

Dong-Pyo Yang v 75 Rockefeller Cafe Corp.
2007 NY Slip Op 31814(U)
June 19, 2007
Supreme Court, New York County
Docket Number: 0600477/2006
Judge: Bernard J. Fried
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BERNARD J. FRIED PART 60
Justice

FBEM

DONG-PYO YANG, on behalf of himself individually,
as a Shareholder of 75 ROCKEFELLER CAFÉ CORP.,
and in the name of 75 ROCKEFELLER CAFÉ CORP.,
and on behalf of all other shareholders of said
corporation similarly situated

INDEX NO. #600477-2006
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

Plaintiff(s),

- v -

75 ROCKEFELLER CAFÉ CORP., MOON HONG
CHOI a/k/a MUN KYONG HONG, YONG J. CHOI a/k/a
EDMUND CHOI, EMPIRE STATE CAPITAL CORP.,
GERARDO CONA AND ANNE CONA,

Defendant(s),

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

IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM
DECISION.

FILED

JUN 20 2007

Dated: 6/19/07 COUNTY CLERK'S OFFICE
NEW YORK

[Signature]
J.S.C. **BERNARD J. FRIED**
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK : PART 60

-----X

DONG-PYO YANG, on behalf of himself individually,
as a Shareholders of 75 ROCKEFELLER CAFÉ CORP.,
and in the name of 75 ROCKEFELLER CAFÉ CORP.,
and on behalf of all other shareholder of said
corporation similarly situated

Plaintiff(s),

INDEX NO.: 600477-2006

-against-

75 ROCKEFELLER CAFÉ CORP., MOON HONG
CHOI a/k/a MUN KYONG HONG, YONG J. CHOI a/k/a
EDMUND CHOI, EMPIRE STATE CAPITAL CORP.,
GERARDO CONA and ANNE CONA,

Defendant(s).

-----X

APPEARANCES:

For Plaintiff(s):

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FRIED, J.:

On January 30, 2007, Plaintiff, Dong-Pyo Yang (“Yang”), a 30% shareholder in 75 Rockefeller Café Corp (“75 Rock”), a corporation formed for the purpose of operating a restaurant and delicatessen¹ brought an order to show cause against Defendant, Empire State Capital Corp. (“Empire”), a creditor of 75 Rock that has acquired a controlling interest in the corporation. The order, which I signed, required Empire to show reason why: (1) it should not be held in contempt of court as the result of its failure to comply with a stay, originally issued by this Court on February 15, 2006 as a temporary restraining order and continued, from the bench, on May 8, 2006; (2) why, pursuant to the previous orders, Empire should not be enjoined from taking any actions whatsoever in the capacity of officer, shareholder and/or director of 75 Rockefeller, pending the hearing and determination of this matter. Plaintiff has requested further injunctive relief: (a) enjoining Empire from taking any actions seeking to sell, transfer, encumber, mortgage, lien or otherwise attempt to hypothecate any shares of 75 Rockefeller, pending the hearing of this matter; and (b) directing that a proposed special meeting of the shareholders of 75 Rockefeller, called by Empire and scheduled to be held on January 23, 2007, for the purpose of electing new directors and appointing new officers, be stayed and enjoined from proceeding pending such hearing.

As relevant to this motion, the details of the underlying litigation are as follows:

¹ 75 Rock was formed by three shareholders, Yang, Moon Choi and Minyoung Yang (not related to the Plaintiff, Dong-Pyo Yang). Pursuant to the Shareholder’s Agreement, Minyoung Yang, the 10% shareholder agreed not to work in the business while holding shares in the corporation. Both Dong-Pyo Yang and Moon Hong Choi (the wife of individual defendant Yong J. Choi) were employed by 75 Rock.

Plaintiff Yang brought a derivative action on behalf of 75 Rock, against the corporation itself, Moon Hong Choi (“Moon Choi”), a member of the Board of Directors and a 60% shareholder, Yong J. Choi (Yong Choi), Moon Choi’s husband, Empire, and Gerardo and Anne Cona (collectively, the “Conas”), a husband and wife who became creditors at 75 Rock at the arrangement of Yong Choi. At issue are loans taken out by Moon Choi on behalf of 75 Rock. Plaintiff alleges that Moon Choi misrepresented, among other things, that she was the sole shareholder of the company and had authority approve the loans when, in fact, Yang’s approval was required, as evidenced in the Secretary’s Certificate. While the validity of the loans and the propriety of Moon Choi’s conduct are disputed, it is uncontested that Empire lent funds to 75 Rock and that the Chois guaranteed this loan, with Moon Choi pledging her stock in 75 Rock as collateral.

Yang filed his complaint February 14, 2006 and moved on February 15, 2006, by order to show cause for relief including the temporary restraining order (“TRO”), which I granted and later continued, preventing Empire or the Conas from collecting any further funds from 75 Rock and further enjoining either of them from declaring 75 Rock in default of any agreement and obligation authorized by Moon Choi or Yong Choi relating to the corporation.

By a letter dated June 9, 2006, Empire (hereinafter “Empire”) informed the Chois that, pursuant to a guaranty executed by the Chois on or about March 23, 2004 (the “Guaranty”), because the loan payments had not been made, Empire had become the owner of the shares previously issued to Moon Hong Choi (“Moon Choi”) and that it was taking legal possession of those shares pursuant to a default of the loan agreement documents

executed by Choi on March 23, 2004. (See Defendant's Memorandum of Law at p. 2, and Exhibit C thereto). Moon Choi delivered a stock certificate, representing a 60% interest in 75 Rock to Empire, and it is undisputed that Empire's security interest in the stock is perfected. (Defendant's Memorandum of Law p. 1-2; Tr. May 8, 2006 p. 54).

On December 22, 2006, Empire's president, Joseph Wu ("Wu"), sent Yang, as 75 Rock's secretary, a letter, requesting that a shareholder's meeting be held. After receiving no response, Wu sent another letter, dated December 31, 2006, giving notice to the Plaintiff that Empire, as a 60% shareholder in the corporation, was calling a shareholder's meeting for January 23, 2007. (See Defendant's Memorandum of Law at p. 2 and Exhibit D thereto).

I heard oral argument on this motion January 22 and February 5, 2007 and granted Plaintiff's request for a TRO seeking to stay the special meeting scheduled for January 23, 2007, until after issuance of a decision on whether the preliminary injunction is granted. Additionally, as I stated at the January 22nd argument, Plaintiff's contempt motion is to only be considered, if at all, after resolution of whether the preliminary injunction should issue.

Plaintiff maintains that the stock transfer from Choi to Empire was, or should be held, impermissible contractually, legally and equitably. Yang also argues that, for the following reasons, I should grant a preliminary injunction against Empire: (1) the stock transfer is invalid because no default has occurred; (2) the stock transfer is invalid because Empire had actual or constructive notice of the applicable restrictions on share transfer; and, finally, (3) even if the stock transfer is valid, Empire may assert no greater rights than the previous shareholder, Moon Choi.

First, Plaintiff argues that under both the terms of the parties' agreements and the law

governing suretyship, Empire may not recover from the Chois until it declares 75 Rock in default, as it is currently prohibited from doing by the May 8, 2006 order. For this reason, Plaintiff asserts that the Chois, rather than Empire, are the proper parties authorized to vote any and all of the pledged securities and that Empire's attempt to call a shareholder meeting is void. Claiming that, prior to the TRO, 75 Rock, never defaulted, Plaintiff notes that, as required by ¶18 of the Loan Agreement, Yong Choi provided Empire with 84 post-dated checks, from the bank account of 75 Rock, which Empire was able to endorse and deposit. In further support of this argument, Plaintiff alleges that Empire followed this procedure until a week prior to issuance of the February 15, 2006 TRO. Contending that default by the principal obligor is a condition precedent which must be fulfilled before the guarantor's liability accrues, Plaintiff argues that the Chois' secondary liability is not yet operative.

Second, Plaintiff claims that, in the alternative, the stock transfer is invalid because Empire knew or should have known of the restrictions on Moon Choi's stock. Yang argues that Empire acted with "unclean hands" in obtaining Moon Choi's stock, because Empire had actual knowledge that Yang was secretary of the corporation and that his consent was required for the corporation to approve the loan agreement. Plaintiff also argues that, because Empire only collateralized 60% of the shares, that Empire must have known the remaining 40% were owned by another shareholder or shareholders. However, Yang alleges that, Empire, instead, obtained neither Yang's consent to the loan, nor a corporate resolution as required by the corporation's procedures, despite the fact that Empire even prepared a document requiring Yang's signature.

Third, in response to Defendants' contention that Empire is simply replacing Choi

as a shareholder, Plaintiff argues that, even if I find the stock transfer valid, Empire can assert no greater rights than its predecessor shareholder, Moon Choi, in whose shoes it stands. Plaintiff argues that, because the Chois have been temporarily stayed from involvement with 75 Rock for their “flagrant misconduct,” Empire, “stand[ing] in the Chois shoes” would have no greater rights than the Chois and should thus be barred from engaging in any managerial activities.

In opposition to Plaintiff’s arguments, Empire states, first, that it did not violate this Court’s order by taking possession of the stock. Instead, it asserts that Empire was merely enforcing its rights against Choi under the Pledge Agreement and the Personal Guaranty, which are independent of any rights asserted under the Loan Agreement with 75 Rock. Defendant claims that because the Chois are obligated to Empire via these agreements, the Chois’ obligations to Empire remain, even if Plaintiff ultimately succeeds in having the loan by Empire to 75 Rock rescinded because the invalidity of an underlying obligation does not effect the liability of the Guarantor.² Furthermore, Defendant argues that, pursuant to NY UCC §3-416, because the guaranty agreement is an unconditional guarantee of payment and not merely a guarantee of collection, Empire is not required to resort to any other party before pursuing the Chois to collect on its debt.³ Empire also argues that, by taking legal possession

² Defendant also argues that, because Empire is now in legal possession of the stock, that it is not bound by the restrictive terms of the Shareholder Agreement between the plaintiff and Choi, and is free to dispose of the stock as it sees fit.

³ Of course, §3-416 does not remove the necessity of a default as a condition precedent to a guarantor’s liability. §3-416(1) explains that “‘Payment guaranteed’ or equivalent words added to a signature mean that the signer engages that if the instrument is not paid when due he will pay it according to its tenor without resort by the holder to any other party.”

of the stock, it is simply replacing Choi as a shareholder, and that, as a shareholder, it has the same right to call a shareholders meeting as would the Chois, had they remained shareholders.

Second, Empire contends that it had no notice the Chois were not permitted to pledge their stock. Empire argues that it had no duty to inquire as to whether Choi was authorized to borrow the money on behalf of 75 Rockefeller; moreover, it insists that it had no notice, actual or constructive, that Choi was prohibited by the shareholder agreement from pledging the stock. Defendant also cites NY UCC §8-204, which states that “A restriction on transfer of a security imposed by the issuer, even if otherwise, lawful, is ineffective against a person without knowledge of the restriction unless: (1) the security is certificated and the restriction is noted conspicuously on the security certificate.” Empire further claims that a pledgee of stock is among the persons protected by this statute. Because the stock certificates themselves contained no such conspicuous restriction, Defendant argues that the restriction, if applied against Empire, would constitute an unreasonable and unenforceable alienation of shares as a matter of law.

Along with its assertion that Empire had no actual or constructive notice of restrictions on the Chois stock, Empire also notes that, pursuant to ¶20 of the Shareholder’s Agreement, plaintiff was responsible for ensuring that all stock certificates issued by the corporation bore the proper indorsement, which, if included, would have notified Empire of the restriction. Consequently, Empire argues that the Plaintiff should be barred from seeking equitable relief to enforce provisions of the Shareholder’s Agreement that he himself

violated.⁴

Third, and finally, Empire argues that its interest in the stock is perfected and superior to any claim the Plaintiff may have. Empire cites to UCC 9-313, which provides that “A secured party may perfect a security interest in certificated securities by taking delivery of the certificated securities under Section 8-301,” and to UCC 8-301, which states that “Delivery of a certificated security to a purchaser occurs when: (1) the purchaser acquires possession of the security certificate.” Defendant argues that the stock pledge agreement created the security interest and that the delivery of the certificates to Empire perfected that interest. For this reason, Empire contends that, even if the plaintiff ultimately prevails against the Choi defendants and is awarded a money judgment, any claim Plaintiff will assert against the stock will be subordinate to Empire’s rights to the stock. Empire also argues that, because plaintiff has not yet prevailed against the Choi defendants, that any argument regarding potential diminution of the Chois’ assets and consequent prejudice to the plaintiff is premature.

The Pledge Agreement between Empire and the Chois at §3.1, page 4, states that “Unless a default shall have occurred and be continuing, Pledgor [the Chois] shall be entitled to receive all cash dividends or other distributions to be paid in respect of the Pledged Securities, to vote any and all of the Pledged Securities...All rights of Pledgor to receive dividends or other distributions in respect of the Pledged Securities and to vote and give consents, waivers, and ratifications shall cease if a default occur and be continuing.” Thus,

⁴ Empire adds that, as former Senior Vice President of Daewoo America, Yang is an experienced businessman.

from the plain language of the Pledge Agreement, it is clear that a “default” must have occurred before Empire would, if ever, be entitled to exercise the voting rights formerly held by the Chois.⁵

It is undisputed that Empire never declared 75 Rock to be in default. In fact, defendants state in their memorandum of law “...the Chois’ liability to Empire arose without a ‘default’ by 75 Rock. Empire did not in fact declare 75 Rock in default before taking legal possession of the stock.” (Defendant’s Memorandum of Law, p. 5-6). Instead, Defendant argues, that the terms of the Guaranty agreement do not require that it declare 75 Rock in default before taking possession of the stock. At oral argument, Defendant’s counsel conceded that the loan against the principal obligor is rendered unenforceable by my earlier order, and he has not disputed Plaintiff’s assertion that 75 Rock was not in default prior to the order being issued. (Feb. 5 Tr. p. 12). However, when asked if the past due obligations to Empire constituted a default, Defendant’s counsel argued that “...[t]here is a default by the Chois in payment of the obligation.”

Despite Defendant’s contention that the Guaranty entitles Empire to exercise

⁵ The Pledge Agreement unfortunately does not define “default”, however, § 4.1, which details rights of the Lender, refers to another document to define the term. *i.e.* “If a default as defined in the Note [defined earlier therein as the “Borrower’s Note” for a loan in the amount of \$400,000.00] shall occur...” Attached at Exhibit B to Plaintiff’s Order To Show Cause, is a March 23, 2004 document between 75 Rock (“Borrower”) and Empire for a loan in the amount of \$400,000.00. This document, which appears to be the Borrower’s Note referenced in the Pledge Agreement, contains several references to a “default”, yet “default” is never defined, nor is it made clear from whose actions or failure to act a default may result. At times, the term is used in connection with obligations of 75 Rock alone, yet in other parts of Borrower’s Note, the term is used in connection with obligations of both 75 Rock or the Guarantors. Ultimately, however, the definition of “default”, as intended to trigger a loss of Pledgor’s rights under the Stock Agreement, remains unclear.


stockholder's rights previously held by the Chois, regardless of whether a default has occurred, I find that Empire is not entitled to vote this stock unless a "default" has occurred, as required by the Pledge Agreement. The plain language of this agreement cannot be varied by the Guaranty. While none of the documents referred to by either side provide a clear definition of what acts constitute a "default" and, more importantly, by whose actions a "default" can be effected, Defendants have presented no evidence that a "default," whatever that may entail, has occurred. Apart from the conclusory assertion raised by Defendant's counsel at oral argument, Defendant has not opposed Plaintiff's contention that no "default, as contemplated by the Pledge Agreement, transpired. Consequently, I find that Plaintiff has demonstrated a likelihood of success on the merits and is thus entitled to the preliminary injunction.

Accordingly, it is ORDERED that Empire is enjoined from taking any actions seeking to sell, transfer, encumber, mortgage, lien or otherwise attempt to hypothecate any shares of 75 Rock, pending hearing of this matter.

It is further ORDERED that, until the conclusion of this hearing, the January 22, 2007 TRO staying the proposed special meeting remains in effect; and
 Plaintiff's contempt motion is DISMISSED as moot.

DATED: June 19, 2007

FILED
 JUN 20 2007
 COUNTY CLERK'S OFFICE
 NEW YORK


 J.S.C.
BERNARD J. FRIED
 J.S.C.