

New Journey Global Inc. v Bohe Liu

2018 NY Slip Op 32921(U)

November 21, 2018

Supreme Court, New York County

Docket Number: 652924/2017

Judge: O. Peter Sherwood

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

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NEW JOURNEY GLOBAL INC. and JAMES CHOW,

**Individually and as an agent of
New Journey Global Inc.,**

Plaintiffs,

- against -

**BOHE LIU a/k/a JERRY LIU and XIAOLING
QIN a/k/a KATHY QIN,**

Defendants.

**DECISION AND ORDER
Index No. 652924/2017
Motion Sequence Number: 001**

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O. PETER SHERWOOD, J.:

BACKGROUND

These facts are taken from the complaint.

Defendants Bohe Liu and Xiaoling Qin became friends with plaintiff James Chow, who is 72 years old and has limited English language skills, and started introducing him to real estate investment opportunities. Chow agreed to go in with defendants equally and purchase a house at 314 West 138th Street (the Property). Defendants assured Chow they could convert the Property into a hotel. Chow offered a property he owned as collateral for a \$1,000,000 loan to be paid back by the venture, which loan Liu obtained. On the date of closing on the Property, Chow found out Liu had formed New Journey Global Inc (New Journey) to hold title to the Property.

Instead of contributing equal portions to the venture, Liu and Qin obtained a mortgage loan of \$800,000 secured by the Property. Chow signed all of the documents at the closing on November 6, 2015, including those on the Property mortgage, although he claims he did not know the Property was being mortgaged.

After the closing, defendants began running the Property as a hotel. They claimed to have made renovations but refused to show Chow any documentation. They also refused to show Chow New Journey's books and records. By obtaining mortgage records through the bank in April 2016, Chow discovered Liu had disbursed approximately \$300,000 from the loan proceeds for unknown purposes.

Liu and Chow entered into a shareholder agreement on December 12, 2016 (the Agreement), regarding the Property. The Agreement stated Liu was a 44.44% shareholder and solely responsible for the \$800K mortgage loan secured by the Property. Liu also had an option to buy Chow's interest for \$900K before April 15, 2017. After that date, Chow could buy Liu's interest for \$720K. If neither buys the other out, the Property will be sold, Chow's investment will be returned (after certain expenses), and the remainder will go to Liu, to be used first to pay off the mortgage. At that time, Liu resigned from being president of New Journey. Chow became president.

In May 2017, Chow became aware of a promissory note dated November 6, 2015, by which New Journey promised to pay \$250,000 to third party Hui Zhen Wang.

In the Amended Complaint, plaintiff alleges claims for:

- 1) Fraud in the Inducement against Liu and Qin for promising to make equal contributions;
- 2) Breach of Fiduciary Duty and Duty of Loyalty by Qin and Liu for converting funds and running New Journey into debt;
- 3) Accounting and Turnover, asking defendants to account for all New Journey assets and turn over any assets to Chow; and
- 4) Declaratory Judgment that Liu is solely responsible for the promissory note

The Instant Motion

Plaintiff Chow moves to immediately vacate the notice of pendency on the Property. Chow explains that, during the course of litigation, the mortgage on the Property came due and went unpaid. The mortgagee began an action against New Journey, Chow, and Liu. Chow paid off the mortgage to avoid foreclosure and the loss of his investment. The mortgagee then issued a satisfaction of mortgage and stipulated to cancel the notice of pendency.

Chow, holding a majority of shares in New Journey, then transferred the Property to himself on August 31, 2017.

Qin never owned the Property directly or indirectly. Liu never owned the Property directly. Any claim based on ownership of shares in New Journey fails, pursuant to CPLR section 6501. Further the counterclaims at issue here are for money damages, which cannot support a notice of pendency.

Chow also argues the transfer was properly performed by the holder of a majority of the shares. Further, he claims to be a bona fide purchaser for value, having invested \$1M and paid off the mortgage of almost \$900K.

Opposition and Cross-Motion

Defendants oppose plaintiffs' motion and seek leave to amend their answer to assert six additional affirmative defenses, and to change some of the six counterclaims asserted. They appear to make changes throughout the amended pleading but have not provided a blackline of their proposed amended answer and counterclaims. They now seek to void the Agreement, state a claim by Qin based on unjust enrichment for her work for New Journey, and seek a declaratory judgment that the transfer of the Property was improper and should be rescinded. While defendants mention derivative claims in the Notice of Cross-Motion, the proposed amended answer does not explicitly state any derivative claims.

Defendants present a different history of the company, arguing Chow acted wrongfully in paying off the mortgage and transferring the Property to himself. They argue that the Agreement was signed by Liu under duress, and without consideration to him, and should be disregarded. Defendants claim to have fulfilled the requirements to obtain a constructive trust (a confidential/fiduciary relationship, a promise, a transfer made in reliance on the promise, and unjust enrichment) and argues they are entitled to one.

Defendants also move to amend their answer, and argue it should be allowed, as there is no surprise or prejudice to plaintiffs.

Reply and Opposition to Cross-Motion

Plaintiffs argue the notice of pendency cannot be rescued by the proposed second amended answer. A notice of pendency cannot stand where the filing party has no interest in the subject real estate. Further, if the notice of pendency must be supported by the associated pleading, and if the pleading is insufficient, the notice must be cancelled (*see 5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313, 320 [1984] ["the complaint filed with the notice of pendency must be adequate unto itself; a subsequent, amended complaint cannot be used to justify an earlier notice of pendency"]). Further, the proposed Second Amended Answer fails to cure the deficiency and cannot support a new notice of pendency, as it still fails to assert a right, title, or interest in the property at issue.

Leave to amend the first amended answer should also be denied. Defendants fail to provide a blackline of their proposed Second Amended Answer or anything else which clearly shows the proposed changes or additions. Further, while defendants argue a lack of prejudice, they have already amended once, changed attorneys multiple times, and delayed this action. The defendants

also rely on the Liu affidavit, which refers to various exhibits which are not provided. Accordingly, the Liu affidavit should be ignored.

The proposed Second Amended Answer fails to cure the deficiencies of the prior version. Sale of the Property was approved by a majority of membership interests in New Journey. There was no fraud. As far as defendants rely on Debtors and Creditors Law 276, that statute does not apply, as defendants are not creditors of the plaintiffs. While defendants claim they were under duress because they lacked time to read the Agreement, the Agreement allows decisions to be made by a majority interest of the company, which it was here. As far as defendants argue they were under the duress of a potential default, foreclosure still would have taken a significant amount of time, so the possibility of default cannot cause duress. Further, no wrongful threat is alleged to support such a claim.

Chow is a bona fide purchaser for value. He invested \$1 million for the Property and then paid off the mortgage of almost \$900,000. Further, as defendants never had any direct claim to the Property, this is really an intra-company dispute or, at most, related to Liu's interest in the company. Defendants can be compensated with money. Therefore, these claims cannot support a notice of pendency.

DISCUSSION

CPLR 6501 provides that “[a] notice of pendency may be filed in any action . . . in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property.” Defendants have not alleged the requisite direct ownership interest in the Property (*see General Property Corp. v. Diamond*, 29 AD2d 173, 175 [1st Dept 2005] [Interest in a joint venture involving realty is not an interest in the realty itself]).

Defendants argue they are entitled to a constructive trust. Presumably, they make this argument because a claim for a constructive trust can make an action one “affect[ing] the title . . . to . . . real property”. However, “[t]he cases hold that a notice of lis pendens cannot be filed where the party who has filed it claims no right, title or interest in or to the real estate against which it is filed, and where the suit concerns simply some” other wrong (*Braunston v Anchorage Woods, Inc.*, 10 NY2d 302, 305 [1961]). Even if the situation were one in which the defendants sought to preserve plaintiff's assets, “[t]he theory of preventing sales of [land] by defendants by a lis pendens is not that [plaintiff is] likely to become insolvent but rather that there is an issue affecting the title or right to enjoyment of the [plaintiff's] real property” (*id.*). Here, there is no issue affecting the

title or right to enjoyment of the property, only a claim to the constructive trust remedy. Accordingly, the notice of pendency must be lifted.

As to the cross-motion to amend the answer, leave to amend a pleading pursuant to CPLR § 3025 “shall be freely given,” in the absence of prejudice or surprise (*see e.g. Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]; *Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 354 [1st Dept 2005]). Mere lateness in seeking such relief is not in itself a barrier to obtaining judicial leave to amend (*see Ciarelli v Lynch*, 46 AD3d 1039 [3d Dept 2007]). Rather, when unexcused lateness is coupled with significant prejudice to the other side, denial of the motion for leave to amend is justified (*see Edenwald Contracting Co. v City of New York*, 60 NY2d 957, 958 [1983]). Prejudice in this context is shown where the nonmoving party is “hindered in the preparation of his case or has been prevented from taking some measure in support of his position” (*Loomis v Civetta Corinno Const. Co.*, 54 NY2d 18, 23 [1981]). No prejudice has been shown here.

In order to conserve judicial resources, examination of the underlying merits of the proposed amendment is mandated (*Thompson, supra*, 24 AD3d at 205; *Zaid, supra*, 18 AD3d at 355). Leave will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law (*see Aerolineas Galapagos, S.A. v Sundowner Alexandria*, 74 AD3d 652 [1st Dept 2010]; *Thompson, supra*, 24 AD3d at 205). Thus, a motion for leave to amend a pleading must be supported by an affidavit of merit or other evidentiary proof (*Delta Dallas Alpha Corp. v S. St. Seaport Ltd. Partnership*, 127 AD3d 419, 420 [1st Dept 2015]).

CPLR 3025 requires “[a]ny motion to amend or supplement pleadings [to] be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading” (*id.*). Although defendants have provided a proposed amended answer, counterclaims and described some, but by no means all, of the proposed changes, they have not provided a blackline showing the proposed changes.

Accordingly, the motion to vacate the notice of pendency shall be GRANTED because defendants have not stated any direct interest in the Property. Instead, they assert certain shareholder interests in a corporation which held title to real property. The cross motion for leave to amend the complaint is DENIED for failure to satisfy the pleading requirements of CPLR 3025. with leave to move within twenty (20) days to amend their answer and counterclaims, to include the provision of the required blackline (or other explanation of amendments) and supporting materials. A copy of the proposed blackline pleading shall be provided to opposing counsel and

counsel shall meet and confer with the goal of reaching agreement to the filing of a pleading without the need for motion practice.

Accordingly, a motion having been made by New Journey Global, Inc. and James Chow, an aggrieved person, to cancel a notice of pendency herein, filed in the office of the County Clerk of New York County on May 21, 2018 (*see* NYSCEF Doc. No. 26), and notice of such motion having been given as directed by the court, and due deliberation having been had thereon, and the court having determined that cancellation is appropriate in that the defendants have no title to the real property, it is hereby

ORDERED that the County Clerk of New York County, upon service upon him of a copy of this order with notice of entry, shall cancel the aforesaid notice of pendency; and it is further

ORDERED that such service upon the County Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and *County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that Counsel shall appear at a preliminary conference on Tuesday, January 22, 2019 at 10:30 AM at Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

DATED: November 21, 2018

ENTER,

O. PETER SHERWOOD J.S.C.