

39 College Point Corp. v Transpac Capital Corp.

2004 NY Slip Op 30018(U)

February 17, 2004

Supreme Court, Queens County

Docket Number: _400031/2722

Judge: Charles J. Thomas

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CHARLES J. THOMAS IA PART 3
Justice

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39 COLLEGE POINT CORP.,
Plaintiff,
-against-
Index
Number 31272 2002
Motion
Date November 19, 2003

TRANSPAC CAPITAL CORP., YU JU SU,
GOLDEN CHOICE REALTY, INC., ASIA
BANK, N.A., JIMMY SHAO, THE OFFICE
OF THE CITY REGISTER OF THE CITY
OF NEW YORK and JOHN DOES 1-20 Who
Are Persons or Entities Who May Be
Interested In This Action and Who
Are Unknown to Plaintiffs,
Defendants.
Motion
Cal. Number 14

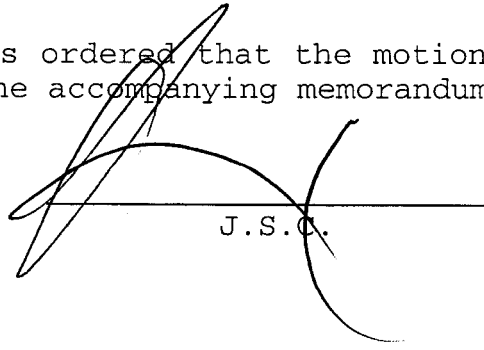
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The following papers numbered 1 to 5 read on this motion by
defendant Transpac Capital Corp. for a default judgment on its
counterclaims and on this cross motion by Jimmy Shao, a defendant
in 39 College Point Corp v. Transpac Capital Corp. (Index No.
31272/02) and the plaintiff in Shao v. 39 College Point Corp.
(Index No. 14317/00) for an order consolidating the two actions.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1
Notice of Cross Motion - Affidavits - Exhibits ...	2
Answering Affidavits - Exhibits	3-4
Reply Affidavits	5

Upon the foregoing papers it is ordered that the motion and
the cross motion are denied. (See the accompanying memorandum.)

Dated: 2/17/04



J.S.C.

M E M O R A N D U M

SUPREME COURT: QUEENS COUNTY
IA PART: 3

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39 COLLEGE POINT CORP.,

INDEX NO.: 31272/02

Plaintiff,

BY: THOMAS, J.

-against-

DATED: 2/17/04

TRANSPAC CAPITAL CORP., YU JU SU,
GOLDEN CHOICE REALTY, INC., ASIA
BANK, N.A., JIMMY SHAO, THE OFFICE
OF THE CITY REGISTER OF THE CITY
OF NEW YORK and JOHN DOES 1-20
Who Are Persons or Entities Who
May Be Interested In This Action
and Who Are Unknown to Plaintiffs,

Defendants.

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Defendant Transpac Capital Corp. has moved for a default judgment on its counterclaims. Jimmy Shao, a defendant in 39 College Point Corp v. Transpac Capital Corp. (Index No. 31272/02) and the plaintiff in Shao v. 39 College Point Corp. (Index No. 14317/00) has cross-moved for an order consolidating the two actions.

On December 21, 1995, defendant Transpac allegedly loaned plaintiff College Point \$499,999.99, receiving in return a promissory note executed by the plaintiff obligating itself to make certain monthly payments. The plaintiff has allegedly defaulted on the payment of principal and interest since November 14, 2000. Defendant Transpac alleges that the plaintiff currently owes it the principal sum of \$499, 999.99 plus interest at the rate of 12.25% per annum.

According to defendant Transpac, on or about January 4, 1996, the plaintiff purchased premises located at 133-04 39th

Avenue, Flushing, New York with the loan proceeds from defendant Transpac and with the proceeds from another loan made by Asia Bank. The plaintiff allegedly gave a mortgage on the property to defendant Transpac which, however, was not recorded until August 8, 2000. In or about March, 2003, the plaintiff sold the property and allegedly placed funds in escrow with Lawyers Title Insurance Corp. sufficient to satisfy the alleged debt owed to the defendant.

On or about December 8, 2002, plaintiff College Point began this action, 39 College Point Corp v. Transpac Capital Corp. (Index No. 31272/02), against defendant Transpac, among others, pursuant to Article 15 of the Real Property Actions and Proceedings Law for a judgment declaring that the mortgage held by defendant Transpac on 133-04 39th Avenue, Flushing, New York is null and void. The plaintiff alleged that Yu Ju Su, purporting to act as its president, fraudulently gave a mortgage on the premises to defendant Transpac, which Yu Ju Su erroneously backdated to December 21, 1995, a date before the plaintiff had even purchased the property. On March 25, 2003, Transpac served an amended verified answer with counterclaims. The first counterclaim seeks to recover the principal and interest due on the promissory note, and the second counterclaim seeks to impose a constructive trust over the funds held in escrow by Lawyers Title Insurance Corp. Plaintiff College Point served a cross motion for an order dismissing the counterclaims, but the cross motion was denied by decision and order of Mr. Justice Hart dated June 5, 2003. Defendant Transpac served a copy of the order with notice of entry upon the plaintiff on June 17, 2003. Plaintiff College Point did

not timely serve a reply to the counterclaims, and defendant Transpac has moved for a default judgment.

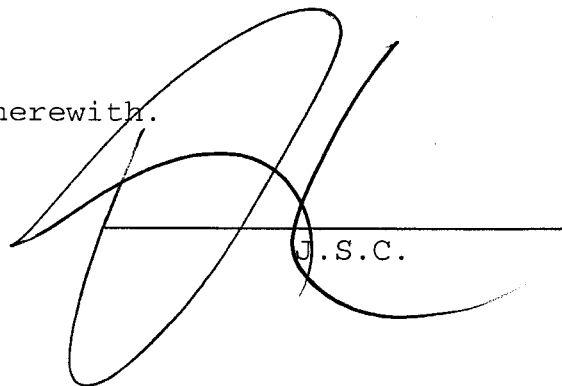
On or about June 19, 2000, Jimmy Shao began another action, Shao v. 39 College Point Corp. (Index No. 14317/00) concerning the subject premises. Asserting causes of action for specific performance and fraud, Shao alleged, inter alia, that, on or about September 7, 1999, Yu Ju Su, purporting to act as the president of defendant College Point, entered into a contract for the sale of 133-04 39th Avenue, Flushing, New York to him. Shao further alleges that Yu Ju Su falsely represented to him that she was the president of defendant College Point and/or had authority to act on behalf of the corporation.

The motion by defendant Transpac Capital Corp. for a default judgment on its counterclaims is denied. In order to successfully oppose a motion to enter a default judgment, a party must demonstrate both a reasonable excuse for the default and a meritorious cause of action or defense. (See, Becker v. University Physicians of Brooklyn, Inc., 307 AD2d 243.) Plaintiff College Point demonstrated both a reasonable excuse for the default in serving a reply to the counterclaims and a meritorious defense. (See, Gray v. B.R. Trucking Co., 59 NY2d 649; Cilindrello v. Rayabin, 297 AD2d 699; Fort Madison Associates v. Caldararo, 280 AD2d 581.) Defendant Transpac prematurely moved for summary judgment on its counterclaims before the joinder of issue on them, and the decision rendered on that motion caused the plaintiff's attorney to erroneously believe that a reply had been served. Insofar as a meritorious defense is concerned, this court notes

that Mr. Justice Hart, finding that triable issues of fact existed, denied defendant Transpac's motion for summary judgment on its counterclaims. (See, decision and order dated June 5, 2003.)

The cross motion by Jimmy Shao for an order consolidating 39 College Point Corp v. Transpac Capital Corp. (Index No. 31272/02) and Shao v. 39 College Point Corp. (Index No. 14317/00) is denied. The factual and legal issues in the two actions are not sufficiently identical to warrant consolidation. (See, M & K Computer Corp. v. MBS Industries, Inc., 271 AD2d 660, 660-661.) While the two actions do present one common factual issue, i.e., the authority of Yu Ju Su to act on behalf of defendant College Point, nevertheless, consolidation is not warranted because the other issues differ, and there would be undue delay in the disposition of the first action. (See, Snitow & Pauley v. Abromowitz, 289 AD2d 54.) The court notes that a note of issue was filed in Shao v. 39 College Point Corp. on January 4, 2002, but discovery has not even begun in 39 College Point Corp v. Transpac Capital Corp., a case started on or about December 8, 2002, almost a year after the filing of the note of issue in the first action. Moreover, Shao did not demonstrate that he has a legitimate reason for seeking consolidation since he is a defendant in 39 College Point Corp v. Transpac Capital Corp. only because he is a contract vendee.

Short form order signed herewith.


J.S.C.