

Wong v Moy

2012 NY Slip Op 32566(U)

October 5, 2012

Supreme Court, New York County

Docket Number: 601048/2008

Judge: Barbara R. Kapnick

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **BARBARA R. KAPNICK**

PART 39

Index Number : 601048/2008

WONG, BENNY

vs
MOY, ELMA

Sequence Number : 005

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

| PAPERS NUMBERED |
|-----------------|
| |
| |
| |

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

and cross-motion are decided in accordance with the accompanying memorandum decision.

FILED

OCT 10 2012

NEW YORK
COUNTY CLERKS OFFICE

Dated: 10/5/12


BARBARA R. KAPNICK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

-----X
BENNY WONG and L&W DEVELOPMENT INC.,

Plaintiffs,

-against-

DECISION/ORDER
Index No. 601048/08
Motion Seq. No. 005

ELMA MOY and FLORENTINE MUSIC &
TUTORIAL, INC.,

Defendants.

-----X
FLORENTINE MUSIC & TUTORIAL INC.,

Petitioner,

-against-

CHINESE AMERICAN MEDIA HOLDING INC.
a/k/a CHUNG WAH COMMERCIAL BROADCASTING
COMPANY INC.,

Respondent.

-----X
BARBARA R. KAPNICK, J.:

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

This action arises out of the purchase and subsequent management of a Chinese-language radio station in New York City known as Chung Wah Commercial Broadcasting Company, Inc. ("CWCB"). The original four-count Complaint asserted causes of action for breach of contract, fraud, breach of fiduciary duty, and declaratory and injunctive relief.

By Decision and Order dated April 13, 2009, this Court dismissed the action in its entirety. Plaintiff then moved to reargue, and by Decision and Order dated October 5, 2009, the Court

granted plaintiffs' motion for reargument, to the extent of reinstating the first and second causes of action (for breach of contract and fraud, respectively) as asserted by plaintiff Benny Wong ("Wong") only. This Court also granted plaintiffs' motion to remove the monetary claims in the above-captioned summary proceeding, *Florentine Music & Tutorial Inc. v Chinese American Media Holding Inc.*, pending under L&T Index Number 064987/08 (the "Holdover Proceeding"), from the Civil Court and consolidate it with the instant action for joint trial.

Defendants' Verified Answer filed on December 7, 2009, asserts counterclaims for use and occupancy of the Premises; for payment of certain expenses of CWCB, and installment payments to a third party, pursuant to the parties' agreements; for restoration work done at defendants' premises; and for damages and attorneys' fees resulting from plaintiffs filing and wilfully exaggerating a mechanic's lien.

Defendants Elma Moy ("Moy") and Florentine Music & Tutorial, Inc. ("Florentine") now move for partial summary judgment dismissing Wong's second cause of action for fraud. They also move for partial summary judgment on their first counterclaim for rental income for the use and occupancy of Florentine's premises, and on their fourth counterclaim for payment of certain installment

payments pursuant to the parties' agreements. In addition, Florentine moves for partial summary judgment on its petition for use and occupancy against respondent Chinese American Media Holding Inc. (together with CWCB, "CAMH"). Plaintiffs cross-move for partial summary judgment, claiming that Wong was not obligated to enter into a lease or make lease payments under the parties' agreement, and also seeking construction costs for renovation work performed at Florentine's premises.

The facts of this case were stated in detail in the above-referenced April 13 and October 5, 2009 Decisions and Orders. Therefore, the Court presumes that the parties are familiar with the facts and the facts are not restated here. To the extent that additional facts are necessary to resolve the instant motions, they are stated in the following analysis.

Discussion

Moy and Florentine's Summary Judgment Motion

Moy seeks summary judgment on her fourth counterclaim, which is based upon Moy's purchase of CAMH from non-party Kin Won Leung ("Leung") for \$648,000, pursuant to a "Sale Agreement" signed by Moy and Leung on January 11, 2005. Under the Sale Agreement, Moy paid \$129,600 at the closing and agreed to pay the balance in 48 equal monthly installments of \$10,800. Moy claims that, pursuant

to the "Shareholder Agreement" between Moy and Wong, dated August 31, 2007, Wong is solely responsible for the last 24 payments of \$10,800 each due to Leung from February 2008 through January 2010, totaling \$300,000.¹

Paragraph 5 of the Shareholder Agreement provided that "Wong or the Business shall be fully responsible for the balance of the payments under the Sale Agreement for CWCB between Kin Won Leung and Elma Moy signed on 1/11/2005 with the remaining twenty four (24) payments of \$10,800.00 each starting September, 2007." Wong does not dispute that he signed the 2007 Shareholder Agreement, but rather, he claims that the equipment Moy purchased was "garbage," that Moy was "cheated" by Leung, and that, therefore, Leung "was not entitled to any money." Wong EBT Tr., 9/14/10 at 153. Thus, it is undisputed that Wong failed to make 24 payments of \$10,800, as required under the 2007 Shareholder Agreement. Therefore, Moy has made a prima facie showing of her entitlement to summary judgment on this counterclaim.

¹ In a separate action *Leung v Moy* (Sup Ct, Kings County, Index No. 8297/10), judgment was entered against Moy on January 6, 2011 for the 24 outstanding payments owed to Leung, with interest, in an amount totaling \$306,828.71. Leung and Moy stipulated to settle the judgment for \$300,000, which Moy fully paid on March 17, 2011. Moy Aff., Exs. I, J, K.

In opposition, Wong argues that Moy owed fiduciary obligations to him, and that she took advantage of Wong's trust by misrepresenting and concealing the true financial condition of CAMH. Wong Opp. Brief, at 18. In essence, this argument coincides with Wong's second cause of action for fraud, which is based upon Moy's alleged misrepresentations that CAMH "was profitable, or at least broke even, in the past, that the parties would be equal shareholders in such enterprise and equally share the costs and burdens of setting up the venture," and that the venture would operate rent-free from the premises of Florentine (of which Moy is the president), located at 384 Broadway in New York City (the "Premises"). Complaint, ¶ 72.

A fraud claim requires a showing of "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 (1996).

As a preliminary matter, at his deposition, Wong admitted that, at the time of his initial investment, he knew that the radio station was not profitable, that the facility was not very good and that the equipment was very old, thereby undermining his claim that

Moy misrepresented or concealed information concerning CAMH's profitability. 7/22/10 Wong Tr., at 104-106. Moreover, Wong claims that he "reached an agreement" with Moy in September 2006, whereby Wong would invest and become a 50% owner in CAMH and Moy would provide an annual sales report to show the history of profitability of the radio station. Complaint, ¶ 17. According to Wong, in furtherance of this agreement, on October 20, 2006, Wong and Moy entered into and signed a "Shareholder Agreement." *Id.*, ¶ 19. However, the record before this Court contains no evidence of a written agreement from 2006, and Wong admitted at his deposition that there was no written agreement in 2006. 7/22/10 Wong Tr., at 112.

When Wong and Moy reduced their agreement to writing in the 2007 Shareholder Agreement, they represented that their agreement was the "result of lengthy discussion and negotiation between themselves and their business advisors," and identified the parties' efforts to "restore the mutual willingness to continue their business relationships [sic] which has developed into a modified relationship as set forth herein." Shareholder Agreement, ¶ 6. Wong and Moy also agreed that "[a]ny prior discussion or representation in [sic] contrary to the provisions set forth herein shall be deemed merged into and be controlled by this agreement." *Id.*, ¶ 9. Thus, it appears that Wong knew about all of Moy's

alleged misrepresentations and concealment at the time that he entered into the Shareholder Agreement, and yet he expressly agreed to modify his business relationship with Moy. He further stated that the Shareholder Agreement would supersede any prior discussions or representations, without incorporating any such promises into the Shareholder Agreement. Thus, the evidence makes clear that Moy neither misrepresented facts nor intended to defraud Wong.

Furthermore, "[a]s a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it." *UST Private Equity Invs. Fund v Salomon Smith Barney*, 288 AD2d 87, 88 (1st Dept 2001); see also *HSH Nordbank AG v UBS AG*, 95 AD3d 185 (1st Dep't 2012); *Abrahami v UPC Constr. Co.*, 224 AD2d 231, 234 (1st Dept 1996) ("sophisticated businessmen[] had a duty to exercise ordinary diligence and conduct an independent appraisal of the risk they were assuming").

Here, the element of justifiable reliance is undermined by Wong's 35 years of business experience preceding this lawsuit. Wong owns and controls plaintiff L&W Development, Inc. ("L&W"), a construction company (7/22/10 Wong Tr., at 5-12), and he admits

having knowledge of Moy's business investments, as well as having advised her on business matters. Wong Aff., ¶¶ 10-12. As a matter of law, Wong, a sophisticated businessman, could not have justifiably relied upon any oral representations by Moy concerning the financial condition of CAMH. Rather, Wong had a duty to conduct ordinary diligence by independently appraising the financial condition of CAMH prior to entering the joint venture, which he admits he failed to do. Wong Aff., ¶¶ 28, 39. In short, Wong "can hardly claim with any credibility that he, a savvy businessman, entered into the resulting agreement[] lulled by faith or trust in the part[y] across the bargaining table" *Shea v Hambros PLC*, 244 AD2d 39, 47 (1st Dept 1998).

Wong's assertion that the parties' agreement was obtained by fraud in the inducement is also undermined by the fact that it is based upon conclusory statements, not genuine claims based upon proof. *Citibank v Plapinger*, 107 AD2d 627, 628 (1st Dept 1985), *aff'd* 66 NY2d 90 (1985) ("such evidence, in order to defeat a motion for summary judgment, must be genuine and based on proof, not shadowy and conclusory statements"). For the foregoing reasons, Wong's argument that he was fraudulently induced to enter the joint venture is without merit, and Wong's second cause of action for fraud is dismissed.

Wong next argues that he is entitled to rescission, because there was no meeting of the minds. According to Wong, Moy understood that Wong purchased CAMH only in order to maintain the radio station as a cultural institution regardless of its profitability, while Wong claims that he never would have invested in CAMH had he known that it was losing money. As discussed above, had Wong conducted ordinary diligence before entering into the venture with Moy, he would have discovered the financial condition of CAMH. Moreover, Wong affirmed the validity of the parties' agreement in his breach of contract cause of action, and by entering into the 2007 Shareholder Agreement even though he knew about Moy's alleged fraud beforehand. Wong cannot now disaffirm the same agreement for purposes of rescission. *Brown v Manufacturers Trust Co.*, 278 NY 317, 324 (1938) ("[o]ne cannot rely on a contract as valid and seek to recover because of its breach, which constitutes an affirmation of the contract, and then have a recovery on the ground that the contract is void, which constitutes a disaffirmance of the same contract"). Therefore, this argument is unpersuasive.

Wong next argues that summary judgment cannot be granted because paragraph 5 of the Shareholder Agreement, referred to supra, is ambiguous. Specifically, Wong claims that the word "or" in the first sentence is ambiguous, because it may mean "an

alternative," or it may mean "two alternatives of the same thing." Wong Opp. Brief, at 21, citing Merriam-Webster's Online Dictionary. The Court agrees with Wong's definitions, but not with his conclusion. Under the plain language of paragraph 5, Wong or the Business could be liable. The fact that Moy seeks to hold Wong responsible for his promise under paragraph 5 does not mean that she is required, or even attempting, to hold "Wong and the Business ... responsible," as is argued by Wong. Wong Opp. Brief, at 21 (emphasis in original). Rather, Moy merely seeks to enforce paragraph 5 of the Shareholder Agreement against Wong, as one of two alternatives. *United States Print. & Lithograph Co. v Powers*, 233 NY 143, 152 (1922) ("promises by two or more persons create a joint duty unless the contrary is stated"). Therefore, Wong's argument that there is an ambiguity is unpersuasive. *New York City Off-Track Betting Corp. v Safe Factory Outlet, Inc.*, 28 AD3d 175, 177-178 (1st Dept 2006) ("mere assertion by a party that contract language means something other than what is clear when read in conjunction with the whole contract is not enough to create an ambiguity sufficient to raise a triable issue of fact").

Wong further argues that his performance under the 2007 Shareholder Agreement was excused by Moy's failure to relinquish her shares of stock and corporate books and records, which prevented Wong from selling CAMH. According to Wong, Moy

controlled CAMH's bank accounts and withdrew its remaining funds, and allegedly failed to reimburse Wong 50% of the costs of the business under paragraph 4 of the Shareholder Agreement.

Under the doctrine of anticipatory breach, "a wrongful repudiation of the contract by one party before the time for performance entitles the nonrepudiating party to immediately claim damages for a total breach," and "relieves the nonrepudiating party of its obligation of future performance." *American List Corp. v U.S. News and World Report*, 75 NY2d 38, 44 (1989). Anticipatory breach requires a showing of "a clear and unequivocal intention by defendant not to perform or to abandon the contract." *HRL Union Ave. Corp. v New York City Hous. Auth.*, 223 AD2d 486, 487 (1st Dept 1996), *lv den* 88 NY2d 803 (1996).

Here, the 2007 Shareholder Agreement reduced Moy's ownership interest from 50% to 25%, but nothing contained in the agreement required Moy to provide stock certificates to Wong. Shareholder Agreement, ¶ 3. Moy also "resign[ed] from any offices [and] directorship[s]," from her position as "bank account signatory," and from "employment from the Business." *Id.* Moy was entitled to receive 25% of the net proceeds of any sale by Wong, who was "solely responsible for the Business." *Id.* Nothing contained in the Shareholder Agreement required Moy to turn over corporate books

and records, and Wong fails to explain how he, as the individual "solely responsible for the Business," had no access to these items or was ever denied access by Moy. Thus, none of the conduct alleged by Wong constituted a clear and unequivocal intention by Moy not to perform or abandon the Shareholder Agreement.

Paragraph 4 of the Shareholder Agreement provided that "Wong and Moy shall equally share any and all expenses, liabilities and taxes, including but not limited to worker compensation, disabilities and withholding taxes for the period of March 1, 2007 to August 31, 2007." Wong claims that Moy never paid her share of these expenses, including costs and expenses associated with the renovation of CAMH. Wong Aff., ¶ 61. Moy claims that Wong failed to pay his half of these expenses, which did not include any construction or renovation costs. Moy Aff., ¶ 31. Notwithstanding the parties' disagreement over whether construction costs were included in paragraph 4, Moy's purported breach of the Shareholder Agreement left Wong with "a choice--to treat the entire contract as broken and sue immediately for the breach or reject the proposed breach and continue to treat the contract as valid." *Inter-Power of N.Y. v Niagara Mohawk Power Corp.*, 259 AD2d 932, 934 (3rd Dept 1999), *lv den* 93 NY2d 812 (1999). Wong was required to make an election, and he could not "at the same time treat the contract as broken and as subsisting. One course of action excludes the

other.'" *Id.*, quoting *Strasbourg v Leerburger*, 233 NY 55, 59 (1922). Wong does not claim that he treated the entire contract as broken. To the contrary, Wong claims that CAMH moved into the Premises and remained there for at least 19 months. Wong Aff., ¶¶ 69, 75. In addition, while Moy's purported breach would have relieved Wong of the need to tender performance, Wong "nonetheless [was] required to show that [he] was ready, willing and able to perform [his] obligations under the contract." *Inter-Power of N.Y.*, 259 AD2d at 934. During his deposition, Wong admitted that he never intended to pay Leung, as he was required to do under paragraph 5 of the Shareholder Agreement. 9/14/10 Wong Tr., at 152-153. Thus, Wong's testimony establishes that he was not ready, willing, and able to perform his obligations under the Shareholder Agreement, thereby undermining his anticipatory breach argument.

Wong also disputes Moy's claim for damages on the installment payments to Leung. According to Wong, Leung received payments from Moy and used those funds to pay non-party Spanish Broadcasting Company for a month-to-month lease of the radio frequency. Wong argues that, rather than pay Leung, he "opted to enter into a contract with Spanish Broadcasting Company, directly." Wong Aff., ¶ 68. Wong claims that he merely elected to discontinue using Leung as an intermediary for payment to Spanish Broadcasting Company as a third party, "because it was not sound business

judgment." Wong Opp. Brief, at 23. This argument flies in the face of the plain language of paragraph 5 of the Shareholder Agreement, whereby Wong expressly agreed to "be fully responsible for the balance of the payments" to Leung. *Greenfield v Philles Records*, 98 NY2d 562, 569 (2002) ("a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms"). For the foregoing reasons, Wong fails to raise any issues of fact or rebut Moy's prima facie showing. Therefore, Moy's motion for summary judgment on her fourth counterclaim is granted.

Florentine seeks summary judgment on its first counterclaim, and its separate petition in the Holdover Proceeding, for compensation for CAMH's use and occupancy of the Premises. Paragraph 1 of the 2007 Shareholder Agreement provided, in pertinent part, as follows:

Being the authorized representative of the owner of the building in which the new station site for CAMH doing business as [CWCB] at 384 Broadway, 5th floor, New York, Moy shall herein or immediately soon after, enter into a lease agreement with CAMH for the space which has been renovated by Wong and shall be used as a radio station thereat for a two year term at eight thousand dollar monthly as the flat rent
.....

Moy claims that, on behalf of Florentine, she sent a proposed lease for CAMH's signature, with a lease term of September 1, 2007 through August 31, 2009, a copy of which she submits with her moving papers. Moy Aff., ¶ 74 and Ex. G. According to Moy, CAMH refused to sign the proposed lease or pay rent but nevertheless began to occupy the Premises. *Id.*, ¶ 75. In March 2008, Florentine served CAMH with a 10-Day Notice to Quit the Premises (*id.*, Ex. H), but Moy claims that CAMH did not leave the Premises until August 2009 and failed to pay the agreed-upon rent pursuant to the 2007 Shareholder Agreement.

Wong does not dispute that CAMH occupied the Premises, but rather, he disputes only the lease term for which Florentine seeks rent, arguing that CAMH occupied the Premises beginning in November of 2007 (not September), and that CAMH vacated the Premises in June of 2009 (not August). Wong admits that CAMH paid \$13,000 during its occupancy of the Premises. Wong's Response to Defendants' Statement of Material Facts, ¶ 59. As it is undisputed that the parties never entered into a written, two-year lease, that CAMH used and occupied the Premises for at least 19 months and paid only \$13,000 in rent, Florentine is entitled to summary judgment on liability in the Holdover Proceeding, with the amount of CAMH's use and occupancy of the Premises to be determined during trial. New York Real Property Law § 220 ("[t]he landlord may recover a

reasonable compensation for the use and occupation of real property”).

Wong's Cross-Motion for Summary Judgment

In his cross-motion for partial summary judgment, Wong argues that he is not personally liable for the obligations of CAMH under the Shareholder Agreement, including CAMH's obligation to enter into a lease agreement and its obligation to make payments under any such lease. A claim for breach of written guaranty requires a showing of "an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty." *City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 (1st Dept 1998). For instance, in *Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd.*, 97 AD3d 444, 447 (1st Dept 2012), the First Department upheld a personal guaranty in a loan document where it was "offset by a separate heading entitled, 'Personal Guarantee and Collateral Agreement,'" and "[i]mmmediately above the signature line a statement appear[ed] that the signer [was] personally guaranteeing the loan."

Here, paragraph 2 of the Shareholder Agreement provided that, "[u]pon the signing of this agreement, Moy shall not be responsible for any claims, taxes, and liabilities of CWCB or CAMH or of any of its affiliates, subsidiaries or branches (referred to [sic] The

Business). Wong shall be fully responsible for the post 8/31/07 responsibilities of the Business." As discussed above, paragraph 3 of the Shareholder Agreement pertained to Moy's resignation and reduced ownership interest in CWBC, and, again stated that "Wong shall be solely responsible for the Business." Read as a whole, these provisions pertain to Wong's responsibility for carrying out the day-to-day functions of CAMH, as a result of Moy's resignation and Wong's increased ownership interest. The word "guaranty" never appears in the Shareholder Agreement, and nothing contained in this agreement can be construed as a representation that Wong, in his personal capacity, would be responsible for the obligations of CAMH. Moreover, paragraph 1 of the Shareholder Agreement called for Moy to "enter into a lease agreement with CAMH," not Wong. Although Moy and Florentine argue that "if CAMH cannot make the [lease] payments, Mr. Wong is clearly obligated to do so" (Moy and Florentine Reply Brief, at 16), they fail to cite any legal authority in support of their argument. Nor do they allege any facts that would entitle them to pierce CAMH's corporate veil. For the foregoing reasons, Wong's cross-motion for partial summary judgment is granted to the extent of dismissing Moy and Florentine's first counterclaim, which seeks compensation for use and occupancy of the Premises against Wong and L&W.

Wong also cross-moves for an order awarding him construction costs for renovation work he performed at the Premises, arguing that Moy and Florentine received the benefit of Wong's construction work without paying for the constructions costs. In support of his argument, Wong cites paragraph 4 of the Shareholder Agreement, which, as discussed above, pertained to Wong and Moy's agreement to equally share expenses of CAMH.

As a preliminary matter, Wong's unjust enrichment theory is not pleaded in the Complaint. While, generally, "a party may not obtain summary judgment on an unpleaded cause of action," it "may be awarded on an unpleaded cause of action if the proof supports such cause and if the opposing party has not been misled to its prejudice." *Weinstock v Handler*, 254 AD2d 165, 166 (1st Dept 1998) (internal citation omitted).

Wong's first cause of action alleges that Moy and Florentine "breached the contracts between the parties, both written and oral." Complaint, ¶ 69. With respect to construction costs, this cause of action is based upon the parties' alleged oral agreement preceding the Shareholder Agreement. Moy and Florentine concede that the parties entered into an oral agreement but dispute that it included an agreement to share construction costs, thereby raising a factual issue concerning the parties' alleged oral agreement to

share construction costs. Moy Aff., ¶¶ 24, 33. Moreover, while CAMH was incorporated on October 20, 2006, listing its address at the Premises, it is undisputed that CAMH never entered into a written lease to occupy the Premises, and, according to Wong, CAMH did not occupy the Premises until November of 2007, after the construction work was completed. Thus, it is not clear to the Court whether the construction work at the Premises was performed pursuant to an oral agreement with, and for the benefit of, Florentine, as owner of the Premises, or for the benefit of CAMH pursuant to an oral agreement that would trigger the shared expenses outlined in paragraph 4 of the Shareholder Agreement. In addition, to the extent that Wong's unjust enrichment claim is based upon breach of the alleged oral agreement, as alleged in the Complaint, it is duplicative. *Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 61 AD3d 614, 615 (1st Dept 2009). For these reasons, at this juncture in the litigation, Wong fails to make a prima facie showing on his unpleaded claim for unjust enrichment.

Accordingly, it is hereby

ORDERED that the motion for summary judgment is granted to the extent of granting partial summary judgment in favor of defendants Elma Moy and Florentine Music & Tutorial, Inc. as follows:

1. Plaintiff Benny Wong's second cause of action for fraud is dismissed with prejudice and without costs or disbursements;
2. Elma Moy is granted judgment against plaintiff Benny Wong on her fourth counterclaim in the amount of \$300,000, together with interest from March 17, 2011 at the statutory rate, to be calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly;
3. Respondent Chinese American Media Holding Inc. a/k/a Chung Wah Commercial Broadcasting Company Inc. is found liable to petitioner Florentine Music & Tutorial, Inc. on its petition for respondent's use and occupancy of petitioner's premises located at 384 Broadway in New York City, and the issue of the amount of damages shall be determined at the trial herein; and
4. The motion is otherwise denied.

It is further,

ORDERED that the cross-motion by plaintiff Benny Wong for partial summary judgment is granted to the extent of dismissing the

first counterclaim of Elma Moy and Florentine Music & Tutorial, Inc., and is otherwise denied; and it is further

ORDERED that counsel are directed to appear for a conference in IA Part 39, 60 Centre Street, Room 208 on November 14, 2012 at 10:00 a.m.

This constitutes the decision and order of this Court.

Dated: October 5, 2012



BARBARA H. KAMINICK
J.S.C. J.S.C.

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