

Saichi Huang v Estate of Fotopoulos

2009 NY Slip Op 31165(U)

May 19, 2009

Supreme Court, New York County

Docket Number: 116837/08

Judge: Edward H. Lehner

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

PRESENT: EDWARD H. LEHNER
Justice

PART 19

SAICHI HUANG, ET AL.

INDEX NO.

116837108

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

HARRY C. FOTOPoulos,
ET AL.

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

PAPERS NUMBERED

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

FILED

MAY 20 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: MAY 19 2009

[Signature]
J.S.C.

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 CITY OF NEW YORK
COUNTY OF NEW YORK: PART 19

-----X
SAICHI HUANG, as executrix and as residuary
Beneficiary of the ESTATE OF CHENG HUANG,

Plaintiff,

Index No.:
116837/08

-against-

THE ESTATE OF HARRY C. FOTOPOULOS,
DIMITRIOS FOTOPOULOS, as executor to the
ESTATE OF HARRY C. FOTOPOULOS; DIMITRIOS
FOTOPOULOS, individually; 470-86 TRE REALTY
CORP; 1392 OGDEN ESTATES CORP.; 3545 REALTY
CORP.; 907 TRE REALTY CORP.; SOUTH CENTRAL
REALTY CORP.; 4126 ASSOCIATES, INC.;
99 CENTRAL AVE LLC; TREMONT 470 LLC;
550 REALTY COMPANY, LLC; EAST TREMONT
PROPERTIES, INC.; SINGH and FRIENDS, LLC;
"JOHN DOE" AND/OR "JANE DOE"; and "XYZ CORP.,

Defendants.

-----X
EDWARD H. LEHNER, J.:

BACKGROUND

Plaintiff moves for a preliminary injunction to enjoin defendants from transferring, selling, offering for sale, soliciting offers for the purchase of, distributing, using, assigning, foreclosing or otherwise discharging the purchase money mortgage for the premises located at 1392-1404 Ogden Avenue, Bronx, New York, without first obtaining the written consent of plaintiff. Defendants cross-move, pursuant to CPLR 3211 (a) 1, 4, 5, and 7 to dismiss the complaint against them.

Plaintiff, the widow and beneficiary of the late Cheng Huang, asserts that she is bringing a shareholders' derivative suit, pursuant to New York Business Corporation Law § 720, alleging, in her amended complaint, seven causes of action: (1) breach of fiduciary duty; (2) ultra vires; (3) fraud; (4) conversion of corporate assets; (5) accounting; (6) rescission and injunctive relief to set aside a conveyance; and (7) permanent injunction. The basis of her suit is that she has not received any distributions from the defendant corporations, and that the corporations have sold assets without her knowledge or consent.

Plaintiff alleges that, as the beneficiary of her late husband, she is a shareholder in the defendant corporations. As evidence of this corporate interest, plaintiff has provided minutes of shareholder meetings, dated July 30, 1986, in which Cheng Huang and Harry Fotopoulos resolved and agreed that each owned one-half of the following corporations: 1404 Central Realty Corp., South Central Realty Corp., 907 Tre Realty Corp., 3545 Realty Corp., and 470-86 Tre Realty Corp. Plaintiff has also attached to her papers an agreement, purportedly signed by Cheng Huang and Harry Fotopoulos in January, 1985, that states that each of those parties is to own one-half of the property located at 99 South Central Avenue, Spring Valley, New York.

Cheng Huang died in 1989, leaving a multi-million dollar estate. In the estate accounting and estate tax return, signed by plaintiff, none of the subject properties or corporations are mentioned as being owned at the date of death by Cheng Huang.

In her papers, plaintiff also includes two checks made out to her as payee from

defendant 907 Tre Realty Corp., one dated November 26, 2002, for \$ 35,000, and one dated June 10, 2003, for \$15,000. There is no indication on these instruments the purpose for which the checks were drawn.

Harry Fotopoulos died in 2005. In March of 2006, plaintiff filed a claim against his estate in the Surrogates Court of Rockland County seeking the exact same amount, \$3,775,000, that she is claiming in the instant action, representing her alleged share of the value of the income and sale price of properties held by the defendant corporations. That claim was rejected by the executor of the estate in 2006, on the grounds that Cheng Huang was not a shareholder of the subject corporations at the time of his death. Defendants also state that the claim against the estate in 2006 was the first claim ever made by plaintiff for an interest in the corporations.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211, the pleading should be liberally construed, the facts alleged by the plaintiff should be accepted as true, and all inferences should be drawn in the plaintiff's favor (*Leon v Martinez*, 84 NY2d 83 [1994]). However, the court must determine whether the alleged facts "fit within any cognizable legal theory." *Id.* at 88. Further, "[a]llegations consisting of bare legal conclusions ... are not presumed to be true [or] accorded every favorable inference." *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 (1st Dept 1999), *affd* 94 NY2d 659 (2000).

Plaintiff's efforts to designate the instant matter as a shareholders' derivative suit are ineffective for several reasons. If the gravamen of the complaint is injury to the corporation, the suit is derivative. However, if the injury is to the stockholder individually and not to the corporation, the suit is individual in nature. *See Marx v Akers*, 88 NY2d 189 (1996). Here the amended complaint asserts that the action is derivative in nature and counsel so stated at oral argument (tr. p. 7). However, plaintiff has only asserted injuries to herself, as evidenced by both the caption and the wherefore clauses. "A complaint the allegations of which confuse a shareholder's derivative and individual rights will, therefore, be dismissed" [*Abrams v. Donati*, 66 NY2d 951, 953 (1985)].

The sine qua non of a derivative action is that the plaintiff show that he or she is a shareholder of the corporation whose rights he or she is asserting. The board of director minutes from 1986 indicate that plaintiff's husband was a 50% owner of the corporations, but, three years later, his estate tax return and Surrogate's Court accounting do not indicate that, at the date of death, he was possessed of such an interest. It is noted that these tax and accounting documents are extremely detailed with respect to the decedent's holdings. Furthermore, the two checks submitted by plaintiff made out to her by one of the corporate entities, in and of themselves, with no more documentation, are insufficient to demonstrate that the corporation was making a distribution to plaintiff as a shareholder. Plaintiff's bare legal conclusions that are contradicted by the documents supplied are insufficient to evidence her status as a shareholder. *See, Tal v Malekan*, 305 AD2d 281 (1st Dept 2003).

With respect to any individual claim of plaintiff, Surrogate's Court Procedure Act

(SCPA) § 1810 provides:

“Nothing in this article shall prevent a claimant from commencing an action on his claim at law or in equity, provided that where a claim has been presented and rejected or deemed rejected pursuant to 1806 in whole or in part the action must be commenced within 60 days after such rejection”

SCPA § 1806 states:

“(3) If the fiduciary shall fail to allow the claim within 90 days from the date that it has been presented to him, the claim shall be deemed to have been rejected.”

Plaintiff presented her claim to the estate of Harry Fotopoulos on March 29, 2006, which was subsequently rejected. The effect of a fiduciary's rejection of a claim is to require the claimant to commence an action in any court of competent jurisdiction within 60 days after the rejection, in the absence of which the matter must be adjudicated in the Surrogate's Court. Since plaintiff commenced the present action, which seeks the same relief on the same grounds as her claim filed against the estate of Harry Fotopoulos, more than 60 days after that claim was rejected, the claim is time-barred in this court. *Lazan v City of New York*, 213 AD2d 381 (2d Dept 1995).

Based on the foregoing, plaintiff's motion seeking a preliminary injunction is denied as moot.

CONCLUSION

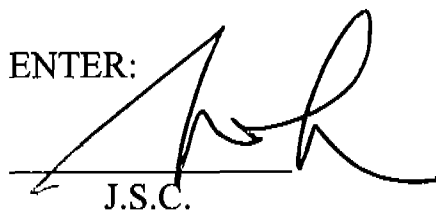
It is hereby

ORDERED that defendants' cross motion to dismiss the complaint is granted and the Clerk is directed to enter judgment accordingly, and it is further

ORDERED that plaintiff's motion for injunctive relief is denied as moot.

Dated: May 19, 2009

ENTER:



J.S.C.

FILED
MAY 20 2009
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