

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND
FOR MIAMI-DADE COUNTY, FLORIDA

CIRCUIT CIVIL DIVISION

CASE NO. 16-14947 CA 01

LIPSCOMB, EISENBERG & BAKER, PL, a
Florida professional limited liability
company, and MICHAEL KEITH
LIPSCOMB, an individual,

Plaintiff,

v.

MALIBU MEDIA, LLC, a California limited
liability company, PILLAR LAW GROUP,
PLLC, a California professional law
corporation, DIGITAL CONTENT, INC., an
administratively dissolved Wyoming
corporation, DATA ANALYTICS, INC., a
foreign corporation

Defendant.

DEFENDANT DATA ANALYTIC, INC.'S MOTION TO DISMISS

Defendant, DATA ANALYTICS, INC. (“DAI”), by and through its undersigned counsel, hereby files its Motion to Dismiss the Complaint filed by Plaintiffs, LIPSCOMB, EISENBERG & BAKER, PL (“LEB”) and MICHAEL KEITH LIPSCOMB (“Lipscomb”) (collectively, “Plaintiffs”), and state as follows:

FACTS RELEVANT TO COUNT I

1. Plaintiff LEB, Malibu, and DCI entered into an agreement (“GAS Agreement”) with German American Services, Inc. (“GAS”) wherein LEB, Malibu, and DCI were joint and severally liable to make payments to GAS. Complaint at ¶11.

2. LEB alleges that DCI and Malibu failed to contribute monies towards the GAS debt. Complaint at ¶ 12.

3. In or about February or March 2014, DCI's owner formed DAI. In connection therewith, DCI transferred all of its assets and obligations to DAI. Neither DCI's ownership, business or *[sic]* employees changed as a part of the transition and in all respects DAI is DCI with a different name. Complaint at ¶ 19.

ARGUMENT

4. When considering a motion to dismiss, the Court must accept the plaintiff's allegations as true, view the evidence in a light most favorable to the plaintiff, and decide only questions of law. *See Elmore v. Fla. Power & Light Co.*, 760 So. 2d 968, 971 (Fla. 4th DCA 2000). If the allegations do not entitle the plaintiff to relief, the Court must dismiss the complaint. *See Jackson Grain Co. v. Kemp*, 177 So. 2d 513, 516 (Fla. 2d DCA 1965).

5. Conclusory allegations are never sufficient to state a cause of action and should be disregarded by the court. *See American Seafood, Inc. v. Clawson*, 598 So 2d 273, 274 (Fla. 3d DCA 1992).

6. Plaintiffs attempt to drag DAI into this litigation by making conclusory allegations all contained in one single paragraph in the Complaint stating that “in or about February or March 2014, DCI's Owner formed DAI” and “[i]n connection therewith, DCI transferred all of its assets and obligations to DAI. Neither DCI's ownership, business or employees changed as a part of the transition and in all respects DAI is DCI with a different name.” Complaint at ¶19.

7. Plaintiff does not, and cannot alleged any more facts to support this faulty allegation that DAI is the successor of DCI because both companies are independent for each other and DCI

never transferred all of its obligations to DAI as required by law to consider a corporation a successor.

8. “The term successor ‘is generally applicable to corporations wherein one corporation by a process of amalgamation, consolidation or duly authorized legal succession becomes vested in the rights and assumes the burdens of its predecessor corporation.’” *Corneal v. CF Hosting, Inc.*, 187 F. Supp. 2d 1372, 1375 (S.D. Fla. 2001).

9. In the Complaint, there are no supporting allegations that DAI was consolidated into DCI or assumed the burdens of its alleged predecessor corporation, DCI.

10. “Generally, Florida law does not impose the liabilities of a predecessor corporation on a successor corporation unless: (1) the successor expressly or impliedly assumes obligations of the predecessor, (2) the transaction is a de facto merger, (3) the successor is a mere continuation of the predecessor, or (4) the transaction is a fraudulent effort to avoid the liabilities of the predecessor.” *Laboratory Corp. of America v. Professional Recovery Network*, 813 So. 2d 266, 269 (Fla. 5th DCA 2002); *Krogen Exp. Yachts, LLC v. Nobili*, 947 So. 2d 581, 582 (Fla. 4th DCA 2007) (holding that there was no successor liability “because there was neither an assumption of the liabilities of the original corporation, nor was the successor a continuation of the original.”).

11. The Complaint contains only one paragraph stating in a conclusory manner that “DCI transferred all of its assets and obligations to DAI.” Complaint at ¶ 19. There is no allegation that DAI expressly or impliedly assumes the obligations of DCI, no allegations that this was a merger, no allegations that DAI was a mere continuation of DCI (as DAI was created while DCI was still in existence), and certainly no allegations that the creation of DAI was a fraudulent effort to avoid liabilities of DCI.

12. To the contrary, DCI paid all of its liabilities and creditors prior to the dissolution of DCI in the end of 2014.

13. In this matter, there are no allegations with ultimate facts, not conclusory statements that would allow the trier of fact to conclude that DAI is in fact the successor of DCI and that Dai assumed all of DCI's obligations.

14. As a matter of fact, the GAS Agreement, not attached to the Complaint due to its confidentiality, specifically lists DCI as a named party obligated to pay GAS along with Plaintiff and Defendant Malibu. "LEB, Malibu and DCI are jointly and severally liable under the terms of an agreement between them, on the one hand, and German American Services, Inc. ("GAS"), on the other hand."

15. The GAS Agreement was executed in July 2015, over a year after DAI was in existence. It is reasonable to assume that if DAI was in fact DCI's successor, then DAI would be a named party to the GAS Agreement. Instead, the GAS Agreement specifically listed DCI, a company that was dissolved at the time, as one of the creditors.

WHEREFORE, for the foregoing reasons, Defendant Data Analytic, Inc. ("DAI") respectfully requests that the Court dismiss Plaintiff's Breach of Contract claim (Count I) against DAI, and grant any other relief the Court deems just and proper

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was served by e-mail upon those listed below on
July 28, 2016.

M. Keith Lipscomb, Esq. LIPSCOMB, EISENBERG & BAKER, PL <i>Attorney for Plaintiff</i>	klipscomb@lebfirm.com
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/s/ Heloiza Correa
HELOIZA A. CORREA