

**Jang Ho Choi v Beautri Realty Corp.**

2008 NY Slip Op 32089(U)

July 22, 2008

Supreme Court, New York County

Docket Number: 0603835/2007

Judge: Shirley Werner Kornreich

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PRESENT: HON. SHIRLEY WERNER KORNREICH

PART 54

Index Number : 603835/2007

**CHOI, JANG HO**

VS.

**BEAUTRI REALTY CORP.**

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT/LIEU COMPLAINT

INDEX NO.

603835/07

MOTION DATE

4/10/08

MOTION SEQ. NO.

1

MOTION CAL. NO.

his motion to/for \_\_\_\_\_

PAPERS NUMBERED

1

2

3

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

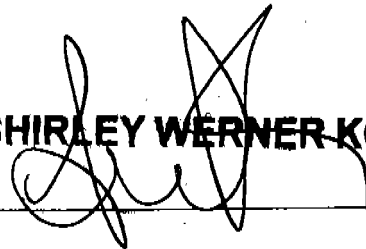
**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION AND ORDER.**

**FILED**

JUL 24 2008

COUNTY CLERK'S OFFICE  
NEW YORK

**HON. SHIRLEY WERNER KORNREICH**



J.S.C.

Dated: 7/22/08

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 54

-----X  
JANG HO CHOI,

Plaintiff,

-against-

BEAUTRI REALTY CORP.,  
SUNG JAY CORP. and  
CHANG WOOK LIM

Defendants.

-----X  
KORNREICH, SHIRLEY WERNER, J.:

Index No.: 602994/04

DECISION  
and ORDER

**FILED**  
JUL 24 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

This action arises out of three promissory notes pursuant to which plaintiff Jang Ho Choi loaned defendant Chang Wook Lim \$2,100,000. Plaintiff now moves, pursuant to CPLR § 3213, for summary judgment in lieu of complaint, seeking the entry of judgment in its favor for the remaining principal and interest due on each note plus attorneys' fees. Defendant Beautri Realty Corp. (Beautri) opposes. Neither Lim nor defendant Sung Jay Corp. (Sung Jay) have answered or opposed this motion.

*I. Background*

*A. Affidavit of Jang Ho Choi*

Plaintiff Jang Ho Choi avers the following. On or about July 15, 2006, Choi agreed to lend Beautri and Lim \$500,000. Lim represented himself to be the principal of Beautri. In exchange for this loan, Beautri and Lim entered into a promissory note dated July 15, 2006 (July Note) setting forth the terms of the transaction. The July Note provides that interest would accrue at twelve percent per annum with monthly payments due on the fifteenth of every month.

The July Note also states the failure by Beautri and Lim to make any monthly payment due would result in default. In the event of default, the note calls for the remaining principal and interest to be immediately due and payable. Beautri and Lim have failed to make any payments on the July Note since defaulting in January 2007. As of November 15, 2007, the remaining interest and principal due under the July Note is \$550,000.

On or about September 5, 2006, Choi agreed to lend Beautri and Lim an additional \$600,000. As in the July transactions, the parties entered into a promissory note dated September 5, 2006 (September Note) outlining the terms of the transaction. The September Note provides that interest would accrue at twelve percent per annum with monthly payments due on the fifth of every month. The September Note also states the failure by Beautri and Lim to make any monthly payment due would result in default. In the event of default, the September Note also called for the entire principal and interest to become immediately due and payable. Once again, Beautri and Lim failed to make any payments on the September Note since defaulting in January 2007. As of November 15, 2007, the remaining interest and principal due under the September Note is \$684,000.

On or about November 30, 2006, Choi agreed to lend Beautri, Lim and Sung Jay \$1,000,000. As in the July and September transactions, the parties entered into a promissory note dated November 30, 2006 (November Note) outlining the terms of the transaction. The November Note provides that interest would accrue at twelve percent per annum with monthly payments due on the first of every month. As in the July and September Notes, failure to make any monthly payment due would result in default, and, in the event of default, the entire principal and interest would be immediately due and payable. Beautri, Lim and Sung Jay defaulted on the

November Note in January 2007. As of November 15, 2007, the remaining interest and principal due under the November Note is \$1,150,000.

Lim signed all three notes individually and as President of both Beautri and Sung Jay. Since all three notes have been in default since January 2007, Choi states that Beautri and Lim are jointly and severally indebted to him for \$2,389,000 and Sung Jay for \$1,150,000. Choi also notes that interest continues to accrue on the July Note at a rate of \$5,000 per month, on the September Note at a rate of \$6,000 per month and on the November Note at a rate of \$10,000 per month. In addition, in the event collection proceedings are commenced, each note contains a provision awarding Choi attorneys' fees in the amount of fifteen percent of the total remaining principal and interest due on each loan. Therefore, Choi claims he is owed an additional \$358,000 in attorneys' fees.

*B. Affidavit of Chung Sang Yae*

Chung Sang Yae, a resident and citizen of Korea, avers that she is the sole shareholder and President of Beautri, whose only asset is a mixed use building located at 9 West 32<sup>nd</sup> Street, New York, N.Y. (the Premises). Chung avers that she purchased all 200 shares of Beautri's stock from Lim pursuant to a stock purchase agreement dated November 15, 2001 (Stock Purchase Agreement). Chung has attached 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 alone 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.” Chung further avers that Lim was not Beautri’s President in 2006 and had no authority to borrow money or sign notes on Beautri’s behalf. In addition, Chung claims that Beautri did not receive any money in connection with these promissory notes and that she never had any communication with Lim or Choi concerning these transactions.

## *II. Conclusions of Law*

Summary judgment in lieu of complaint is an expedited procedure for commencing an action “based upon an instrument for the payment of money only or upon any judgment.” See CPLR 3213; Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3213:1, at 497. In order to qualify for relief under CPLR 3213, plaintiff must submit proof of the agreement, its unconditional terms of repayment and default by the defendant. See *SCP Inc. v. Bermudatel, Inc.*, 224 A.D.2d 214, 216 (1<sup>st</sup> Dept 1996); *MDJR Enters., Inc. v. LaTorre*, 268 A.D.2d 509 (2<sup>nd</sup> Dept 2000); *Colonial Commercial Corp. v. Breskel Assocs.*, 238 A.D.2d 539 (2<sup>nd</sup> Dept 1997). A promissory note qualifies as an instrument for the payment of money only, provided the plaintiff can establish a prima facie case by showing proof of the note and the failure by the defendant to make the required payments called for under the note’s terms. *Bonds Fin., Inc. v. Kestrel Techs., LLC*, 48 AD3d 230, 231 (1<sup>st</sup> Dept 2008). However, the note will not qualify for CPLR 3213 relief “if outside proof is needed, other than simple proof of nonpayment or a similarly de minimis deviation from the face of the document.” *Id.*

### *A. Lim & Sung Jay*

Plaintiff has met its burden regarding Lim and Sung Jay. Choi has presented signed copies of the July, September and November Notes as well as his affidavit evidencing proof of

default by each defendant. Neither Lim nor Sung Jay have answered or opposed this motion. Accordingly, plaintiff's motion for summary judgment in lieu of complaint is granted on default as to defendants Lim and Sung Jay.

*B. Beautri*

In his reply affirmation Choi argues, for the first time, he is entitled to summary judgement in lieu of complaint against Beautri because Lim had apparent authority to act on Beautri's behalf. Arguments advanced for the first time in reply papers are not to be considered by a court in its determination of a motion for summary judgment. *Clearwater Realty Co. v. Hernandez*, 256 AD2d 100, 103 (1<sup>st</sup> Dept 1998). In addition, Chung's affidavit raises issues of fact about whether Lim had authority to act on Beautri's behalf.

Nonetheless, the court notes that 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 (1<sup>st</sup> 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.*

In a related action currently before this court entitled *Lee & Lee, LLC, et al, v. Beautri Realty Corp., et al.*, Index No. 602994/04 (The Lee & Lee Action), the court made certain findings regarding Lim's apparent authority to act on Beautri's behalf. The Lee & Lee Action is for specific performance of a March 2004 Contract for Sale (the Contract) of the Premises. On October 20, 2006, the court granted plaintiffs' cross-motion for summary judgement ordering

defendants to perform the Contract (October 2006 Order) and convey the Premises to plaintiffs. Subsequently, on October 23, 2007 (October 2007 Decision), the court, *inter alia*: granted Chung's motion to intervene in the Lee & Lee Action; granted Chung's motion to vacate the October 2006 Order; and denied Choi's motion to intervene in the Lee & Lee Action. The court, there, noted that issues of fact exist as to whether Lim had apparent authority to act on behalf of Beautri. On pages six and seven of the October 2007 Decision, the court wrote:

Here, 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 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...

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 Korean 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.

Here, the same issues of fact exist regarding Lim's apparent authority. Chung offers the same unauthenticated documentation purporting to show her ownership of Beautri. She also offers the same testimony that Lim was not given any authority to act on behalf of Beautri and

that his actions were both fraudulent and misleading. Choi provides as evidence of Lim's apparent authority testimony that Lim collected rent, had access to Beautri's bank accounts, signed Beautri's tax returns and was listed as principal on corporate registration documents with the City of New York. Therefore, outside evidence is necessary to determine if Beautri is liable to Choi for the sums owed in each promissory note. *Bonds Fin.*, 48 AD3d at 231; *Weissman v. Sinorm Deli*, 88 NY2d 437, 444 (1996) ("Where the instrument requires something in addition to the defendant's explicit promise to pay a sum of money, CPLR 3213 is unavailable."); *Beal Bank v. Melville Magnetic Resonance Imaging*, 270 AD2d 440 (2d Dept 2000) (since outside proof was required to determine sum due upon promissory note at issue in event of default grant of summary judgment in lieu of complaint was inappropriate). Accordingly, it is

ORDERED that plaintiff's motion for summary judgment in lieu of complaint against defendant Chang Wook Lim is granted, on default, and the Clerk is directed to enter judgment in plaintiff's favor and against defendant Chang Wook Lim in the amount of \$2,384,000 with interest from November 15, 2007 at a rate of 12% per annum, to be computed by the Clerk, together with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that plaintiff's motion for summary judgment in lieu of complaint against defendant Sung Jay 32 Corp. is granted, on default, and the Clerk is directed to enter judgment in plaintiff's favor and against defendant Sung Jay 32 Corp. in the amount of \$1,150,000 with interest from November 15, 2007 at a rate of 12% per annum, to be computed by the Clerk, together with costs and disbursements as taxed by the Clerk; and it is further

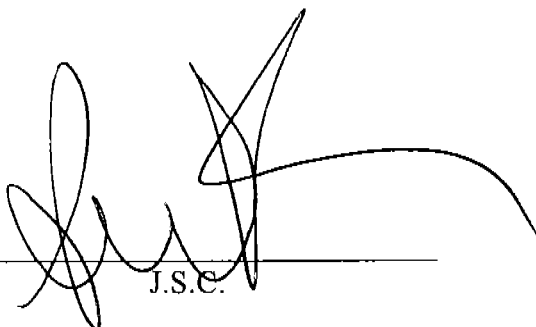
ORDERED that plaintiff's motion for summary judgment in lieu of complaint against defendant Beautri Realty Corp. is denied; and it is further

ORDERED that the issue of attorneys' fees shall be determined at trial; and it is further

ORDERED that the remaining parties are to appear before the Court for a preliminary conference, as scheduled at 9:30 a.m. on August 21, 2008 at 111 Centre Street, Room 1227, New York, N.Y.

ENTER:

Date: July 22, 2008  
New York, New York

  
\_\_\_\_\_  
J.S.C.

**FILED**  
JUL 24 2008  
COUNTY CLERK'S OFFICE  
NEW YORK