

Shen Zhang v Wen Wei Ho

2012 NY Slip Op 30566(U)

January 9, 2012

Sup Ct, Queens County

Docket Number: 12854/2009

Judge: Darrell L. Gavrin

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA Part 27
Justice

SHEN ZHANG, individually and as director and holder of fifty percent of the outstanding shares of WIL CAN (USA) GROUP INC. d/b/a S.C. NORTH AMERICA

Index
Number 12854/2009

Motion
Date November 22, 2011¹

Plaintiff(s),

- against -

Motion
Cal. Number

WEN WEI HO, GAN HUI QIAN, WEN KAN WANG, EAST PARK TRADING INC. and EVERGREEN FOOD SERVICE INC.

Motion
Seq. Number

Defendant(s).

The following papers numbered 1 to 16 read on this motion by defendants East Park Trading Inc. (East Park) and Evergreen Good Service Inc. (Evergreen) pursuant to CPLR § 3211 (a) to dismiss the complaint asserted against them, and for judgment against plaintiff Shen Zhang, individually and as director and holder of 50% of the outstanding shares of Wil Can (USA) Group Inc. d/b/a S.C. North America (Wil Can), together with interest, costs, disbursements and reasonable attorney's fees; and this motion by defendants Wen Wei Ho and Gan Hui Qian pursuant to CPLR § 3211 (a) (1), (2), (3) and (7) and CPLR § 2104 to dismiss the complaint asserted against them, and for judgment in their favor on their counterclaims against plaintiff, together with interest, costs, disbursements and reasonable attorneys' fees in the action.

¹These motions were fully submitted to Justice Timothy J. Flaherty on December 3, 2009. However, the papers were misplaced and Justice Flaherty never rendered a decision. Upon Justice Flaherty's retirement, this case was administratively reassigned to this court. On November 22, 2011, the parties resubmitted the papers to this court for consideration.

	Papers <u>Numbered</u>
Notices of Motion - Affidavits - Exhibits	1-7
Answering Affidavits - Exhibits	8-13
Reply Affidavits	14-16

Upon the foregoing papers it is ordered that the motions are joined together for determination as follows:

Plaintiff alleged in his complaint that he and defendant Wen Wei Ho formed Wil Can, a corporation which provides freight-forwarding and delivery services, and each hold 50% of the outstanding shares in it. Plaintiff also alleged that he had been a director of Wil Can and oversaw its daily business operations, whereas defendant Wen Wei Ho served as an officer of the corporation and handled Wil Can's finances. Plaintiff further alleged that unbeknownst to him, defendant Wen Wei Ho began to mishandle, misappropriate and mismanage the corporation's assets, for the personal enrichment of Ho and the enrichment of Ho's family, and engaged in illicit activity, including receiving kickbacks, laundering money and facilitating the import of illegal goods from China in connection with defendants East Park and Evergreen. Defendant Wen Wei Ho allegedly prevented plaintiff from reviewing financial and corporate records, failed to account to him or pay his salary, permitted defendant Gan Hui Qian (Ho's wife) to make business decisions for Wil Can, and engaged in a competing business with defendant Wen Kan Wang. Plaintiff alleged that because defendant Wen Wei Ho has control over Wil Can's assets, there is a danger they will be dissipated to the detriment of the corporation's creditors and plaintiff's interest as a shareholder. Plaintiff also alleged that he has incurred damages as a consequence of the conduct of defendants.

In the complaint, plaintiff asserts seven causes of action. The first four causes of action, for alleged breach of fiduciary duty owing to Zhang and Wil Can (first cause of action), misappropriation of corporate opportunity (second cause of action), fraud and misrepresentation (third cause of action), and equitable accounting (fourth cause of action), are asserted only against defendant Wen Wei Ho. Plaintiff also asserts a cause of action (the sixth cause of action) against defendants East Park and Evergreen for breach of implied covenant of good faith and fair dealing and aiding and abetting management in defrauding Wil Can. The fifth and seventh causes of action are asserted against all defendants and are claims for alleged breach of implied covenants of good faith and fair dealing (fifth cause of action), and alleged breach of fiduciary duty and director/officer misconduct pursuant to Business Corporation Law § 720 (seventh cause of action). Plaintiff seeks injunctive and monetary relief, including punitive damages, and an accounting.

Defendants Wen Wei Ho and Gan Hui Qian served a joint answer, denying the material allegations of the complaint, asserting various affirmative defenses, including lack of standing and capacity, and interposing a counterclaim for alleged abuse of process.

Defendants East Park and Evergreen also served a joint answer denying the material allegations of the complaint, asserting various defenses, including lack of capacity, and failure to state a cause of action, and interposing counterclaims for alleged abuse of process, and an award of punitive damages and attorneys' fees.

With respect to the branch of the respective motions by defendants Wen Wei Ho and Gan Hui Qian, and East Park and Evergreen seeking dismissal of the complaint pursuant to CPLR § 3211, the motions were made after joinder of issue and therefore, actually seek summary judgment pursuant to CPLR § 3212, on CPLR § 3211(a) grounds (*see e.g. Impastato v De Girolamo*, 95 AD2d 845 [2d Dept 1983]). In support of their motions, defendants Wen Wei Ho, Gan Hui Qian, East Park and Evergreen assert, among other things, that plaintiff has failed to state a cause of action against them in his individual capacity. They claim that all the claims in the complaint are derivative in nature, and contain no allegations of a breach of any duty owed by them to plaintiff which is independent of any duty owing to Wil Can. They also claim that plaintiff lacks capacity to assert claims derivatively on behalf of Wil Can against them.

To the extent the first, second, third, fourth and seventh causes of action in the complaint are based upon wrongs allegedly suffered by Wil Can, and not plaintiff individually, they do not form a basis for an award to damages to plaintiff individually (*see Abrams v Donati*, 66 NY2d 951, 953 [1985] “[A]llegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may derivatively sue but not individually”); *Elenson v Wax*, 215 AD2d 429 [2d Dept 1995]). In addition, to the extent plaintiff alleges that defendant Wen Wei Ho breached his fiduciary duties as a corporate officer, plaintiff cannot assert such claim in his individual capacity (*see Glenn v Hoteltron Sys., Inc.*, 74 NY2d 386, 392 [1989]). Similarly, the injury purportedly suffered by plaintiff as a result of defendant Wen Wei Ho's alleged misconduct- i.e. establishing a rival corporation- is merely derivative of the injuries suffered by Wil Can itself (*see Abrams v Donati*, 66 NY2d at 953 [“For a wrong against a corporation a shareholder has no individual cause of action, though he loses the value of his investment ...”]).

To the extent the fifth cause of action for breach of implied covenants of good faith and fair dealing is asserted by plaintiff in his individual capacity as against defendants, plaintiff has failed to allege any facts demonstrating the existence of any contractual relationship between him and Gan Hui Qian, East Park or Evergreen. Nor does plaintiff

allege the existence of any contractual relationship between him and defendant Wen Wei Ho which imposed duties upon Ho independent from those fiduciary duties required of Ho as an officer of Wil Can. Plaintiff also makes no allegation that he suffered any injury as a consequence of any alleged breach by defendant Wen Wei Ho of any implied contractual covenant without a parallel harm to Wil Can.

With respect to the sixth cause of action asserted against defendants East Park and Evergreen, again, plaintiff has failed to allege the existence of any contractual relationship between him in his individual capacity and those defendants. To the extent he alleges that defendants East Park and Evergreen aided and abetted defendant Wen Wei Ho in defrauding Wil Can, such a cause of action accrues to Wil Can, not plaintiff in his individual capacity.

To the extent the causes of action are asserted by plaintiff, in his capacity as a shareholder and director of defendant Wil Can, against defendants, Business Corporation Law § 626 (b) imposes upon the plaintiff in a derivative action a dual requirement as to the ownership of stock: “it shall be made to appear that the plaintiff is ... [a shareholder] at the time of bringing the action and ... at the time of the transaction of which he complains.” “It is settled law that a plaintiff stockholder in a stockholder’s derivative action loses his right to continue to prosecute the action if he ceases to be a stockholder (*Tenney v Rosenthal*, 6 NY2d 204, 210 [1959]; *Bernstein v Polo Fashions*, 55 AD2d 530 [1st Dept 1976])” (*Rubinstein v Catacosinos*, 91 AD2d 445, 446 [1st Dept 1983], *affd for reasons stated* 60 NY2d 890 [1983]).

Plaintiff alleged in his complaint that a settlement agreement dated October 29, 2008 had been entered into on his behalf by his then counsel in relation to the action entitled *Wil Can (USA) Group, Inc. v Zhang* (Supreme Court, Queens County, Index No. 6623/2007) (the *Wil Can* action), pursuant to which Zhang was to relinquish his ownership interest in Wil Can, execute a confession of judgment and pay an aggregate sum of \$120,000.00 in equal installment payments over a 60-month period. Plaintiff Zhang additionally alleged that he unsuccessfully attempted to vacate the settlement agreement, citing an order dated April 8, 2009 issued by the Hon. Orin R. Kitzes in the *Wil Can* action. That order, among other things, granted the motion by Wil Can to enforce the October 29, 2008 settlement agreement, and denied Zhang’s cross motion to vacate such agreement.

On April 29, 2009, Zhang filed a notice of appeal from the April 8, 2009 order of Justice Kitzes in the *Wil Can* action. On May 15, 2009, Zhang filed a copy of the summons and complaint commencing this action, and on May 29, 2009, executed and delivered the stock certificate, representing his 100 shares of common stock (50% share), to counsel for defendants Wen Wei Ho and Gan Hui Qian. Counsel for defendants Wen Wei Ho and Gan

Hui Qian admittedly agreed to hold the stock certificate in escrow pending the determination of Zhang's appeal in the *Wil Can* action.

At the time of the making of the motions by defendants Wen Wei Ho, Gan Hui Qian, East Park and Evergreen, the appeal from the April 8, 2009 order in the *Wil Can* action had yet to be determined, but plaintiff nevertheless acknowledged in his opposition papers that he was required to relinquish his stock in Wil Can pursuant to the settlement agreement in the event the appeal was not decided in his favor. By decision and order dated May 25, 2010, the Appellate Division, Second Department, affirmed so much of the April 8, 2009 order of Justice Kitzes as appealed from, with costs (*Wil Can [USA] Group, Inc. v Zhang*, 73 AD3d 116 [2010]). The Appellate Division found that then counsel for Zhang had apparent authority to enter into the settlement agreement, and therefore the agreement was binding upon Zhang.²

In view of the Appellate Division decision and order in *Wil Can*, plaintiff no longer has a right to claim ownership of shares of stock in Wil Can. In addition, plaintiff alleged in the complaint herein that on, or about, March 7, 2007, he informed defendant Wen Wei Ho of his resignation from his position as director at Wil Can (*cf. Tenney v Rosenthal*, 6 NY2d 204 [1959], *supra*). Under such circumstances, plaintiff no longer has standing to prosecute the derivative claims on behalf of Wil Can (*see Business Corporation Law* §§ 626 [b], 720; *Balk v 125 W. 92nd St. Corp.*, 24 AD3d 193 [1st Dept 2005]; *Silverman v Schwartz*, 248 AD2d 332 [1st Dept 1998]).

Under such circumstances, that branch of the motions by defendants Wen Wei Ho, Gan Hui Qian, East Park and Evergreen for summary judgment dismissing the complaint asserted them is granted.

That branch of the motions by defendants Wen Wei Ho, Gan Hui Qian, East Park and Evergreen for judgment on their counterclaims against plaintiff, together with interest, costs, reasonable attorneys' fees is denied.

Defendants Wen Wei Ho and Gan Hui Qian, have failed to demonstrate that issue has been joined with respect to their counterclaim for abuse of process. No copy of the reply has been provided the court (*see CPLR* § 3212 [b]; *Deer Park Associates v Robbins Store, Inc.*, 243 AD2d 443 [2d Dept 1997]; *Lawlor v County of Nassau*, 166 AD2d 692 [2d Dept 1990]). To the extent defendants Wen Wei Ho and Gan Hui Qian seek leave to enter a default

²Zhang asserted in his brief on appeal in the *Wil Can* action that the settlement agreement entailed his relinquishing his 50% interest in Wil Can and paying an aggregate sum of \$120,000.00 to Wil Can in installment payments.

judgment against plaintiff with respect to their counterclaim, they have failed to demonstrate plaintiff is in default for failing to reply to their counterclaim (CPLR § 3215). In addition, to the extent defendants Wen Wei Ho and Gan Hui Qian allege that commencement of this action constitutes abuse of process, the mere commencement of a civil action, is not legally considered process capable of being abused (*see Curiano v Suozzi*, 63 NY2d 113, 116 [1984]).

Defendants East Park and Evergreen have failed to demonstrate entitlement to summary judgment in their favor with respect to their first counterclaim for abuse of process (CPLR § 3212). Again, to the extent they allege that commencement of this action constitutes abuse of process, the mere commencement of a civil action, is not legally considered process capable of being abused (*see Curiano v Suozzi*, 63 NY2d 113, 116 [1984]). To the extent they seek punitive damages as a counterclaim, there is no separate legally cognizable cause of action for punitive damages (*see Kovacs v Briarcliffe School*, 208 AD2d 686 [2d Dept 1994]; *Green v Fischbein Olivieri Rozenholc & Badillo*, 119 AD2d 345, 351 [1st Dept 1986]). To the degree they seek attorneys' fees as a counterclaim, the rule is well settled in this state that the prevailing party in litigation may not recover attorneys' fees, except where authorized by the parties' agreement, statutory provision or court rule (*see Hunt v Sharp*, 85 NY2d 883 [1995]; *Chapel v Mitchell*, 84 NY2d 345, 348-349 [1994]; *Hooper Associates, Ltd. v AGS Computers, Inc.*, 74 NY2d 487 [1989]; *Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12, 21 [1979]). Defendants East Park and Evergreen make no allegation that any agreement exists whereby plaintiff is obligated to pay attorneys' fees to them, and the court is unaware of any statutory provision or court rule authorizing recovery of attorneys' fees under the facts alleged.

Dated: January 9, 2012

DARRELL L. GAVRIN, J.S.C.