration status. In Ajax's view, because converted entities retain their liabilities, a simple substitution is the most efficient way to deal with the situation it finds itself in.¹ This oversimplifies the circumstances, however.

Entity conversions such as the one alleged here are a simplified process allowing a change of business form without a merger or other more complex process and avoids tax and other unwelcome repercussions of those alternatives. See 8 Fletcher Cyclopedica of the Law of Corporations § 3993.50; Balotti and Finkelstein's Delaware Law of Corporations and Business Organizations § 9.28.

¹ Ajax does not indicate whether it yet has attempted to enforce its judgment against Corporation against LLC. The court infers that it is attempting to clear the cloud on the final judgment before attempting to do so.

Corporation is alleged to have converted under Delaware law, which describes the effect of conversion as follows:

(e) The conversion of any other entity into a domestic limited liability company shall not be deemed to affect any obligations or liabilities of the other entity incurred prior to its conversion to a domestic limited liability company or the personal liability of any person incurred prior to such conversion.

(f) When any conversion shall have become effective under this section, for all purposes of the laws of the State of Delaware, all of the rights, privileges and powers of the other entity that has converted, and all property, real, personal and mixed, and all debts due to such other entity, as well as all other things and causes of action belonging to such other entity, shall remain vested in the domestic limited liability company to which such other entity has converted and shall be the property of such domestic limited liability company, and the title to any real property vested by deed or otherwise in such other entity shall not revert or be in any way impaired by reason of this chapter; but all rights of creditors and all liens upon any property of such other entity shall be preserved unimpaired, and all debts, liabilities and duties of the other entity that has converted shall remain attached to the domestic limited liability company to which such other entity has converted, and may be enforced against it to the same extent as if said debts, liabilities and duties had originally been incurred or contracted by it in its capacity as a domestic limited liability company. The rights, privileges, powers and interests in property of the other entity, as well as the debts, liabilities and duties of the other entity, shall not be deemed, as a consequence of the conversion, to have been transferred to the domestic limited liability company to which such other entity has converted for any purpose of the laws of the State of Delaware.

6 Del. Code § 18-214(e), (f). Vermont has analogous provisions at 11A V.S.A. § 11.07.

Thus, when an entity converts, the converted entity automatically inherits the converting entity's rights and obligations. The problem in this case is not that LLC has attempted to shed itself of any liabilities that it had when it was Corporation, but that Ajax initiated this case against Corporation when Corporation already no longer existed, and it never properly initiated litigation against LLC. In these circumstances, the court declines to simply substitute LLC for Corporation.

Ajax essentially is asking the court to modify a final judgment, yet it has filed no Rule 60(b) motion establishing any basis for reopening the judgment. The court does not modify final judgments without first reopening them under Rule 60(b).

Otherwise, no provision of Rule 25 would permit substitution in this context in any event. Wright & Miller says generally of Rule 25 substitutions:

Rule 25 provides, in four subsections, for the substitution of parties if a party has died, become incompetent, or transferred its interest, or if a

public officer has been succeeded by someone else. . . .

. . . .

Rule 25 also is inapplicable if a change of parties is desired for some reason other than one of the four circumstances to which the rule is addressed. It is necessary then to consult Rule 15, on amendments, Rule 17, on the real party in interest, Rule 21, on adding or dropping parties, or Rule 24, on intervention.

The rule presupposes that substitution is for someone who was a party to a pending action.

7C Wright & Miller, Federal Practice & Procedure: Civ. § 1951 (3d ed.) (footnotes omitted, emphasis added).

Ajax is purporting to seek substitution under Rule 25(c), but that provision applies to transfers of interests, such as assignments. An entity conversion by definition is not a transfer of interests. The converting entity *retains* all interests and obligations; they are not transferred to anyone.

As Wright & Miller notes, Rule 25 “presupposes that substitution is for someone who was a party to a pending action.” In other words, Rule 25 assumes that a person was already properly served and made a party to the case *and then* the need for substitution arose. That is not what happened here. Corporation converted into LLC 3 years before this case was filed and *anyone* was purported to have been served. When Corporation ostensibly was served, it no longer existed. LLC has never been served, and it has never appeared.

Even if Rule 25(c) could somehow apply in these circumstances, the rule plainly provides that substitution is unnecessary unless the court, in its discretion, requires it. It says, “In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party.” Although the court presumes that Ajax is concerned about the enforceability of the current final judgment, it has not explained why substitution is necessary or proper, much less why it should be required when the final judgment has never been reopened. Ajax also has not explained how substitution in these circumstances could properly remedy a defect in its initial service on Corporation, if that is the goal.

Order

For the foregoing reasons, Ajax’s motion to substitute is denied.

SO ORDERED this 6th day of October, 2022.



Robert A. Mello, Superior Judge