

Lee & Lee, LLC v Beautri Realty Corp.

2007 NY Slip Op 33514(U)

October 23, 2007

Supreme Court, New York County

Docket Number: 0602994/2004

Judge: Shirley W. Kornreich

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

PRESENT: Hon. Shirley Werner Kornreich
Justice

PART 54

Lee + Lee, LLC

INDEX NO. 602994/04

MOTION DATE 8/2/07

MOTION SEQ. NO. 03

MOTION CAL. NO. _____

- v -

Beatri Realty Corp.

The following papers, numbered 1 to 9 were read on this motion to/for Vacate/Intervene

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

PAPERS NUMBERED

1, 2, 9

Answering Affidavits — Exhibits _____

3, 4, 5

Replying Affidavits _____

6, 7, 8

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
OCT 29 2007
NEW YORK
COUNTY CLERK'S OFFICE

**MOTION TO BE DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

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

Dated: 10/23/07

HON. SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST DEFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X

LEE & LEE, LLC, CHONG OK LEE, and
YOUNG J. KIM

Index No.: 602994/04

Plaintiffs,

-against-

DECISION
and ORDER

BEAUTRI REALTY CORP., a/k/a
BEATRICE REALTY CORP. and
CHANG WOOK LIM

Defendants.

-----X

KORNREICH, SHIRLEY WERNER, J.:

This is an action for specific performance of the March 2004 Contract for Sale (“the Contract”) of a mixed use building located at 9 West 32nd Street, New York, N.Y. (“the premises”). Plaintiffs were the purchasers, and defendants Beautri Realty Corp., a/k/a Beautrice Realty Corp. (“Beautri”) and Chang Wook Lim (“Lim”) were the sellers of the premises. Non-party Chung Sang Yae (“Chung”), Lim’s aunt, moves: pursuant to CPLR § 321(b), to substitute Herzfeld & Rubin , P.C. (“Herzfeld”) as counsel for Beautri, and following such substitution, pursuant to CPLR § 5015(a)(2) and (3), to vacate this court’s October 20, 2006, order which granted plaintiffs’ cross-motion for summary judgment directing defendants to specifically perform the Contract (“the October 2006 Order”) and convey the premises to plaintiffs. In the alternative, Chung, as an interested person, moves pursuant to CPLR § 5015(a)(2) and (3), to vacate the October 2006 Order and permit her to intervene as a defendant in this action pursuant to CPLR § 1012 and 1013. In a separate motion, non-party Jang Ho Choi (“Choi”) moves to intervene as a plaintiff in this action pursuant to CPLR § 1012(a)(2) & (3) and 1013. In a third motion, plaintiffs move for the appointment of a temporary receiver pursuant to CPLR § 6401. All three motions are consolidated for disposition.

I. Background

A. The Initial Specific Performance Action

In March 2004, Lim, acting as president and sole shareholder of Beautri, executed the Contract to sell the premises to plaintiffs for \$4,100,000. The Contract called for plaintiffs to pay \$800,000 of the purchase price in cash divided into two installments - \$400,000 due upon signing the Contract and an additional \$400,000 due at the closing. Pursuant to these terms, on March 10, 2004, plaintiffs paid the initial \$400,000 installment upon signing the Contract. However, shortly before the closing, Lim demanded that plaintiffs pay him the second installment. Plaintiffs complied and paid Lim \$400,000 on July 30, 2004.

On August 5, 2004, a week after receiving the second \$400,000 cash installment, Lim declared plaintiffs to be in default of the Contract and refused to attend the closing scheduled for August 12, 2004. The \$800,000 paid towards the purchase of the premises was not returned. Therefore, on or about September 13, 2004, plaintiffs commenced this action for specific performance of the Contract. On that same day, plaintiffs filed with the County Clerk a Notice of Pendency (“Lis Pendens”) with respect to the premises.

During discovery, Lim averred that he was the president, sole officer and only employee of Beautri and that Chung had no duties and responsibilities with respect to Beautri and the premises. He further averred that he alone managed the premises, collected its rent and paid its mortgage and taxes. Lim also testified that he owned a restaurant called “Arang” on the second floor. New York City Department of Building records list Lim as the head officer, property manager and emergency contact for the premises. Indeed, between January 2002 and February 2004, Lim signed and executed 12 residential and commercial leases for the premises on behalf of Beautri.

Following this and other discovery, defendants moved for summary judgment dismissing

the complaint and plaintiffs cross-moved for specific performance of the Contract. The October 2006 Order denied defendants' motion in its entirety and granted plaintiffs' cross-motion, ordering specific performance of the Contract.

On April 16, 2007, Royal Asian Bank advised plaintiffs it had approved a new mortgage for their purchase of the premises and designated May 30, 2007, as the new closing date. That same day, plaintiffs notified defendants, via fax, of the new mortgage and closing date. Nara Bank was also ready to accept plaintiffs as assignee of six other outstanding mortgages it had on the premises totaling \$2,350,000. In addition, title company Traditional Abstract Corp., was prepared to insure plaintiffs' acquisition of the premises in the amount of \$3,300,000. Neither Lim nor his attorney attended the closing which, therefore, never took place.

B. Chung's Claim as to Beautri and The Premises

Chung, a resident and citizen of Korea, avers that she purchased all 200 shares of Beautri's stock from Lim pursuant to a stock purchase agreement dated November 15, 2001 ("the Stock Purchase Agreement"). Chung has attached to her motion, two exhibits purporting to show that on December 10, 2001, prior to the closing of the stock purchase, Lim executed an assignment of his 200 shares to Chung and resigned as Beautri's sole director and officer. Chung also attaches an exhibit of a meeting of Beautri's Board of Directors that same day, where she was elected president. The closing of the Stock Purchase Agreement took place on December 23, 2001.

Following the purchase, Chung avers that Lim remained involved in the day-to-day operations of Beautri and the premises. While Chung remained in Korea, Lim was in charge of collecting all rent for the premises and was "to transmit [rent] to [her] on a regular basis." She further avers that nearly five years after her purchase of Beautri, Lim's payments to her became "inconsistent" and thus she became concerned. Therefore, she appointed her son Won-Seok Park

(“Park”) as her “agent representing [her] interest in Beautri [and] in all legal matters.” Park then traveled to New York in November 2006 to investigate. Upon his arrival, Chung avers, Park learned that the premises was the subject of litigation. “[A]s agent for Beautri [he] retained Herzfeld & Rubin, P.C. to ascertain the facts concerning the litigation.” In its memorandum in support of this motion, Herzfeld asserts “Park came to New York in November 2006 and contacted [Herzfeld]. [Herzfeld’s] inquiries and search revealed the existence of the present litigation and the underlying facts.”

On May 22, 2007, approximately six months after discovering the October 2006 Order, Chung made the present motion arguing that she is the rightful owner of the premises, that Lim had no authority to enter into the Contract to sell the premises on behalf of Beautri, that Lim falsely acted as president in connection with the sale of the premises and concealed true facts from the court and that he had no authority to retain counsel on behalf of Beautri in this action.

C. Choi’s Claim

On or about July 15, 2006, Choi agreed to lend Beautri and Lim \$500,000. In exchange for this loan, Beautri and Lim entered into a promissory note dated July 15, 2006 (“the July Note”) setting forth the terms of the transaction. In conjunction with the July Note, Beautri and Lim also entered into an agreement with Choi dated July 15, 2006 (“the July Agreement”) where if Beautri and Lim were to default under the July Note, Lim would sell the premises to Choi at a purchase price between \$5,500,000 and \$6,000,000.

On or about September 5, 2006, Choi agreed to lend Beautri and Lim an additional \$600,000. As in the July transactions, the parties executed a promissory note dated September 5, 2006 (“the September Note”), outlining the terms of the transaction and an additional agreement dated September 6, 2006, (“the September Agreement”) which called for Beautri/Lim to sell the premises to Choi for a purchase price between \$5,500,000 and \$6,000,000 in the event of default

under the July or September Notes. On that same date, Beautri/Lim entered into a contract to sell the premises to Choi (“the September Contract”) for \$5,750,000.

On or about November 30, 2006, Choi agreed to lend Beautri and Lim an additional \$1,000,000. As in the July and September transactions, the parties entered into a promissory note dated November 30, 2006 (“the November Note”) outlining the terms of the transaction and an additional agreement dated November 30, 2006, (“the November Agreement”) which called for Beautri/Lim to sell the premises to Choi for a purchase price between \$5,500,000 and \$6,000,000 in the event of default under the July, September or November Notes. In addition, on November 30, 2006, Beautri/Lim entered into a second contract to sell the premises to Choi (“the November Contract”) for \$5,750,000. That same day, the parties executed a mortgage in favor of Choi in the amount of \$490,000 in connection with the amount loaned of \$2,100,000.

Beautri/Lim defaulted under all of its Notes with Choi in January 2007. Following several unsuccessful attempts to collect his \$2,100,000, Choi, on June 6, 2007, sent a letter to Beautri/Lim advising Lim of the defaults and Choi’s desire to close on his purchase of the premises. On June 11, 2007, Choi became aware of this action via a letter from Chung’s counsel stating that Lim had no authority to act on behalf of Beautri since November of 2001 and that Lim may have falsely represented himself to Choi. The letter also stated that Chung was not aware of any of Choi’s various contracts/agreements with Lim and, therefore, considered all of them to be “null and void” with respect to Beautri.

II. *Conclusions of Law*

A. *Vacator of the October 2006 Order*

Apparent authority is created by “words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into the transaction.” *Parlato v. Equitable Life Assur. Soc’y of the United States*, 299 A.D.2d

108, 112 (1st Dept 2002) quoting *Hallock v. State of New York*, 64 N.Y.2d 224, 231 (1984). The agent cannot create the existence of apparent authority by his own acts, rather, there must be a factual showing that the third party relied on the agent's misrepresentation due to misleading conduct by the principal. *Id.* The third-party's reliance on an agent's apparent authority must also be reasonable. *Id.*

Business Corporation Law § 909(a)(3) provides that the sale of all or substantially all of a corporation's assets, if not made in its usual or regular course of business, can only be authorized by two-thirds of all outstanding shares entitled to vote. *Bouton v. Thomas Bros. Sales Corp.*, 179 A.D.2d 612, 613 (2nd Dept 1992); *Vig v. Deka Realty Corp.*, 143 A.D.2d 185, 186 (2nd Dept 1988). This section "precludes any claim of apparent authority since those who deal with corporations are bound by the statutory limitations on the authority of corporate officers." *Bouton*, 179 A.D.2d at 613; *Vig*, 143 A.D.2d at 187.

CPLR § 5015(a) states that the "court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct." An interested person can be a nonparty and is defined as having some legitimate interest in the action where judicial assistance will avoid injustice. *See Nachman v. Nachman*, 274 A.D.2d 313, 315 (1st Dept 2000). Pursuant to CPLR § 5013(a)(3), the court may relieve an affected party from a judgment or order based upon the "fraud, misrepresentation, or other misconduct" of an interested party. These factors apply to conduct which occurred prior to the judgment or the method by which judgment was obtained. *Nachman*, 274 A.D.2d at 315; *Hershkowitz v. Friedlander*, 224 A.D.2d 305, 306 (1st Dept 1996).

Herc, Chung has offered enough evidence to show that she has an interest in the outcome of this action. She provides the Stock Purchase Agreement purporting to demonstrate her purchase of Beautri and all of its assets in December 2001. Chung also offers documentation of

* 8]
Lim's assignment of all 200 shares of Beautri's stock to her on December 10, 2001. Finally, she provides minutes from a meeting of Beautri's Board of Directors that same day where she was elected Beautri's president. As of this time, none of these documents have been authenticated. Therefore, until a further determination can be made as to who rightfully owns Beautri, Chung has an interest in the adjudication of this action. Even if the court presumes the purported sale of Beautri to have taken place, however, issues of fact remain as to whether Lim had apparent authority to act on behalf of Beautri and also whether Lim fraudulently sold the premises.

Herzfeld argues that there is no evidence here to support plaintiffs allegation that Chung permitted Lim to perform any acts as president of Beautri. Herzfeld also claims that there is no evidence of any misleading conduct by Chung, as principal, that would have led plaintiffs to believe that Lim was indeed an agent of Beautri, or that he was authorized to perform any transactions on behalf of Beautri. Chung avers that following the sale of Beautri, Lim was only authorized to collect rent on the premises and transfer it to her on a regular basis. But, it is incontrovertible that Chung, a Korcan resident, remained there after she supposedly purchased Beautri in 2001 and allowed Lim to control the operations of the premises. Lim averred that he was the president, sole officer and only employee of Beautri. He further averred that he alone managed the premises, collected rent and paid all of the premises' mortgage payments and taxes. Lim issued leases and stated that he owned and operated "Arang" a restaurant located on the premises' second floor.

Even if Lim's claims as to ownership were indeed fraudulent and misleading, Chung's grant of authority, combined with Lim's actions over a five year period, may have created an agent-principal relationship which imputed Lim with apparent authority to act on behalf of Beautri. New York City Department of Building records list Lim as the head officer, property manager and emergency contact for the premises. Between January 2002 and February 2004,

Lim executed 12 leases with residential and commercial tenants in the premises on behalf of Beautri. Chung testified that she sent her son Park to New York in November 2006 because she became suspicious about the irregular rent payments Lim was sending her. Therefore, between December 2001 and October 2006, Chung was apparently satisfied with the benefits she was receiving from her arrangement with Lim. Consequently, any lack of contact that Chung had, as principal, with any third parties during this time would not serve to sever Lim's apparent authority to act on behalf of Beautri. *See Parlato*, 299 A.D.2d at 116 ("Considerations of fairness, practicality and sound public policy lead...to this conclusion. Even in the case of a third party unknown to the principal, it seems fair to hold the principal responsible for the agent's misuse of apparent authority while the principal-agent relationship continues to exist, bringing benefits to the principal and giving the principal a measure of control over the agent's conduct.")

Nevertheless, BCL § 909(a)(3) provides enough of a basis at this point to vacate the October 2006 Order since it is not yet clear who owned Beautri in March of 2004 and whether Lim's conduct during that time was fraudulent and misleading. Here, Beautri's regular business was managing the premises. Beautri was not engaged in the business of selling real property. Hence, the sale of the premises, Beautri's sole asset, would not be a transaction made in its regular course of business and, thus, shareholder approval would be required. *See Vig*, 143 A.D.2d at 186-87. Plaintiffs argue that *Kursh v. Verderame*, 87 A.D.2d 803 (1st Dept 1982), serves to bar Chung from using BCL § 909(a)(3) as a reason to vacate the October 2006 Order. In that case, plaintiff Kursh entered into an agreement to purchase land with individual defendant Verderame. The agreement did not identify that the land was actually owned by a family-run corporation formed for the sole purpose of operating the subject property. Verderame acted as an individual principal through the signing of the contract and at no point in time did Kursh know that the land was actually owned by a corporation. Following execution of the agreement,

defendants refused to proceed with the closing and Kursh sued for specific performance of the agreement. Defendants asserted BCL § 909(a)(3) as a defense to the transaction. However, the court precluded defendants from asserting this defense and ordered specific performance of the agreement stating that “since the individual defendant held himself out as having the authority to make the sale, the corporate undisclosed principal is estopped to deny his authority.” *Kursh*, 87 A.D.2d at 803.

The facts here differ somewhat from those in *Kursh*. Here, plaintiffs were aware that they were purchasing the premises from a corporation. The buyer in *Kursh* did not know he was dealing with a corporation. Here, Lim held himself out as being the principal of a corporation. In *Kursh*, the individual defendant held himself out as an individual owner, not as a corporate principal. In other words, Beautri’s corporate identity was not concealed at any point in this transaction. Plaintiffs knew they were buying the premises from a corporation during the negotiation and execution of the Contract. As a result, since this transaction involved a corporation selling its sole asset, which is a transaction not made in its regular course of business, shareholder approval was necessary. *See Bouton*, 179 A.D.2d at 613 (BCL §909(a)(3) precluded plaintiff’s claim of apparent authority and shareholder approval necessary where plaintiff knew he was purchasing property from a corporation and agent held himself out as being sole shareholder with capacity to make all business decisions for corporation). Accordingly, the October 2006 Order must be vacated.

B. Herzfeld’s Motion to Substitute as Counsel for Beautri

CPLR § 321(b) provides that “an attorney of record may withdraw or be changed by order of the court in which the action is pending, upon motion on such notice to the client of the withdrawing attorney, to the attorneys of all other parties in the action...and to any other person, as the court may direct.” Herzfeld argues that since Chung was Beautri’s sole shareholder and

president, Lim had no authority to act on Beautri's behalf in this action, and, therefore, there is no ground to deny its motion. However, as previously stated, issues of fact remain as to the legitimacy of Beautri's sale. Accordingly, until it can be determined who truly owned and operated Beautri when the Contract was executed, Herzfeld's motion to be substituted as counsel for Beautri is denied.

C. Chung's Intervention

CPLR § 1012(a)(3) permits any person to intervene in any action involving "the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be adversely affected by the judgment." A person will be permitted to intervene where they have a real and substantial interest in the outcome of the action. *Agostino v. Soufer*, 284 A.D.2d 147, 148 (1st Dept 2001). Here, Chung claims that she is the rightful owner of Beautri and would thus be adversely affected by any judgment rendered regarding the sale of the premises, which is Beautri's only asset. Plaintiffs correctly note that permitting Chung to intervene raises a great number of issues involving the authenticity of her purchase of Beautri in 2001, the consideration (if any) received from the sale, Lim's authority following the alleged sale, and what level of ownership Chung actually exercised from 2001 through the present. However, all of these questions must now be answered to properly adjudicate this matter. Accordingly, until proven otherwise, Chung has a real and substantial interest in the outcome of this action, and should be permitted to intervene pursuant to CPLR 1012(a)(3).¹

D. Plaintiffs Motion for Appointment of a Temporary Receiver

Pursuant to CPLR § 6401(a), a temporary receiver may be appointed where a danger

¹Pursuant to CPLR § 1014 "a motion to intervene shall be accompanied by a proposed pleading setting forth the claim or defense for which intervention is sought." Herzfeld has attached a copy of Chung's answer to this action with its papers in support of this motion.

exists that the property at issue will be removed from the state, lost, or materially injured or destroyed. This drastic remedy should be invoked only where necessary to protect the interests of the parties. *Armienti v. Brooks*, 309 A.D.2d 659, 661 (1st Dept 2003) quoting *Di Bona v. General Rayfin, Ltd.*, 45 A.D.2d 696 (1st Dept 1974). “There must be danger of irreparable loss, and courts of equity will exercise extreme caution in appointment of receivers, which should never be made until a proper case has been clearly established.” *Id.* quoting *Laber v. Laber*, 181 A.D. 733, 735 (2nd Dept 1918).

Plaintiffs argue that appointment of a receiver is necessary to ensure that the general responsibilities associated with maintaining the premises are being met. These responsibilities include paying the mortgage and taxes, tending to the needs and requests of the tenants, renewal and replacement of leases, responding to emergencies and overall maintenance of the premises. Plaintiffs claim that due to the “apparent disappearance of Lim” no one is currently undertaking these responsibilities and thus there is a risk that the premises will diminish in value.

However, in his affidavit, Scott K. Hur (“Hur”), avers that at the request of Chung and Park, he has been performing various managerial functions on the premises since approximately November 2006. These tasks include collecting rents from residential tenants, executing leases on behalf of Beautri, responding to maintenance requests on the premises and payments to maintain its insurance coverage. Hur also avers that payments of Beautri’s mortgage are automatically transferred every month from Beautri’s account at Nara Bank. A letter from Nara Bank dated July 11, 2007, signed by Helen Choe, a Nara Bank Loan Officer, states that as of July 11, 2007, Beautri’s mortgage payments on the premises are up to date. Chung submits copies of payment records reflecting all payments made on the mortgage since it was transferred to Nara Bank in March 2000. Chung also offers copies of “Maintenance Work Order” forms for various tenants in the premises and receipts for items purchased to perform the corresponding repairs.

Finally, Chung provides copies of three residential leases executed by Hur on behalf of Beautri. Therefore, since the general responsibilities associated with maintaining the premises are apparently being met, and there is no threat of irreparable loss or that the premises will be injured or destroyed, plaintiffs motion to appoint a temporary receiver is denied.

E. Choi's Intervention

A nonparty may intervene as a matter of right "when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment." CPLR 1012(a)(2). Here, Choi seeks to recover money damages of approximately \$2,100,000 allegedly due him under the promissory notes he executed with Lim in 2006. In this action, plaintiffs are seeking specific performance of the Contract they executed with Lim to purchase the premises in 2004, two years prior to Choi's notes. Further, the Lis Pendens filed on behalf of plaintiffs in this action predates any of Choi's transactions with Lim regarding the premises by approximately two years. This would serve to give Choi constructive notice of plaintiffs claim at the time he executed his November 2006 Contract to purchase the premises. *See* CPLR 6501; *Goldstein v. Gold*, 106 A.D.2d 100, 102 (2nd Dept 1984) (filing a notice of pendency puts world on notice of plaintiff's potential rights regarding subject realty and warns all comers that if they buy subject realty or rely on defendant's right, they do so subject to plaintiff's rights). If plaintiffs are successful in this suit, Choi can still litigate against Lim personally for the money owed under the promissory notes. As a result, Choi's motion to intervene in this action is denied. Accordingly, it is

ORDERED that Chung Sang Yae's motion to vacate this courts October 20, 2006 order granting plaintiffs cross-motion for summary judgment is granted and that this courts order of October 20, 2006 is hereby vacated; and it is further

ORDERED that Herzfeld & Rubin, P.C's motion to substitute as counsel for defendant

Beautri Realty Corp., is denied; and it is further

ORDERED that Chung Sang Yae's motion to intervene is granted, and that Chung Sang Yae be permitted to intervene in the above-entitled action as a party defendant and that her annexed answer is deemed served and filed; and it is further

ORDERED that the summons and complaint in the above titled action be amended by adding Chung Sang Yae as a party defendant and the amended caption shall now read

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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LEE & LEE, LLC, CHONG OK LEE, and
YOUNG J. KIM

Index No.: 602994/04

Plaintiffs,

-against-

BEAUTRI REALTY CORP., a/k/a
BEATRICE REALTY CORP. and
CHANG WOOK LIM,

Defendants.

-and-

CHUNG SANG YAE, a/k/a SANG YAE CHUNG or
SANG YAE CHUNG

Intervenor-Defendant.

-----X

and it is further

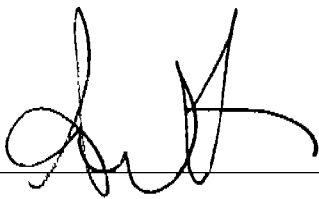
ORDERED that the attorney for the intervenor shall serve a copy of this order with notice of entry upon the Clerk of the Court and upon the Clerk of the Trial Support Office (Room 158), who are directed to amend their records to reflect such change in the caption herein; and it is further

ORDERED that Jang Ho Choi's motion to intervene in this action is denied; and it is further

ORDERED that plaintiffs motion for the appointment of a temporary receiver is denied.

ENTER

DATE: October 23, 2007
New York, NY



J.S.C.

FILED
OCT 29 2007
NEW YORK
COUNTY CLERK'S OFFICE