

Shao Yun Liu Inc. v Ming Jin Chen

2007 NY Slip Op 33737(U)

November 16, 2007

Supreme Court, Suffolk County

Docket Number: 0035657/2006

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK
I. A. S. PART 23 SUFFOLK COUNTY

PRESENT:

HON. EMILY PINES
 JUSTICE

MOTION DATE: 08-17-2007
 SUBMIT DATE: 09-20-2007
 MOTION NO.: 001 MD
 002 MG
 CASEDISP

SHAO YUN LIU INC. AS SUCCESSOR IN
INTEREST AND ASSIGNEE OF AC500
INC.,

X PLAINTIFF'S ATTORNEY

John M. Stravato, Esq.
 PO Box 298
 Bethpage, New York 11714

DEFENDANT'S ATTORNEY

Plaintiff, Arthur Shulman, Esq.
 1601 Veterans Memorial Highway, Suite 425
 Islandia, New York 11749

- against -

MING JIN CHEN,

Defendant.

X

ORDERED, that plaintiff's motion (motion sequence number 001) brought on by Order to Show Cause (COSTELLO, J.) seeking an Order of Attachment is denied; and it is further

ORDERED, that defendant's cross-motion (motion sequence number 002) for summary judgment dismissing the complaint is granted and the action is dismissed.

Plaintiff corporation commenced this action against defendant by the filing of a Summons with Notice on December 22, 2006. Defendant then filed a Notice of Appearance and demand for a complaint on January 16, 2007 and a Verified Complaint was then served on or about February 8, 2007. The Verified Complaint sets forth two causes of action¹, conversion and breach of contract. Specifically, the Complaint alleges that while working for the corporate plaintiff, defendant wrote certain checks totaling \$83,000 without the prior knowledge or consent of plaintiff, thus converting

¹The Verified Complaint erroneously captions both causes of actions as the "FIRST CAUSE OF ACTION".

said funds to his own use. On the second cause of action (erroneously captioned the first cause of action), plaintiff alleges that while defendant was working for plaintiff corporation, he developed certain herbal formulas that were the property of plaintiff's predecessor corporation. Plaintiff claims that defendant failed to provide the formula to plaintiff thus breaching his contract with plaintiff, resulting in lost revenues exceeding two million dollars (\$2,000,000.00).

Defendant served a Verified Answer with Affirmative Defenses on or about April 7, 2007. Defendant alleges that the action is barred by collateral estoppel, *res judicata* and the statute of limitations. Specifically, defendant argues that the issues raised in the complaint were previously litigated in a divorce action between Shao Yin Liu and defendant.

Plaintiff now moves for an Order attaching the proceeds of a distributive award in the amount of \$185,000, to be paid by Shao Yun Liu to defendant herein, and directing that said funds be paid into an attorney escrow account. In support of the motion, plaintiff attaches an affidavit from Lie Li, who states she is a shareholder and officer of the corporate plaintiff. Li alleges that defendant converted corporate funds for his own use and developed an herbal formula that had "enormous financial potential". Plaintiff alleges that defendant has been working as an oncologist in a hospital in Kunming, China, and has only come to the United States on a limited basis since 2003; thus, it argues that if he receives the final proceeds from the divorce settlement, he will return to China and never return to the United States, rendering the instant lawsuit moot.

Defendant opposes the motion and cross-moves for summary judgment dismissing the action based on lack of standing, *res judicata*, collateral estoppel and statute of limitations. Defendant sets forth in an affidavit, the lengthy procedural history of the divorce action, referenced herein. The Court will set forth the details as relevant to the instant applications.

The submissions reflect that Shao Yun Liu ("Liu") and defendant were married in 1990, in China, and shortly thereafter immigrated to the United States. At the time, defendant was already a doctor in China, but could not practice medicine in the United States. In 1993, Liu and defendant formed a corporation, AC500, an acupuncture and holistic herbal practice/clinic. According to defendant, the name, "AC500" was selected because it was similar to the name of a blend of herbs "Anti-Cancer 500", that defendant had used in his experimental treatment of cancer while a doctor in China. Defendant states that the blend of herbs is readily available to anyone wishing to purchase it and is not the property of AC500. Thereafter, on or about February 19, 2001, Liu commenced a divorce against defendant, and then, on or about May 14, 2001, Liu formed a new corporation Shao Yun Liu, Inc., plaintiff herein, and was the sole shareholder and officer of that corporation.

The divorce action was tried before Justice Bivona and a Decision After Trial rendered January 16, 2004. Justice Bivona determined that AC500 was a marital asset subject to equitable distribution and valued it at \$222,000, of which defendant was awarded 50%, or the sum of \$111,000. Defendant was awarded additional equitable distribution in the amount of \$133,750 for his share of the marital residence and \$127,500 for the value of his share of Liu's enhanced earning capacity as a result of her obtaining her acupuncture license during the marriage. The total equitable distribution award to defendant of \$372,250 was to be paid in four equal annual installments commencing April 1, 2004. Liu appealed Justice Bivona's decision and the Second Department modified the Judgment and remanded the matter for a new determination regarding valuation of Liu's enhanced earning capacity, the marital portion of Liu's acupuncture license and the direction to pay the equitable distribution award in four annual installments.

Upon the remand, on April 10, 2007, Liu and defendant appeared before Justice Bivona, and entered into a Stipulation resolving the outstanding issues, which Stipulation was So-Ordered. In the Stipulation, Liu and defendant agreed that she would pay defendant the sum of \$185,000.00 as and for his total distributive award, payable within 120 days from that date. The Stipulation further provided that "Plaintiff acknowledges that she has no personal or other claim arising out of her former ownership and/or being an officer of AC500, Inc., and this stipulation is meant to satisfy any and all claims that either party may have against the other relating to AC500, Inc. The parties acknowledge that there is a pending lawsuit under the caption Shao Yun Liu Inc., etc v. Ming Jen Chen Index #06-35657 and the plaintiff represents that she is not a party to this lawsuit." On April 10, 2007, the parties were allocuted on the record regarding this Stipulation. On the record, Liu stated that she did not authorize the instant lawsuit and that when she sold the corporation she did not assign any right to sue defendant.

Liu submits an affidavit in opposition to the cross-motion in which she states that she was the sole shareholder of AC500 Inc and transferred and assigned all her rights to plaintiff corporation. However, neither plaintiff, nor Liu, has submitted any proof or documentation to substantiate this claim of assignment. Instead, plaintiff has submitted a document entitled "SHAORYUN LIU, INC. SHARE PURCHASE AGREEMENT". In that agreement, Liu transferred 100% ownership in plaintiff corporation to Lihui Feng. No mention is made in that document of any assignment or transfer of the assets of AC500, Inc.

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. *Winegrad v. New York University Medical Center*, 64 N.Y2d 85, 487 N.Y.S.2d 316 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 404 N.E.2d 718, 427

N.Y.S.2d 595 (1980). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial. *State Bank of Albany v. McAullife*, 97 A.D.2d 607, 467 N.Y.S.2d 944 (3d Dept. 1983). The role of a court in deciding a motion for summary judgment “is not to resolve issues of fact or to determine matters of credibility, but merely to determine whether such issues exist.” *Dyckman v. Barrett*, 187 A.D.2d 553, 590 N.Y.S.2d 224 (2d Dept. 1992).

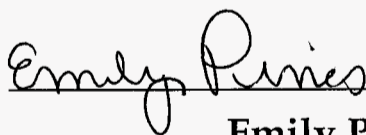
In the case at bar, defendant has met his *prima facie* burden of demonstrating entitlement to summary judgment. The documentary evidence establishes that plaintiff is not the proper party and lacks standing to bring an action against defendant for conversion and breach of contract. Defendant was neither an owner nor employee of the plaintiff corporation, rather, defendant was an employee of AC500, Inc. Further, Liu, defendant’s former wife, testified before Justice Bivona that she did not authorize this action by plaintiff nor did she assign any right to sue defendant to plaintiff. The Court notes, that while Liu executed a Stipulation before Justice Bivona stating that she had no claim arising out of her ownership of AC500, Inc., and that the stipulation resolved all such claims, she then submitted an affidavit in opposition to the defendant’s cross-motion for summary judgment. Such actions seriously impair Liu’s credibility with this Court. Moreover, defendant has submitted the computerized records maintained from the New York State Department of State website indicating that both AC500, Inc., and plaintiff are active corporations. Thus, defendant has established *prima facie* that plaintiff is not the proper party to bring the instant action.

Plaintiff has not come forward with evidence to defeat the motion for summary judgment. Rather, plaintiff has submitted the affidavit of Liu, whose credibility and motivation are clearly suspect in light of the events detailed herein and an agreement wherein she transferred her interest in plaintiff corporation to a third party. Plaintiff has failed to offer a scintilla, of evidence documenting either its relationship to AC500, Inc., or to defendant.

Based upon the foregoing, plaintiff’s motion for an Order of Attachment is denied and defendant’s cross-motion for summary judgment is granted and the action is dismissed. In light of this determination, the Court need not reach defendant’s remaining arguments.

The foregoing constitutes the **DECISION** and **ORDER** of the Court.

Dated: November 16, 2007
Riverhead, New York



Emily Pines
J. S. C.