

Zu Xiang Zheng v Zhuang Zhuang

2009 NY Slip Op 32539(U)

October 2, 2009

Supreme Court, Queens County

Docket Number: 18120/2005

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES
Justice

IA Part 17

	x	Index Number <u>18120</u> 2005
ZU XIANG ZHENG, et al.		
- against -		Motion Date <u>July 15,</u> 2009
ZHUANG ZHUANG, et al.		Motion Cal. Number <u>66</u>
	x	Motion Seq. No. <u>9</u>

The following papers numbered 1 to 32 read on this motion by defendant Zhuang Zhuang for an order (1) consolidating the within action with the action entitled *New York Sign City, Inc. v Tim Cheng*, pending in Civil Court, Queens County, Landlord Tenant Part, Index No. 72249/2008; (2) directing Tim Cheng and/or Betty Mei Ling Chung to pay use and occupancy arrears from June 30, 2005 in the amount of \$8,000.00 a month, totaling \$288,000.00; (3) in the alternative, directing Tim Cheng and/or Betty Mei Ling Chung to pay \$5,000.00 per month equal to \$205,000.00 for storage from June 30, 2005 to the present; (4) in the alternative, directing Tim Cheng and/or Betty Mei Ling Chung to pay use and occupancy arrears from June 30, 2005 to the present in the sum of \$3,200.00 a month, equal to \$131,200.00 pursuant to the Business Operating Agreement; (5) in the alternative, directing that a hearing be held to determine the reasonable value of use and occupancy for 8,000 square feet of commercial space which has been paid to the landlord; (6) alternatively, ordering Tim Cheng and/or Betty Mei Ling Chung to pay use and occupancy immediately, pending this motion; (7) directing Tim Cheng and/or Betty Mei Ling Chung to pay immediately, future use and occupancy; and, alternatively, ordering Tim Cheng and/or Betty Mei Ling Chung to pay use and occupancy in arrears, present and future, pending a final resolution of this action; (8) and in the alternative, directing Tim Cheng and/or Betty Mei Ling Chung to immediately move out of the premises. Defendant Tim Cheng cross-moves for an order dismissing the commercial holdover proceeding, pursuant to

CPLR 3211(a)(1)and(3). Defendant Betty Mei Ling Chung cross-moves, in opposition, and seeks an order disqualifying Benjamin B. Xue, Esq., as attorney for plaintiffs.

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Upon the foregoing papers, the motion and cross motions are determined as follows:

This is an action for breach of contract, breach of fiduciary duty, unjust enrichment, conversion, diversion of business opportunities, and failure to repay a loan.

On April 21, 1994, Delong Realty Company, the owner of the premises known as 41-06 Delong Street, Flushing, New York, entered into an agreement to lease 67% of said premises to New York Sign & Supply-Impressive Products Inc., for a period of 15 years. The lease term commenced on May 1, 1994 and expired on April 30, 2009, and states that the tenant shall use and occupy the premises for the manufacture, storage and sale of signs and kitchen equipment. The lease was executed on behalf of New York Sign & Supply-Impressive Products Inc., by Tim Cheng.

As previously noted by the court in its order of April 22, 2008, on October 19, 1999, Zu Xiang Zheng (Zheng) and Betty Mei Ling Chung (Chung) entered into an agreement entitled "Business Operation Agreement" which sets forth the obligations of the parties relating to New York Sign City, Inc.'s (NYSC), operations at the premises located at 41-06 Delong Street, Flushing, New York. According to this agreement, Chung permitted Zheng to have complete financial, management, manufacturing and production control of NYSC, and permitted Zheng to do business under NYSC's name, at the Delong Street location, in consideration for the payment of a specified fee or percentage of gross sales, as stated in said agreement. Chung was also granted a license to maintain an office and storage space at the Delong Street premises in exchange for specified monthly payments.

Thereafter, Zheng, Zhuang Zhuang (Zhuang) and Eddie Wong, a nonparty to this action, entered into a second agreement simply entitled "Agreement" which appointed Zhuang and Wong to operate, manage and administer NYSC's business, pursuant to the terms of the "Business Operating Agreement." Chung ratified said "Agreement." On December 11, 1999 Zheng, Zhuang, Wong and Chung entered into an agreement entitled "Supplemental Agreement" pertaining to compliance with the two prior agreements, and the turn over of NYSC upon the default of any of the obligations set forth in the prior agreements. On August 1, 2000, Wong released his entire interest in NYSC to Zhuang. Thereafter, the parties allege various breaches of the three agreements, giving rise to the instant action and putting in issue the repayment of the loan between Chung and Zheng, and which party should have ultimate control over NYSC.

This court, in its order of April 22, 2008, determined that based upon the affidavit of a nonparty, it appeared that Zhuang systematically diverted assets from NYSC since the filing of the order of December 21, 2005, which directed that accurate books and records be maintained and that no corporate assets of NYSC be transferred, encumbered, dissipated, secreted or wasted. The court found that as plaintiff had asserted that Zhuang had failed to remit to the plaintiff the monthly minimum payment of \$12,000.00 due under the contract, and no evidence to the contrary was presented, and as Zhuang had violated the prior order of December 21, 2005, the court direct Zhuang to deposit into the court the sum of \$12,000.00 for April 2008, and, thereafter, for each consecutive month until the resolution of this action, within 10 days of the service of said order together with notice of entry. Zhuang was further directed to cease and desist any and all operations of New York Sign Contractors, Inc., and any other business entity other than NYSC operating at the Delong Street premises.

On August 12, 2008, NYSC commenced an action in Civil Court, Queens County, entitled *New York Sign City, Inc. v Tim Cheng* in the Commercial Landlord Tenant part (Index No. LT 072249/08) to terminate his tenancy of approximately 8,000 square feet in the Delong Street premises and to recover rent from July 2005 through July 30 2008, and for use and occupancy for the period thereafter. The holdover petition was executed by Shi Yong Chen, as President of NYSC, who is described as the "landlord." Mr. Cheng is the husband of Betty Mei Ling Chung. Following the commencement of the holdover proceeding, Mr. Cheng served a motion to dismiss, and the petitioner therein served a cross motion for use and occupancy. On October 22, 2008, counsel for Mr. Chen executed a stipulation in Civil Court whereby it was agreed that the action would be "addressed" as follows: "This proceeding and the pending motion to dismiss & the cross-motion for U & O are to be transferred to the Supreme Court, Queens County & to be consolidated in the action pending before Justice Kitzes, Index # 18120/05, captioned *Zu Xiang Zheng et al v Zhuang, et al.*"

The within motion was brought by counsel for defendant Zhuang, purportedly on behalf of NYSC. NYSC is a plaintiff in this action and is represented here by another law firm, and not by counsel for Zhuang. The issue of who ultimately has the right to control and manage NYSC has not been determined, and contrary to the claims of Zhuang's counsel, there are no pending motions filed in this part in 2008, which remain outstanding.

In the within motion Shi Yong Chen has submitted an affidavit in which he states that he is the president of NYSC, and that he is not proficient in the English language and that the statements set forth in the affidavit were translated into Chinese for him. This affidavit will not be considered, as it is not accompanied by an affidavit from a qualified translator (CPLR 2101[b]).

In view of the fact that neither Mr. Zhuang nor his counsel represent NYSC in this action, and as the Civil Court action appears to have been commenced by Zheng's adversaries who claim to represent NYSC, the within motion to transfer and consolidate the Civil Court action with the within action, and for related relief, is denied. Mr. Cheng's cross motion to dismiss the Civil Court action is denied, as this court lacks jurisdiction to make any determination in that action.

That branch of Zhuang's motion which seeks a mandatory injunction directing Chung to pay into court a sum for "use and occupancy" and in the alternative seeks to evict Chung from the subject premises, is denied. This request is also brought by defendant Zhuang and his counsel on behalf of NYSC. However, as NYSC is the plaintiff in this action and is represented by separate counsel and does not seek such relief, the court will not entertain such a request. It is noted that Zhuang is not the owner of the premises, and his right to control and manage NYSC is disputed. That branch of Chung's cross motion which seeks to dismiss this branch of defendant's motion, therefore, is granted.

Turning now to the remainder of Chung's cross motion to disqualify plaintiffs Zheng's and NYSC's counsel, it is noted that this court, in a memorandum decision dated November 3, 2005 and an order dated December 16, 2005, directed that Ms. Chung be added as a defendant in the within action. This court, in an order dated June 2, 2006, among other things, granted that portion of Zhuang's cross motion to consolidate with the within action, the action entitled *Betty Mei Ling Chung v Zu Xiang Zheng, Zhuang Zhuang and Eddie Wong* (Index No. 1606/06), for the purpose of a joint trial only.

On June 27, 2006, Zheng and Chung executed two agreements, in which Chung acknowledged her indebtedness to Zheng and the parties made certain provisions regarding NYSC's operations and liabilities, if Zheng regained control of NYSC. These agreements specifically provided that they were not a complete settlement of the actions between Zheng

and Chung. It is undisputed that these two agreements were drafted by Zheng's counsel, Benjamin B. Xue. Ms. Chung asserts that Mr. Zheng cannot read these English language documents; that Xue prepared them with express signing language and a signature line bearing her name; that Mr. Zheng is illiterate in Chinese; and, therefore, these documents were created for the express purpose of delivering them to her, and for Zheng to persuade her to sign, while circumventing her attorney.

Mr. Xue states in his affirmation that he was retained by Mr. Zheng in late July 2005, and that the within action was initially commenced solely against Zhuang. Mr. Xue states that while he believed Ms. Chung should have been added as a defendant, Zheng was adamant that she not be made a party as they were friends and he was in communication with Chung and her husband regarding the NYSC dispute with Zhuang. He states that he believes that long before, and long after his law firm was engaged as counsel in this action, Mr. Zheng and Ms. Chung communicated regarding NYSC, and that this lasted until late March 2009. Mr. Xue states that although Ms. Chung's former counsel, Po Yuen, was aware of the fact that Mr. Zheng was represented by counsel, a meeting took place in late December 2005, between Zheng, Ms. Chung and her husband, Tim Cheng, regarding the return of NYSC from Zhuang, and that Zheng had also delivered a retainer check from Chung to Po Yuen. Mr. Xue asserts that on both occasions, Mr. Yuen discussed the case with Zheng without his knowledge or presence.

Mr. Xue states that he met with Mr. Yuen in March 2006 together with Mr. Zheng, at which time he informed Mr. Yuen that Zheng would like to recover the business as soon as possible, and manage it, unless Chung repaid the loan and deposit, and that Zheng, Chung and Cheng were engaging in discussions themselves regarding these issues.

Mr. Xue states that after the order directing that Ms. Chung be added as a defendant in this action, Mr. Zheng instructed Mr. Xue's office to draft some documents for Zheng to use as "settlement templates." He states that his office drafted several versions of said templates, including the two that were executed by Chung and Zheng. Mr. Xue states that he did not communicate with Ms. Chung and that he did not know that these templates were being used as a contract for Chung to sign until Zheng gave him the fully executed documents. He states that he promptly provided a copy of the executed documents to Ms. Chung's then counsel, David Hoffman, Esq., of counsel to Po Yuen, Esq., who was handling Ms. Chung's case at that time. Neither Mr. Hoffman nor Mr. Yuen made any objection to Ms. Chung's execution of these documents.

Mr. Xue states that after these agreements were executed, Ms. Chung appeared to have abandoned both actions. Ms. Chung's counsel failed to appear at compliance conferences on September 6, 2006, and on December 13, 2006; Ms. Chung failed to appear

at several court-ordered depositions; Ms. Chung's counsel failed to appear at the January 5, 2007 post-note of issue conference, and did not execute a stipulation until January 25, 2007 which required Ms. Chung to appear for a deposition on February 5, 2007; Ms. Chung discharged Mr. Yuen and Mr. Hoffman on February 12, 2007 and retained the Law Offices of Jin Huang; at a compliance part conference, a so-ordered stipulation was issued on March 5, 2007, directing Ms. Chung to appear at a deposition before April 16, 2007 or be precluded from testifying at trial of Action No. 2.

On March 23, 2007, Ms. Chung retained her present counsel, Anthony Cheh, Esq. Mr. Cheh made no objections to the June 2006 agreements until the service of the within cross motion on April 22, 2009.

The Disciplinary Rules have been replaced by the Rules of Professional Conduct, which provide at 22 NYCRR § 1200.33 as follows:

“Communication with person represented by counsel

(a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

(b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.”

Here, there is no evidence that Mr. Xue ever communicated directly with Ms. Cheng outside the presence of her counsel, or that he caused his client Zheng to communicate with Ms. Chung. Communications between Mr. Zheng and Ms. Chung are not prohibited.

To the extent that Mr. Xue drafted a series of “settlement templates” for Mr. Zheng, while Xue could have anticipated that Zheng would show these documents to Chung, there is no evidence that Xue instructed Zheng to bring these documents to Chung and have her sign them. Furthermore, the court finds Ms. Chung's objections to these documents to be suspect, as it comes more than three years after they were executed, after she and her counsel repeatedly failed to participate in scheduled conferences and depositions, and more than two years after she retained her present counsel.

Therefore, under the circumstances presented here, that branch of Cheng's cross motion which seeks to disqualify Mr. Xue from representing Mr. Zheng in this action is denied.

Accordingly, defendant Zhuang's motion is denied in its entirety. The cross motion by Tim Cheng is denied. That branch of defendant Chung's cross motion which seeks to dismiss Zhuang's motion is granted and that branch of her cross motion which seeks to disqualify Mr. Xue from representing Mr. Zheng and NYSC is denied.

Dated: October 2, 2009

J.S.C.