

Yu Sheng Jiang v Asia Plaza Corp.

2008 NY Slip Op 32090(U)

July 22, 2008

Supreme Court, New York County

Docket Number: 0604082/2005

Judge: Jane S. Solomon

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

PRESENT: HON JANE S. SOLOMON
Justice

PART 55

Index Number : 604082/2005
JIANG, YU SHENG
vs.
ASIA PLAZA
SEQUENCE NUMBER : 003
COMPEL

INDEX NO. 604082/2005
MOTION DATE 5-5-2008
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

his motion to/for _____

PAPERS NUMBERED
1-4
5-6
7-9

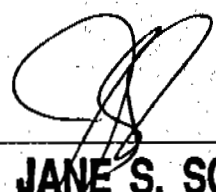
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

FILED
JUL 24 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/24/08


JANE S. SOLOMON S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

FOR THE FOLLOWING REASON(S):

REASON(S) REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 55

-----X

YU SHENG JIANG,

Plaintiff,

-against-

ASIA PLAZA CORPORATION, CHEN AND CHAN
RESTAURANT CORP and JIAN YUN CHEN

Defendants.

-----X

JANE S. SOLOMON, J.

Defendant Asia Plaza Corporation ("Asia Plaza"),

against whom the Complaint was dismissed by a decision dated
April 5, 2006, owns a building in Flushing, Queens, a portion of
which it leased to non-party Tianjin Goubuli USA, Inc.

("Tianjin") for use as a restaurant. Tianjin sublet the
building's cellar for use as a karaoke business to non-party
Shengda International, Inc., which later sold its business and
assigned its sublease rights to plaintiff (or an entity owned by
him) in January 2005. In or around August 2005, Tianjin's
restaurant closed, and Asia Plaza regained possession of the
premises and entered into a new lease with defendant Chen and
Chan Restaurant Corp. (the "Restaurant") for the same space.

Plaintiff claims that the Restaurant then contacted him
to demand a significant rent increase to continue the sublease,
and that the Restaurant's president, defendant Jian Yun Chen
("Chen"), was later arrested for unlawful eviction after turning

INDEX NO. 604082/2005

DECISION AND ORDER

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NEW YORK

off the electricity to plaintiff's space. Plaintiff contends that charges against Chen were not pressed as part of a proposed exchange for a new sublease, but that the parties ultimately were unsuccessful in negotiating an agreement due to bad faith on Chen's part. This action ensued, in which plaintiff sued defendants on several grounds, essentially for breach of a leasehold interest, or a right to one, in the space.

When the Complaint was dismissed as against Asia Plaza, the claims against the other defendants were severed. The remaining claims are against the Restaurant and Chen for unlawful eviction (for having the electricity turned off and changing the locks on the premises) and for tortious interference with business (for refusing to enter into a sublease). A compliance conference Order was issued on October 15, 2007, requiring all depositions to be held by December 18, 2007, discovery to be completed by January 18, 2008, and the Note of Issue filed by January 18, 2008. The Order also prevented defendants from seeking adjournments "because rather than appear at a conference called by the Part Clerk on 9/20/07 for today, due to parties' inaction," defendants' attorney Xian Feng Zou ("Zou") faxed a request for those dates to the court. Plaintiff subsequently served two additional Notices to Take Deposition of the defendants, scheduling depositions for November 29, 2007; Zou did not respond. Plaintiff now moves under CPLR §§ 3124 and 3126 for

an order compelling the remaining defendants to be produced for depositions as well as for sanctions against them for their noncompliance with the October 15, 2007 Order.

After the filing of this motion, Zou informed plaintiff's attorney that his office no longer represented the defendants. In support of his withdrawal, Zou attached a copy of a stipulation dated February 19, 2008, wherein Chen purports to agree to represent both himself and the Restaurant.

In opposition to this motion, Chen appears *pro se* and purportedly on behalf of the Restaurant. He denies negotiating with plaintiff for a new sublease and claims that Zou did not notify him of plaintiff's discovery demands. He requests that the Court dismiss the Complaint against the remaining defendants, arguing that if plaintiff suffered any loss, it was caused by the prior tenant, Tianjin. Chen also asserts that, in August 2005-- shortly after the Restaurant executed its lease with Asia Plaza-- he resigned as president of the Restaurant and transferred all of his interest in the company to another individual, Jian Hui Chen. In support of this assertion, he submits a copy of an "Officer/Director Resignation" dated August 12, 2005, in which he resigns as president, as well as a copy of the "Minutes of First Meeting of Shareholders" of the Restaurant dated August 15, 2005, in which Jian Hui Chen is listed as the Restaurant's Chairperson and as holder of 100% of its shares.

Although Chen's affirmation did not come in the form of a cross-motion, his arguments are persuasive and there does not appear to be a claim against him. Chen's actions as alleged in the Complaint and in the papers accompanying this motion all relate to services he performed on behalf of the Restaurant, and not on his own behalf. Accordingly, upon searching the record, the Complaint is dismissed as against him.

With respect to the Restaurant, it is noted that while Chen may represent himself, New York law prohibits a corporation from proceeding without counsel. Moreover, Chen's affidavit and exhibits call into question whether he was qualified to consent to Zou's withdrawal as the Restaurant's attorney, and it appears that no order has been entered relieving Zou as counsel.

The Restaurant then is in default on this motion, as well as in respect of its discovery obligations, the matter on which this motion is based. The striking of its Answer is the appropriate sanction. Plaintiff will be permitted to file a note of issue for an inquest. He is reminded that at an inquest he must establish his prima facie right to relief. Accordingly, it hereby is

ORDERED that the Restaurant's Answer is struck; and it further is

ORDERED that, upon searching the record, the action is severed and dismissed as against Chen, and the Clerk is directed

to enter judgment accordingly; and it further is

ORDERED that plaintiff's motion to compel defendants to appear for a deposition is denied in view of the foregoing; and it further is

ORDERED that the plaintiff shall file Note of Issue for an inquest against the Restaurant by August 31, 2008.

Dated: July 22, 2008

ENTER:



J.S.C.

JANE S. SOLOMON

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