

Qin Yi Zhu v Xing Li

2007 NY Slip Op 32561(U)

August 13, 2007

Supreme Court, New York County

Docket Number: 0105550/2006

Judge: Martin Shulman

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

PRESENT: MARTIN SHULMAN
J.S.C.
Justice

PART 1

Zhu

INDEX NO. 105550/06

MOTION DATE _____

- v -

MOTION SEQ. NO. 01

Li

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits <u>A-E</u>	<u>1, 2</u>
Cross-Motion + Answering Affidavits — Exhibits <u>A</u>	<u>3, 4</u>
Replying Affidavits <u>+ Opp. to Cross-Motion - Exhibit A</u>	<u>5, 6</u>

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion and cross-motion are
decided in accordance with the attached
decision and order.

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

FILED
AUG 20 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: August 13, 2007

MARTIN SHULMAN J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

At an Individual Assignment Part 1 of the Supreme Court of the State of New York, held in and for the County of New York, at the courthouse thereof in the County of New York, City, and State of New York, on the 13th of August, 2007

PRESENT: **MARTIN SHULMAN**
J.S.C.

HON: _____
JUSTICE.

Zhu
vs.
Li

PRE-NOTE OF ISSUE

ORDER OF TRANSFER-325(d)

County Clerk's

Index No. 105550 ~~20~~ 06

It appearing that the Civil Court of the City of New York has jurisdiction of the parties to this action and pursuant to Rule 202.13(a) of the Uniform Civil Rules for the Supreme Court and the County Court, it is

ORDERED, that this cause bearing Index Number 105550/06 be, and it hereby is, removed from this court and transferred to the Civil Court of the City of New York, County of New York, and it is further

ORDERED, that the clerk of New York County shall transfer to the clerk of the Civil Court of the City of New York, County of New York, all papers in this action now in his possession, upon payment of his proper fees, if any, and the clerk of the Civil Court of the City of New York, County of New York, upon service of a certified copy of this order upon him and upon delivery of the papers of this action to him by the clerk of the County of New York, shall issue to this action a Civil Court Index Number without the payment of any additional fees, and it is further

ORDERED, that the above-entitled cause be, and it is hereby, transferred to said Court, to be heard, tried and determined as if originally brought therein but subject to the provisions of CPLR 325(d).

ENTER,

J.S.C. MARTIN SHULMAN
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

-----X
QIN YI ZHU, LING XIA HE and SWEET DECADENT
CONFECTIONS, INC.,

Index No: 105550/06

Decision and Order

Plaintiffs,

-against-

XING LI and JING WEN HAN,

Defendants.
-----X

Hon. Martin Shulman:

Plaintiffs Qin Yi Zhu, Ling Xia He and Sweet Decadent Confections, Inc. (collectively "plaintiffs") move by order to show cause ("OSC") to enjoin defendants Xing Li and Jing Wen Han (collectively "defendants") from entering the premises occupied by plaintiff Sweet Decadent Confections, Inc. ("SDCI") and from interfering with SDCI's business operations. The OSC also seeks attorney's fees, costs and disbursements incurred in connection with the OSC. Pending the hearing of the OSC, Justice Sherry Klein Heitler, the originally assigned I.A.S. Justice, granted plaintiffs a temporary restraining order ("TRO")¹ on April 24, 2006 enjoining defendants from entering SDCI's premises and interfering with its business operations.²

¹ Defendants' alleged violation of the TRO is the subject of a separate simultaneously pending order to show cause (motion sequence number 2) wherein plaintiffs seek to hold defendants in contempt.

² This action was reassigned to this Court on or about January 4, 2007 after having been adjourned numerous times before Justice Heitler. The parties first appeared before this Court for oral argument on February 21, 2007, at which time this Court conducted extensive settlement negotiations which ultimately proved fruitless.

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AUG 20 2007
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[* 4]

Defendants oppose the OSC and cross move to dismiss the complaint based upon a clause in the written agreement between the parties which allegedly mandates arbitration, or alternatively, to compel arbitration and stay this action pending arbitration. Further, if the court grants plaintiffs a preliminary injunction as requested in the OSC, defendants request that same be conditioned upon plaintiffs posting an undertaking in the amount of \$50,000.00.

Background

The verified complaint alleges four causes of action for: 1) breach of an alleged "shareholder agreement"³ based on defendants' failure to make monetary contributions totaling \$20,000 and their refusal to share profits and losses equally; 2) breach of fiduciary duty to SDCI and plaintiffs; 3) tortious interference with contract; and 4) unjust enrichment. Plaintiffs' causes of action are premised upon the following relevant factual allegations:

- Plaintiff Qin Yi Zhu ("Zhu") formed SDCI and is its president;
- SDCI is a New York corporation engaged in the operation of a coffee shop at 37½ Allen Street, New York, New York (the "premises" or the "coffee shop");
- Zhu and defendant Xing Li ("Li") were SDCI's sole shareholders;
- Zhu and his wife, co-plaintiff Ling Xia He ("He"), entered into the agreement with defendants on December 18, 2005;
- Plaintiffs operate the coffee shop while defendants are passive shareholders and directors;

³ The "shareholder agreement" (Exh. A to OSC) is actually entitled "Partnership Agreement", and is referred to herein as the "agreement".

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- The agreement provided that plaintiffs, defendant Li and co-defendant Jing Wen Han ("Han") each own a 25% interest in SDCI and agreed to share its profits and losses equally;
 - Defendant Li, the lessee of the premises, subdivided same giving a portion of the premises to SDCI for operation of the coffee shop;
 - SDCI operated at a net loss from August 2005 to December 2005;
 - Plaintiffs invested \$20,000 in the coffee shop while defendant Li invested \$4,000 and defendant Han invested nothing;⁴
 - SDCI paid Li approximately \$12,000 for its occupancy of the premises;⁵ and
 - Defendants engaged in various actions resulting in police intervention, including sealing off the coffee shop's access to restrooms, turning off the coffee shop's electricity and water supply and threatening physical violence.

Defendants, who now appear *pro se*, initially appeared in this action by counsel and served a written verified answer in or about November, 2006.⁶ In opposing the OSC, defendants generally deny plaintiffs' allegations without specifically addressing plaintiffs' claims of wrong-doing (i.e., sealing off the coffee shop's access to restrooms, turning off the coffee shop's electricity and water supply and threatening physical

⁴ Plaintiffs characterize the agreement as requiring Zhu, He, Li and Han to each contribute capital in the amount of \$10,000 with each having a resulting 25% ownership interest. In fact, paragraph 7 of the agreement provides that each of the individual parties is to contribute equipment having a value of \$10,000. Exh. A to OSC.

⁵ The record before the court contains no indication of the terms under which the coffee shop was to occupy its portion of the premises.

⁶ Defendants subsequently served and filed an amended answer dated April 25, 2007. However, the amended answer is a nullity because defendants' time in which to amend their answer as of right expired and they failed to seek leave of court to amend. See CPLR 3025.

6] violence).⁷ Defendants offer a substantially different account of the transactions between themselves and plaintiffs, as follows:

- Defendants contributed \$20,000 as required by the agreement while plaintiffs contributed only \$12,000, claiming an alleged business loss of \$8,000;
- Plaintiffs stole money from the coffee shop's cash register, refused to explain missing receipts from the register, denied defendants access to the business books and records and are mismanaging the business; and
- Plaintiffs have locked defendants out of the business and deprived them of their investment.

Discussion

To establish entitlement to a preliminary injunction in this action, plaintiffs must demonstrate: 1) a likelihood of ultimate success on the merits; 2) irreparable injury if no preliminary injunction is issued; and 3) a balancing of the equities in plaintiff's favor. CPLR §6301; *Aetna Insurance Co. v. Capasso*, 75 N.Y.2d 860, 552 N.Y.S.2d 918 (1990). It is a drastic remedy which may only be granted to a party with a clear legal right to such relief grounded on undisputed facts as to the harm sought to be enjoined. *First Nat. Bank of Downsville v. Highland Hardwoods, Inc.*, 98 A.D.2d 924, 926, 471 N.Y.S.2d 360, 363 (3rd Dept., 1983); see also, *Feder v. Frank Brunckhorst Co.*, 35 A.D.2d 964, 317 N.Y.S.2d 982 (2nd Dept., 1970)(movant showed no clear right to preliminary injunction where questions of fact and law existed which could only be resolved by trial).

⁷ For example, defendants do not specifically deny turning off the coffee shop's electricity, but rather state that "the electrical control box is installed inside plaintiffs' shop where they have full control." Li/Han Opp. Aff. at ¶14.

Here, as detailed above, virtually all of the facts are in dispute and as such the court cannot find that plaintiffs have established a clear legal right to the relief sought or a likelihood of success on the merits of their claims. Further, the relief plaintiffs seek, to wit, barring defendants from entering the premises, is overbroad. It is undisputed that defendants have an ownership interest in the coffee shop and as such have the right to enter the premises peacefully and to review SDCI's books and records.

Parenthetically, with respect to plaintiffs' allegations that defendants interfered with business operations by turning off the coffee shop's electricity, by letter dated May 7, 2007 plaintiffs' counsel withdrew a subsequent order to show cause (motion sequence number 3) which sought an order directing defendants to restore electrical service to the premises, advising the court that the motion was moot since plaintiffs opened their own account for electrical services at the premises. Thus, the threat of disruption to the coffee shop's business by alleged electricity deprivation no longer exists. For all of the foregoing reasons, plaintiffs' OSC must be denied.

Finally, defendants' cross-motion is denied. With respect to arbitration, the agreement provides: "Unresolved disputes go to mediation before arbitration." To be enforceable, an arbitration clause must be "clear, explicit and unequivocal . . ." *Prote Contracting Co., Ltd. v. Board of Education of the City of New York*, 135 A.D.2d 523, 521 N.Y.S.2d 752 (2nd Dept., 1987). The aforementioned provision is woefully inadequate and cannot be interpreted as a waiver of any of the parties' rights to resort to the courts to resolve disputes.

Accordingly, it is

[* 8]
ORDERED that plaintiffs' OSC is denied in its entirety and the TRO is hereby vacated; and it is further

ORDERED that defendants' cross-motion is denied in its entirety; and it is further

ORDERED that this action be transferred to the Civil Court of the City of New York, County of New York pursuant to CPLR §325(d).

This constitutes this court's decision and order.

DATED: New York, New York
August 13, 2007


HON. MARTIN SHULMAN, J.S.C.

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