SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

----------X

THE ESTATE OF CHUNG LI,

Plaintiff,

- v -

DENNIS LEE, STEVEN LEE, THE ESTATE OF NANCY LEE LUK, THE ESTATE OF LEE CHAN WUN YIN, MIMIE LI, IVY LI, LIZA LI, HELEN LI, LEE TAI ENTERPRISES U.S.A. LTD., 238-240 7TH AVE. CORP.,

Defendants.

----------X

INDEX NO. 650891/2022

MOTION DATE 05/15/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

Hon. James E. d'Auguste:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31, 32, 35, 36, 38, 39, 40, 42, 43
were read on this motion to/for DISMISSAL.

This action involves a long-running intrafamily dispute over the ownership of various real estate owning corporations in New York. Defendants Estate of Nancy Lee Luk ("Nancy's Estate"), Lee Tai Enterprises U.S.A. Ltd. and 238-240 7th Ave. Corp. move to dismiss the complaint on the following grounds:

(a) Lack of standing and legal capacity to sue (CPLR 3211[a][3]) of the plaintiff Estate of Chung Li ("Chung Li's Estate"), by reason of the failure to name the ancillary administrator of the estate;

(b) Failure to state a claim (CPLR 3211[a][7] as against defendant Nancy's Estate, for failure to join Chun Ka Luk ("CK Luk") as the administrator of the estate;

(c) Lack of personal jurisdiction (CPLR 3211[a][8] over Nancy's Estate, insofar as service was purportedly made at "dwelling place/usual place of abode" of the estate rather than the administrator;

(d) Statute of limitations (CPLR 3211[a][5]) because the time to commence any declaratory judgment accrued in either 2007 or 2016;

(e) Res judicata, merger of claims, collateral estoppel and/or claim preclusion (CPLR 3211[a][5]) by virtue of various determinations of the Queens County Surrogate's Court;

(f) Lack of standing of the ancillary administrator (CPLR 3211[a][3]) to file an action for declaratory relief under Article 16 of the SCPA[1]; and

(g) Failure to state a claim (CPLR 3211[a][7]) pursuant to the doctrine of tax estoppel because the plaintiff previously took the position before the IRS that it owned only 20% of the shares of the subject corporations.

For the following reasons, the motion to dismiss is denied.

Background

According to the complaint, in 1970 the late Chung Li[2] created two real estate owning corporations: Lee Tai Enterprises U.S.A. Ltd. ("Lee Tai") and 238-240 7th Ave. Corp. ("238-240") (together with Lee Tai, the "New York Companies"). Over time, the New York Companies acquired five properties: one office building, three residential buildings, and a single family home (Complaint, ¶¶ 1-2).

During Chung Li's lifetime, he primarily lived in Hong Kong. As a result, two of his children who lived in New York managed the New York Companies. Dennis Lee ("Dennis"), one of Chung Li's two sons, managed the New York Companies and the properties from approximately 1973 until 1980, when Dennis returned to Hong Kong. From approximately 1980 onward, Nancy Lee Luk ("Nancy"), one of Chung Li's five daughters, took over the management of the New York Companies and the respective properties (*id.*, ¶ 3). Chung Li died without a will in 2006 (*id.*, ¶ 9), and Nancy asserted that she solely owned the New York Companies because Chung Li and Nancy's mother, Lee Chan Wun Yin

[1] Defendants have not defended this position in their reply. The Court will thus treat the argument as abandoned and decline to discuss it.
[2] Chung Li is referred to as "Li Chung" in the complaint and some of the other litigation papers.

a/k/a Lee Chan Woon Yin a/k/a Lee Chan Won Yen ("Madam Lee") gave her all the shares of the stock of the New York Companies by oral *inter vivos* gifts (*id.*, ¶ 4).

Since that time, Dennis, Chung Li's Estate and Madam Lee's estate have engaged in litigation regarding Nancy's management of the New York Companies and her claim of exclusive ownership of them (*id.*, ¶ 5). In particular, in 2010 Chung Li's Estate filed a proceeding under the Surrogate's Court Procedure Act ("SCPA") § 2103 in Queens County Surrogate's Court (*Matter of the Estate of Chung Li*, Surrogate's File No. 2010-1965/A) seeking discovery, *inter alia*, regarding Chung Li's ownership interest in the New York Companies (*id.*, ¶ 41). Nancy then moved to dismiss on the sole ground that the proceeding was time-barred under the three-year statute of limitations for conversion (NYSCEF Doc. No. 4 [Surrogate's Court Order dated March 3, 2016], p. 3).

Nancy died on April 29, 2011, just prior to the submission date of that motion. Her husband, CK Luk ("Luk") was made administrator of her estate and substituted for her in that proceeding (Complaint, ¶ 43). By order dated June 8, 2011[3], the motion was denied, a determination which was upheld on appeal. *In re Chung Li*, 95 AD3d 881, 881 (2d Dept 2012). In its affirmance, the Second Department noted that the Surrogate's Court discovery proceeding was akin to an action for conversion or replevin which accrues from the date of the conversion rather than its discovery, but concluded that "[t]he evidence submitted by [Nancy Lee] Luk in support of her motion did not establish that the purported conversion of the decedent's ownership interest in the companies occurred more than three years prior to the commencement of this proceeding." *Id.* at 882.

Nancy's Estate then submitted an answer, alleging that no corporate records existed

[3] The order has not been placed into the record and is not available on NYSCEF, so the Court relies upon the Second Department's characterization of its holding.

to establish that Chung Li ever had any stock interest in the companies, and that even if he did, he gifted them to Nancy in 1980 (Complaint, ¶ 42). In discovery, unsigned stock certificates were found among Chung Li's possessions which allocated 20% of the outstanding shares to him, 20% apiece to his wife and two sons, and 4% apiece to each of his five daughters, including Nancy (NYSCEF Doc. No. 4, p. and fn. 2). Upon the completion of discovery, her estate again moved for dismissal on statute of limitations grounds. The estate of Chung Li moved for summary judgment on its petition.

By order dated March 3, 2016 (NYSCEF Doc. No. 4), the Surrogate's Court found that the proceeding was not time-barred. However, the Court did not apply the three-year statute of limitations for conversion, insofar as discovery had shown that the intangible real property interests had not been merged into properly signed and issued stock certificates that could be the subject of conversion. Instead, the Court found that "[t]he essence of this proceeding appears to be that of a declaratory judgment action to determine the ownership interests in the corporations" and applied the six-year statute of limitations for actions for which no limitation is specifically prescribed by law under CPLR 213(1) (*id.*, p. 10). Additionally, the Court ruled that Nancy's Estate had failed to submit admissible proof of its gift theory, and that because it was uncontroverted that Li Chung had contributed 100% of the start-up capital for both companies, his estate had at least some ownership interest in those entities (Complaint, ¶¶ 6, 45; NYSCEF Doc. No. 4, p. 10).

Chung Li's Estate then moved to correct, renew and/or modify the March 3, 2016, order "to reflect [decedent Chung Li's] 100% ownership of the subject corporations" (Complaint, ¶ 49; NYSCEF Doc. No. 5 [Surrogate's August 15, 2016, Order]). The Estate also moved to amend the petition to conform to the evidence. Nancy's Estate cross-moved for reargument of its summary judgment motion, objecting to the admissibility of the documentary evidence considered in finding

that Chung Li's Estate had an ownership interest. By order dated August 15, 2016 (NYSCEF Doc. No. 5), the Surrogate's Court denied the Chung Li Estate's motion on the ground, *inter alia*, that the petition had not sought declaratory relief, and that in any event the Court could not have granted it because "all parties necessary for such a proceeding were never served" (*id.*, p. 4). The cross-motion by Nancy's Estate was denied insofar as the Court found that the relevant documents were self-authenticating and that even without them, Chung Li's Estate had proven an ownership interest (pp. 5-6).

The Second Department dismissed the appeal from the August 15, 2016, order on the ground that no appeal lay from an order denying reargument (*Matter of Chung Li*, 165 AD3d 1105, 1105 [2d Dept 2018], *lv denied*, 32 NY3d 915 (2019). The March 3, 2016, order was affirmed. With respect the statute of limitations issue, the appellate court held that its 2012 ruling upholding the rejection of that defense was law of the case. *Id.* at 1106. With respect to the issue of the ownership of the companies, the Court stated "we agree with the Surrogate's Court's determination to grant the petitioner's motion for summary judgment to the extent of finding that the decedent's estate has an ownership interest in the subject corporations and directing CK Luk to turn over to the petitioner any records or property, in Luk's possession, attributable to such interest . . . Contrary to Luk's contention, the petitioner met his burden of establishing the decedent's interest in the subject corporations." *Id.*

The instant action was commenced in February 2022.

Discussion

Failure to Name the Personal Representatives of the Estates of Chung Li and Nancy Lee Luk in the Caption

The introductory paragraph of the complaint alleges that this action is brought "by

and through Donald Edward Osborn . . . in his capacity as the duly-appointed Ancillary Administrator of Decedent's [Chung Li's] Estate." Paragraph 43 identifies CK Luk as the "duly appointed Administrator of Nancy's Estate." However, the captions of both the summons and complaint name only the estates of Chung Li and Nancy as parties, without mentioning either Osborn or CK Luk. Defendants argue that the action must be dismissed because the estates are not legal entities with the capacity to sue or be sued, and that omission of the names of the administrators is a fatal defect.

It is true that an estate, standing alone, is not a legal entity and therefore may not sue or be sued except through a duly-appointed administrator. *See 200 Claremont Ave. Hous. Dev. Fund Corp. v Estate of Lewis*, 2024 WL 714577, *1 (App Term, 1st Dept 2024). However, the Court concurs with plaintiff that in view of the identification of the administrators in the complaint, the failure to name the estates' administrators in the caption is a technical, curable defect that does not require dismissal. CPLR 2101(f) provides:

> A defect in the form of a paper, if a substantial right of a party is not prejudiced, shall be disregarded by the court, and leave to correct shall be freely given. The party on whom a paper is served shall be deemed to have waived objection to any defect in form unless, within fifteen days after the receipt thereof, the party on whom the paper is served returns the paper to the party serving it with a statement of particular objections.

Similarly, CPLR 2001 states:

> At any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded, provided that any applicable fees shall be paid.

Accordingly, "courts have held that captions should be liberally construed and defects in

form should be disregarded unless demonstratively prejudicial or timely objection has been made." *First Wisconsin Tr. Co. v Hakimian*, 237 AD2d 249, 249 (2d Dept 1997); *see Fink v Regent Int'l Hotels, Ltd.*, 234 AD2d 39, 41 (1st Dept 1996). An error in identifying the capacity in which a party is sued is a "trivial defect" in the absence of prejudice to any party. *Weiss v. Markel*, 110 AD3d 869, 871 (2d Dept 2013); *see Nappi v Nappi*, 181 AD2d 1067, 1067 (3d Dept 1992).

Here, defendants have neither demonstrated nor even alleged any prejudice from the failure to specifically name the estates' administrators in the captions. They were sufficiently apprised of the identities of the administrators and their authority to represent the estates from the body of the complaint, and from the participation of the administrators in all of the prior litigation recounted in the complaint. Furthermore, their objection is untimely as their motion was made over a year after a receipt of the pleadings. Nor was it preserved in the stipulation extending their time to respond to the complaint, which itself was executed outside of the fifteen-day period prescribed by CPLR 2101(f).

The cases cited by defendants in support of their motion are distinguishable. None of them involved actions in which, as here, duly-appointed administrators were expressly identified in the complaint, but inadvertently excluded from the caption. In several of them, no administrator existed to represent the estate. *See Haladan Mgmt. Co. v. Est. of Davies,* 2015 WL 5090684 (Civ Ct NYC 2015) (petitioner failed to petition Surrogate's Court for appointment of an administrator); *Visutton Assocs. v Fastman*, 44 Misc 3d 56, 58 (App Term, 2d Dept 2014) (complaint named mere distributee, not administrator); *DuBois v Beaury*, 2020 WL 7024393, *1 (ND NY 2020) (no estate had been created and no administrator appointed). *Grosso v Estate of Gershenson*, 33 AD3d 587 (2d Dept 2006) (no administrator appointed). In others, a representative of the estate existed but was not named in either the summons or the complaint (*34 Main Street LLC v Palmer*, 2022 WL

17063792 (Sup Ct, Rockland Co 2022) (but motion to substitute the administrator for the estate in the caption granted); *Wendover Fin. Servs. v Ridgeway*, 93 AD3d 1156 (4th Dept 2012) (decedent improperly named as a party without any mention of her death, and the executrix was not named at all).

The remaining cases cited by defendants are inapposite. In *Wilmington Tr., Nat'l Ass'n v. Estate of McClendon*, 287 F Supp 3d 353 (SD NY), the estate was named as a party in addition to its special administrator and its personal representative, and all of those parties were named in both the summons and the complaint. The dismissal of the estate for lack of capacity did not require dismissal of the action. Finally, the complaints in *Maldonado v Maryland Rail Commuter Serv. Admin.*, 91 NY2d 467 (1998), *Allen v Scalera*, 2018 WL 11431753 (Sup Ct, NY Co 2018), *Vargas v 4G Cellular Center*, 2018 WL 3202889 (Sup Ct, NY Co 2018) and *Pappalardo v The Madison Square Garden Co.*, 2015 WL 5823042 (Sup Ct, NY Co 2015) were dismissed because the plaintiffs in those cases named non-existent entities as defendants without naming the proper, existing defendants. Here, both of the complaints name existing parties, the administrators.

In any event, the proper remedy where an administrator exists but is not mentioned in either the summons or the complaint is to direct an amendment to substitute the administrator for the estate. *34 Main Street LLC*, 2022 WL 17063792,*6; *Santander Bank, N.A. v Zee Hotel Group LLC*, 2016 WL 2771148,*1 (Sup Ct, NY Co 2016). Accordingly, the Court so directs that the caption of this action be amended to name the administrators of the respective estates.

Service Upon CK Luk

Defendants similarly argue that service upon CK Luk was defective because the captions of the papers named only Nancy's Estate, and only the estate's name appears on the envelopes that were left and mailed at CK Luk's residence. Again, however, the defect in

the caption is trivial, and there is no dispute that CK Luk, as administrator of the estate, received them and was not prejudiced in any way in his ability to respond to them.

Statute of Limitations

Defendants argue that the three-year limitations period for conversion bars this action because plaintiffs' claims accrued either in June 2007 when Nancy first claimed sole ownership of the companies, or in August 2016 when the Surrogate rendered its decision that Chung Li's Estate had some undefined interest in it. Plaintiffs argue that the six-year limitations period for a declaratory judgment governs, and that the action is timely because it was brought within six years from the time that a new justiciable controversy was created by the August 2016 decision confirming, but not precisely quantifying, the interest of Chung Li's Estate.

Resolution of this issue is complicated by the seemingly inconsistent rulings of both the Surrogate and the Second Department. Although the Surrogate's June 2011 and March 2016 orders both adopted the June 2007 date of Nancy's ownership claim as the accrual date to find the filing of the 2010 proceeding timely, the 2011 order applied the three-year limitations period for conversion while the March 3, 2016, order employed the six-year period for a declaratory judgment. The Second Department's 2012 order affirmed the Surrogate's 2011 order applying of the three-year period, which its 2018 order impliedly did by refusing to revisit the issue under the law of the case doctrine. However, the Second Department's 2018 order was, strictly speaking, an affirmance of the Surrogate's March 3, 2016, order which applied the six-year limitations period.

Further confusing matters is the facial conflict between the Surrogate's March 3, 2016, and August 15, 2016, rulings regarding declaratory relief. As noted, the March 3,

2016, order found the essence of the proceeding to be one for a declaratory judgment and effectively declared that Chung Li's Estate had at least some interest in the companies. In contrast, the August 15, 2016, order stated that *no* declaratory relief had been granted because none had been sought in the petition, and that the Court could not have granted it anyway because petitioner had never served all of the necessary parties.

It is not clear why the Surrogate's Court believed it could declare the existence but not the percentage of Chung Li's interest, or why it believed it could declare anything at all given the absence of a proper demand in the petition and the failure to serve all interested parties. The deficiency in the content and service of the petition also raises the question of how the theretofore unpled request for declaratory relief could have been timely in 2016 under either the three or six-year limitations period, given the accrual of the claim in 2007.

In any event, the Second Department's latest order technically upheld both orders by affirming the March 2016 order and dismissing the appeal of the August 2016 one. The appellate court was satisfied that the various orders were sufficiently reconcilable that it found Chung Li Estate's petition timely and the partial declaration enforceable. This Court is bound by those findings. The six-year statute of limitation applied in the Surrogate's Court's March 2016 order should be respected. *See Zwarycz v Marnia Const., Inc.*, 102 AD3d 774 (2d Dept 2013) (applying six-year statute of limitation for declaratory judgment where no stock certificates were ever issued) and this Court thus finds that this action was timely commenced. In this connection, the Court observes that at the time the Surrogate Court applied the three-year limitations period for conversion in 2011, the discovery that the stock certificates were unsigned and thus not susceptible to conversion had not been made. From that time until 2016, the Surrogate Court was merely conducting an inquiry to

determine what Chung Li's property was and what claims could be made upon it, and the proceedings effectively tolled the statute of limitations until the claims could be identified.

The cases cited by Nancy's Estate in which the courts applied a three-year statute of limitation in corporate ownership disputes do not govern here. In neither case was there a specific finding, as there was in the March 2016 Surrogate's Court order, that corporate stock certificates were unsigned and unissued, and thus not subject to conversion. In *Schulman v Schulman*, 166 AD3d 833 (2d Dept 2018), in which no mention of stock certificates was made, and damages rather than a declaratory judgment was sought, the Court found that the action was untimely under both the three-year limitations period for conversion and the six-year period for fraud. In *Loscalzo v 507-509 President St. Tenants Ass'n Hous. Dev. Fund Corp.*, 153 AD3d 614 (2d Dept 2017), plaintiff sought recovery of a stock certificate representing shares in a cooperative apartment corporation and the Court applied the three-year statute of limitations for recovery of chattel. No issue regarding whether the certificate was signed or issued was raised.

Res Judicata, Merger of Claims, Collateral Estoppel and/or Claim Preclusion

Defendants contend that plaintiff's claim is barred by the doctrine of res judicata and collateral estoppel by virtue of the March 16, 2016, Surrogate's Court determination regarding Chung Li's interest in the companies. "Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action . . . One linchpin of res judicata is an identity of parties actually litigating successive actions against each other: the doctrine applies only when a claim between the parties has been previously brought to a final conclusion." *Simmons v Trans Express Inc.*, 37 NY3d

107, 111 (2021) (internal citations and quotation marks omitted). "Collateral estoppel, or issue preclusion, is related to, but distinct from, the doctrine of res judicata . . . [c]ollateral estoppel prevents a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party . . . whether or not the . . . causes of action are the same." *Id.* at 112. Here, neither doctrine precludes plaintiff's claim because the precise percentage of Chung Li's ownership interest in the companies was never finally determined, decided against his estate, and the parties necessary to permit such an adjudication were not named in the Surrogate's Court proceeding. The determination that Chung Li's Estate has some interest was not a "final conclusion," as that interest is not enforceable in any meaningful way without assigning a percentage to it.

Defendants also argue that plaintiff's sole remedy lay in an appeal of the March 16, 2016, order. Clearly, some sort of appeal *was* brought: the Second Department affirmed the partial declaration of the Surrogate's Court, and the Court of Appeals declined to review it. It is not clear what issues were raised or whether clarification of plaintiff's percentage interest was sought. The Second Department was silent on that question, without even indicating whether it should be decided on remand. But again, the net effect of its 2018 ruling is that plaintiff maintains an interest in the companies and that it timely sought a determination of it.

It is unclear why plaintiff did not serve and join the necessary parties to further pursue its claim in the Surrogate's Court, either before or after the appeal. It may be that the Surrogate's August 15, 2016, order denying reargument on the issue was meant to signal that a dead end for relief in that forum had been reached. Indeed, despite having issued the

partial declaration, the Surrogate denied plaintiff's motion to amend the petition to seek further declaratory relief. Possibly the Court concluded that the scope of its power was limited by the petition and the nature of a discovery/turnover proceeding, which is to inquire into and locate the decedent's property. Assuming that the Surrogate could have gone further, it did not.

Accordingly, plaintiff has brought the unresolved issue to this Court. There is no dispute that Supreme Court has jurisdiction over the properties in New York County and that venue is proper. Apart from its res judicata and related arguments, plaintiff has cited no authority that provided that Surrogate's Court had exclusive jurisdiction and was required to exercise.

Tax Estoppel

Defendants lastly argue that even if Chung Li's Estate has any interest in the companies, it cannot be more than 20% because that is the percentage it represented it owned to obtain tax savings from the IRS. Defendants rely on the doctrine of tax estoppel, under which "[a] party to litigation may not take a position contrary to a position taken in an income tax return." *Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422 (2009). However, there is an exception to that doctrine, where the party opposing its application has asserted a "basis for not crediting the statements" in the tax returns. *PH-105 Realty Corp v Elayaan*, 183 AD3d 492, 492 (1st Dept 2020) or "has offered a reasonable explanation why the statement [in the tax returns] contradicts reality." *Tradesman Program Managers, LLC v Doyle*, 202 AD3d 456, 457 (1st Dept 2022).

Here, there is not even a need for plaintiff to provide a reasonable explanation because no statement in its tax return (NYSCEF Doc. No. 23) "contradicts reality." Rather,

the return accurately and transparently reported that plaintiff's claim of a 20% interest was subject to the outcome of the ongoing dispute over Chung Li's ownership in the Surrogate's Court litigation. Furthermore, plaintiff's counsel has submitted an affirmation carefully detailing the estate's negotiations with the IRS (NYSCEF Doc. No. 28 [Affirmation of Lawrence F. Gilberti, Esq.]). Apprised of the risks of the litigation, the agency agreed to base the taxes owed upon the 20% ownership claim, and waive any right to a future tax levy even if it were determined that the estate was entitled to a higher stake (Gilberti Aff., ¶¶ 3-11).

Defendant nevertheless argues that the policy behind the tax estoppel doctrine is to prevent a party from benefitting from "enormous tax savings" by "switching positions." However, plaintiff did not switch its position, but rather consistently maintained that it was entitled at least a 20% stock ownership, and possibly more, depending on the resolution of the litigation. While the Court of Appeals did state that "[w]e" cannot, as a matter of policy, permit parties to assert positions in legal proceedings that are contrary to declarations made under the penalty of perjury on income tax returns," *Mahoney-Buntzman*, 12 NY3d 415, 422, plaintiff's position herein is not contrary to the representations in its returns. Plaintiff may ultimately benefit from some tax savings if its ownership interest is determined to exceed 20%, but nothing in the Court of Appeals ruling prohibits that possibility if it results from a good faith, negotiated settlement with the IRS during which all relevant information is disclosed.

Accordingly, it is hereby

ORDERED that defendants motion to dismiss the complaint is denied, and it is further

ORDERED that the caption is amended, and the Clerk of the Court is directed to change the caption on its records as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

----------X

Donald Edward Osborn, Ancillary Administrator of The Estate of Chung Li,

Plaintiff,

- v -

Dennis Lee, Steven Lee, Chun Ka Luk, Administrator of the Estate of Nancy Lee Luk, The Estate of Lee Chan Wun Yin, Mimie Li, Ivy Li, Liza Li, Helen Li, Lee Tai Enterprises U.S.A. Ltd., 238-240 7th Ave. Corp.,

Defendants.

----------X

And it is further

ORDERED that defendants shall serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

This constitutes the decision and order of this Court.

Date: 4/15/2024

ENTER:

James d'Auguste, J.S.C.