

JJ Trading, LLC v Suntech II Intl., Inc.

2008 NY Slip Op 32499(U)

September 9, 2008

Supreme Court, New York County

Docket Number: 0601732/2006

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan
Justice

PART 36

Index Number : 601732/2006

JJ TRADING LLC

vs

SUNTECH INTERNATIONAL INC.

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

Cross motion
his motion to/for dismiss/summary judgment

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

Answering Affidavits — Exhibits

Replying Affidavits

PAPERS NUMBERED

1, 2

5

Cross-Motion: Yes No

3, 4

Upon the foregoing papers, it is ordered that this motion *→ cross motion* are
decided in accordance with the attached memorandum
of law.

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

FILED
SEP 15 2008
COUNTY CLERK'S OFFICE
NEW YORK

HON. DORIS LING-COHAN

Dated: 9/9/08

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 36

-----X
JJ TRADING, LLC,

Plaintiff,

-against-

SUNTECH II INTERNATIONAL, INC. d/b/a
PACRIM, POTSTICKER I, INC. d/b/a
CHINA MOON, SUNTEC INTERNATIONAL, INC.,
d/b/a WAVE, SUNTEC INTERNATIONAL, INC.,
d/b/a ZEN, CHINA COVE, INC. d/b/a
COVE, WJR RESTAURANTS INC. d/b/a CHIEF
HO, COGENT INTERNATIONAL, INC.,
YANTZE HUDSON, and WILLIAM HOU,

Defendants.

-----X
DORIS LING COHAN, J. :

Defendants William Huo (Huo) (sued here as William Huo) and Cogent International, Inc. (Cogent), move pursuant to CPLR 3211(a)(7), to dismiss the complaint for failure to state a cause of action. In addition, defendants Suntech II International, Inc. (Suntech II), d/b/a Pacrim, Potsticker I (Potsticker I), Inc., d/b/a China Moon, Suntec International (Suntec), Inc., d/b/a Wave and Zen, China Cove Inc. (China Cove), d/b/a Cove, WJR Restaurants Inc. (WJR) d/b/a Chief Ho, Yangtze Hudson (sued here as Yantze Hudson), Cogent, and Huo move for an order, pursuant to CPLR 5015, vacating the note of issue and, pursuant to CPLR 3124, compelling discovery. Plaintiff JJ Trading, LLC (JJ Trading) has cross-moved for an order granting summary judgment.

Motion to Dismiss of Defendants Huo and Cogent

The complaint, consisting of seven separate causes of

Index No. 601732/06

Motion Seq. 001

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action, alleges that plaintiff delivered meat products at defendant Huo's request to defendants Suntech II, Potsticker I, Suntec, China Cove, WJR, and Yangtze Hudson during specific periods between 2003 and 2005. [Verified Complaint, ¶¶ 25, 34, 43, 52, 61, 70, and 79]. Huo is the alleged owner and president of the above-mentioned companies. [Verified Complaint ¶¶ 18-24]. The complaint further alleges that the various defendants failed to pay specific amounts of money totaling approximately \$135,000, despite numerous demands made by plaintiff. [Verified Complaint ¶¶ 32, 41, 50, 59, 68, 77, 86].

Huo moves to dismiss, arguing lack of privity of contract with plaintiff and that the various defendants that allegedly purchased and failed to pay for the meat received from plaintiff, are corporations. Huo states under oath that he did not personally guarantee the corporations' obligations, that he never personally received any goods from the plaintiff, and that, as an officer and shareholder of the corporations, he is shielded from liability for their debts.

It is undisputed that the defendants, other than Huo, are corporations. In response to Huo's motion, Pei Fang (Stephanie) Chuang (Chuang), the president of plaintiff JJ Trading, states that she had spoken with Huo numerous times concerning the various transactions and that "[h]e represented himself as the owner of these restaurants. He personally assured me that payment would be

made. At no time did he indicate that he was acting in a corporate capacity." [Affidavit of Pei Fang (Stephanie) Chuang, ¶ 5].

Generally, officers and shareholders of corporations will not be held personally liable for actions taken in furtherance of the corporation's business because

everyone in business knows that an individual stockholder or officer is not liable for his corporation's engagements unless he signs individually, and where individual responsibility is demanded the nearly universal practice is that the officer signs twice -- once as an officer and again as an individual.

Salzman Sign Co. v Beck, 10 NY2d 63, 67 (1961). This is true even where the corporate officer acts for the corporation, since an officer will not be held liable for actions taken in furtherance of a disclosed principal "unless there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal." *Worthy v New York City Housing Authority*, 21 AD3d 284, 286 (1st Dept 2005) (citation omitted).

Here, as noted above, it is not disputed by plaintiff that defendants, other than Huo, are corporations. Moreover, Chuang does not submit any written documentation indicating that Huo personally guaranteed the debts of the various corporations plaintiff sold meat products to. Additionally, to the extent that plaintiff seeks to argue that Huo should be held personally liable because he did not disclose that he was acting as an agent, the

court notes that, in her affidavit, Chuang states that Huo represented himself as the owner of the restaurants, and she does not specifically state that Chuang was acting in his individual capacity. Moreover, Chuang specifically indicates that "[a]ll of the items were ordered through defendant Cogent, at who's office payment was always made. All of the items were delivered, as per Cogent's instructions, directly to the restaurant(s)". [Chuang Affidavit, ¶4]. Huo's motion to dismiss the complaint as against him personally is granted as there is no proof or allegations that Huo acted in his individual capacity when dealing with plaintiff.

With respect to defendant Cogent, the complaint alleges only that Cogent is a domestic business corporation existing under the laws of New York with a principal place of business at 2 South End Avenue, New York, New York, and that Cogent "is and was at all times mentioned, engaged in the restaurant business." [Verified Complaint, ¶ 14]. This allegation taken by itself, would not be sufficient to maintain a cause of action, since it alleges nothing more than that Cogent is in the restaurant business.

On a motion to dismiss, the complaint should be liberally construed most favorably for the plaintiff and all of the factual allegations must be accepted as true. See *Leon v. Martinez*, 84 NY2d 83, 87-88 (1994); *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977).

Defendants submit the affidavit of Huo, which states that

Cogent has never engaged in the food or restaurant business, but rather, is incorporated to run a semi-conductor business.

[Affidavit of William Huo, dated February 14, 2008, ¶3].

Additionally, defendants submit a series of documents to support their contention that Cogent is in the semi-conductor business, and not the restaurant business. [Reply Affirmation, Exhs. A, B, C & D].

However, in opposition to a motion to dismiss for failure to state a cause of action, the court may consider plaintiff's affidavits submitted in opposition to the motion, to amplify the complaint. *Rimberg & Assoc., P.C. v Jamaica Chamber of Commerce, Inc.*, 40 AD3d 1066, 1067 (2d Dept 2007), citing *Rovello v Orofino Realty Co.*, 40 NY2d 633 (1976). Here, in her affidavit opposing the motion to dismiss, regarding the meat ordered by the various restaurants, Chuang states: "All of these items were ordered through defendant Cogent, at who's office payment was always made. All of the items were delivered, as per Cogent's instructions, directly to the restaurant(s)." [Chuang Affidavit, ¶ 4].

Additionally, plaintiff submits a copy of a check from Cogent, dated February 8, 2008, payable to Kenneth Sugarman ("Sugarman"), which contains the notation "H&L case, 2/15/08 pmt. for all 7 cases." According to Sugarman, counsel for plaintiff, the check was a payment to H&L Baltic for supplies, although no explanation is given as to what kind of company H&L Baltic is, or what kind of

supplies were purchased. Plaintiff also cites a decision in the case of *New Talwah Co., Inc. v Cogent International, Inc.* (Civ Ct, New York County, April 11, 2007, Jaffe, J., Index No. 44609/06), in which, after a trial, the court found Cogent liable for food to be delivered to several restaurants.

Although more evidence will be necessary for plaintiff to establish Cogent's liability at trial, given that the pleadings must be construed most favorably toward plaintiff on a motion to dismiss for failure to state a cause of action, plaintiff has sufficiently alleged involvement by Cogent to withstand defendant's motion to dismiss.

Defendants' Motion to Vacate the Note of Issue and to Compel Discovery

Defendants' motion to vacate the note of issue and to compel discovery is denied as untimely since defendants failed to seek vacatur of such note of issue within 20 days of its filing as required. See 22 NYCRR §202.21(e).

Moreover, on February 22, 2008, Pat Longobucco, an attorney who allegedly appeared before this Court for a discovery conference, of counsel, to attorneys for defendants, signed a stipulation waiving discovery and specifically providing for the filing of a note of issue. Although movants now claim that the signing of such stipulation was in error, defendants failed to move to vacate such "so ordered" stipulation, and did not notify this Court of the alleged error, until the filing of the within

motion, over one month after the signing of such stipulation. Moreover, with respect to discovery conferences, this Part's Rules require that "Counsel appearing shall be prepared to discuss all outstanding discovery issues, as well as the facts of the case and settlement options"; thus, defendants' assertion that appearing counsel lacked the authority to enter into the stipulation and waive discovery, violates this Part's rules. Further, in arguing that further discovery is needed including depositions, defendants fail to explain why the parties did not comply with the October 19, 2007 preliminary conference order, which required that depositions of the parties be held on February 4, 2008. Thus, defendants' motion to vacate the note of issue and compel discovery is denied.

Plaintiff's Motion for Summary Judgment

On a motion for summary judgment, the burden is on the movant to establish, as a matter of law, that it is entitled to summary judgment and that no issues of material fact exist. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

Plaintiff moves for summary judgment in its favor against "defendants 1-6 and 8." Since the defendants are not numbered in any of the papers, the court is left to guess against which defendants plaintiff seeks judgment in its favor. This alone would be a sufficient basis on which to deny plaintiff's motion. Additionally, plaintiff appears to be basing its motion on the

Chuang affidavit and the large number of documents annexed to her affidavit, which appear to be invoices of JJ Trading. Since those invoices are almost exclusively written in Chinese (some of the invoices contain the name of a restaurant in English) and no translation has been supplied, they are obviously an inadequate basis for obtaining summary judgment, even against the individual restaurant defendants. Moreover, plaintiff failed to supply a copy of the pleadings as required. See CPLR 3212. Thus, plaintiff has failed to meet its burden and its motion for summary judgment is therefore denied.

Accordingly, it is

ORDERED that the motion to dismiss of defendant William Huo is granted and the complaint is dismissed as against such individual defendant with costs and disbursements to defendant as taxed by the Clerk of the Court on submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motion to dismiss of defendant Cogent International, Inc. is denied; and it is further

ORDERED that defendants' motion to vacate the note of issue and to compel discovery is denied; and it is further

ORDERED that plaintiff's cross motion for summary judgment is denied; and it is further

ORDERED that within 30 days of entry of this order, defendant
Huo shall serve a copy upon all parties with notice of entry.

Dated: September 9, 2008



Hon. Doris Ling-Cohan, J.S.C.

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