

**Kyusung Cho v Youn Tae Yoo**

2009 NY Slip Op 32091(U)

September 8, 2009

Supreme Court, Nassau County

Docket Number: 009057/2009

Judge: Ira B. Warshawsky

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**SHORT FORM ORDER**

**SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NASSAU**

**PRESENT:**

**HON. IRA B. WARSHAWSKY,  
Justice.**

**TRIAL/IAS PART 9**

**KYUSUNG CHO and YOUNG SOOK CHO, a/k/a  
YOUNG SOOK YOO,**

**Plaintiffs,**

**INDEX NO.: 009057/2009  
MOTION DATE: 06/19/2009  
MOTION SEQUENCE: 001, 002  
and 003**

**-against-**

**YOUN TAE YOO, DANIEL LEE, ROOSEVELT  
AVENUE CORP., GOLDSTONE MANAGEMENT  
CORPL, RICHARD SUN JIN, DO YOUNG KIM,  
VILLAGE GROUP 30 INC., MOUNTAIN U.S.A.  
CORPORATION, MOONSTONE MANAGEMENT  
CORPORATION, "JOHN DOE" and "JANE DOE",  
said names being fictitious and presently unknown,**

**Defendants.**

**Motion Sequence # 001**

The following papers read on this motion:

Order to Show Cause for Injunctive Relief .....	1
Summons and Verified Complaint .....	2
Amended Summons and Verified Complaint .....	3
Affirmation in Opposition of Robert Gumenick .....	4
Affirmation of Thomas Kim, Esq. in Opposition .....	5
Daniel Lee Affidavit in Opposition .....	6
Youn Tae Yoo Affidavit in Opposition .....	7
Memorandum of Law on behalf of Yoo in Opposition .....	8
Affirmation of Miriam Brier, Attorney for Queens Co. Receiver .....	9
Correspondence of Miriam M. Breier, Esq. dated June 24, 2009 .....	10
Reply Affirmation of Michael A. Leon in Further Support of Motion .....	11
Second Reply Affirmation of Michael A. Leon seeking Default .....	12

Motion Sequence # 002

The following papers read on this Motion:

Order to Show Cause to Vacate or Modify Order of May 11, 2009 .....	1
Affirmation of Michael Leon in Opposition to Motion to Modify .....	2

Motion Sequence # 003

The following papers read on this Motion:

Motion on behalf of Defendants Richard Sun Jin and Do Young Kim to Dismiss .....	1
Affirmation of Michael A. Leon in Opposition to Motion .....	2
Plaintiffs' Memorandum of Law in Opposition to Motion .....	3
Reply Affidavit of Do Young Kim .....	4

**PRELIMINARY STATEMENT**

Plaintiffs' Application for Injunctive Relief

Plaintiffs in Motion Sequence # 01 move by Order to Show Cause for the following relief:

- (a) prohibiting and restraining defendants from removing any funds or assets whether held jointly in whole or in part, from any bank, brokerage firm, or other institution, wherever situated and without limitation, and from encumbering, pledging, selling or otherwise transferring or hypothecating any and all assets, whether held jointly in whole or in part, wherever situated and without limitation;
- (b) enjoining and restraining defendants and/or their agents, servants, employees and all persons acting on their behalf from disposing, transferring, encumbering, altering or alienating any and all assets of defendants;
- (c) directing that the defendants disclose the location of any and all of their assets and wheter they have been transferred, encombered, pledged, sold or otherwise hypothecated and if so, indentify (sic.) The location of such assets; and
- (d) granting Plaintiffs such other and further relief as the Court deems just and proper during the pendency of Plaintiffs' underlying action against defendants.

Plaintiffs allege that the Defendants participated in a scheme to defraud them out of

\$6,150,000 loaned to Daniel Lee, Roosevelt Avenue Corp., Goldstone Management Corp., Village Group 30, Inc. and New York Group, Inc., collectively "Lee Defendants." Plaintiffs further allege that Defendant Yoo, acting as their counsel, encouraged them to lend money to the Lee Defendants, all the while acting on their behalf to defraud Plaintiffs. While they loaned \$2,000,000 in July 2007, and an additional \$1,000,000 in November 2007, the security for which was a security interest in the Roosevelt Property, a shopping center in Flushing, New York, and a mortgage on property located at 27 Fairview St., Palisades Park, New Jersey, the Mockler Property, they were instructed by Yoo not to record a mortgage on the Roosevelt Property, in that a UCC was as effective, and they would avoid payment of a mortgage tax.

Thereafter, on July 30, 2008, Defendant E.R. Holding filed a \$3,000,000 mortgage against the property which was the security for their loans. Similarly, Defendants Richard Su Jun and Do Young Kim ("Kim Parties") filed a \$3,200,000 mortgage on the same property on January 3, 2008, and Defendant Million New York, Inc. filed a \$3,600,000 mortgage against the Roosevelt Property on August 15, 2008, giving each of them priority over the Plaintiffs' loans.

The Plaintiffs made a second loan to Lee in January 2008, again allegedly at the request of Yoo, and were to receive security in the form of stock certificates in Goldstone Management Corporation ("Goldstone") and Roosevelt Avenue Corporation ("Roosevelt"). The loan amount was \$3,000,000.

In conjunction with an October 16, 2008 meeting among Plaintiff, Yoo, Lee, and Peter Jeon, Esq., acting on behalf of Lee, Plaintiff agreed to waive interest on the First and Second Loans in return for the payment of \$3,000,000 and the discharge of the mortgage on the Mockler Property. He signed the Escrow Agreement, but claims that despite his direction to Yoo, the latter delivered the agreement to Jeon, even though Plaintiff did not receive the \$3,000,000. Plaintiffs made a further loan of \$150,000 to Lee in July 2008.

Foreclosure proceedings against the Roosevelt Property commenced in September 2008. On September 30, 2009 Lee executed a confession of judgment in favor of the Kim Parties, thereby further diluting the interest of the Plaintiff wife in the property. A Receiver has been appointed in conjunction with the foreclosure proceeding.

The motion also references an investment made by Kyusung Cho in the summer of 2006. This involved \$1,500,000 paid to become an investor in Sharon Springs, Inc., a company in

which Yoo participated as shareholder, director and officer.

Opposition of Daniel Lee

Lee opposes the imposition of an injunction, claiming that the loans made by the Plaintiffs were straight-forward transactions, in which the Plaintiffs received promised interest payments of 20%, recognizing their ability to produce “hard money” at a time when financial institutions were reeling from a financial crisis which limited their ability to advance funds. The Plaintiffs, operators of Dongbu Tour & Travel, Inc., a tenant of Roosevelt Avenue Corp., at “Korea Village”, are claimed to have approached Lee to loan money when traditional financing became less available.

Lee takes umbrage at the conclusory use of such words as “defraud” and “Ponzi scheme” to characterize his actions. He claims that there are presently 4 other related actions in which he and the Plaintiffs are parties, and that similar relief sought by the Plaintiffs in Queens County has been denied.

Lee confirms that the “First Loan” in the amount of \$3,000,000 was secured by a November 26, 2007 Promissory Note, made by him and Roosevelt Avenue Corp, and was guaranteed by Village Group 30. The note was secured by a mortgage on 27 Fairview Street, Palisades Park, New Jersey, “New Jersey Property”, referred to as the “Mockler Property” by Plaintiffs. There was no mortgage issued affecting the Roosevelt Property at that time. Subsequently, on June 3, 2008, Plaintiffs received a mortgage on the Roosevelt Property, intended to be a substitute mortgage for that on the Mockler Property.”

The “Second Loan” was also in the principal amount of \$3,000,000, and is the subject of an action entitled *Kyusung Cho v. Goldstone Management Corp.*, in which Lee claims that a similar request for injunctive relief was denied. While acknowledging that payments under the second loan have not been made, Lee claims that the Plaintiffs have not made a 7-day demand so as to trigger a default. He also alleges that pursuant to the Loan Agreement, the Plaintiffs have chosen to apply rent to the payments due under the Agreement, and have not been paying rent on behalf of Dongbu Tour & Travel, a tenant in the Roosevelt Avenue Property.

In June 2008 Roosevelt Avenue Corp. executed a replacement note for \$3,000,000, and secured payment with two mortgages on real property, including Korea Village (Roosevelt Property). He also claims that in response to continued demands for repayment, the Plaintiffs

received a second mortgage on a hotel in Niagara Falls, Canada.

Lee claims that there is no evidence of fraud, collusion, or a Ponzi scheme, and that the Lee Defendants have no intention to avoid their responsibilities under the loan agreements. He states that he and the entities with which he is involved own real estate with a value of over \$50,000,000, but that if the preliminary relief sought by Plaintiffs is granted, it should be secured by an adequate bond or undertaking.

Opposition of Richard Sun Jin and Do Young Kim

These Defendants take the position that there is no specific allegation of wrongdoing by them, and that the Cho affidavit in support of the motion is almost exclusively directed at allegations of wrongdoing by the former attorney in connection with loans to the Lee Defendants. There is no allegation that money advanced by movants was directed to these Defendants, or that it was used to fund a "Ponzi scheme" to pay off earlier creditors with investments by later ones.

They point out that there are five mortgages of record against the Roosevelt Property as follows:

<u>Mortgagor</u>	<u>Principal Amount</u>	<u>Recording Date</u>
Harvest International Bank	\$14,000,000	October 7, 2005
E.R. Holdings, LLC	\$3,000,000	July 30, 2007
Kim Mortgage	\$3,200,000	February 6, 2008
Million New York, Inc.	\$3,600,000	August 27, 2008
Young Sook Cho	\$3,000,000	October 21, 2008

Movants Cho are fifth in the line of recordation because they did not receive a mortgage on the Roosevelt Property until June 2008, although they advanced the First Loan in July and November 2007. They received a mortgage on the Mockler Property, but not on the Roosevelt Property, for which they received a stock pledge.

They further take the position that the Kims are similarly situated to Cho. They point to the acknowledgment by Lee of an \$8,000,000 antecedent debt to Kims, as evidenced by a confession of judgment for \$4,800,000 and the February 6, 2008 mortgage of \$3,200,000, and that this debt dated at least from April 21, 2006. While not presently able to demonstrate the advance of the full \$8,000,000, counsel annexes three cashier's checks, each for \$1,000,000, payable to Roosevelt Management Corp., and claims that Plaintiffs have not challenged the

existence of an additional \$5,000,000 in advances from Kim to Lee, or one of his entities.

Counsel then examines each of the Thirteen Causes of Action and claims that none of them relate to the Kim Defendants. Rather, they consist of allegations against Yoo and the Lee Defendants for Breach of Contract, Fraud in the Inducement, Negligent Misrepresentation, Unjust Enrichment, Promissory Estoppel, Conversion, Conspiracy to Commit Conversion, Aiding and Abetting Conspiracy, Constructive Trust, Breach of Fiduciary Duty by Yoo, Aiding and Abetting Breach of Fiduciary Duty against Lee, and Accounting. None of these allegations, or the Cho Affidavit, enumerate any acts of wrongdoing by the Kims. Nor, in the request for Injunctive Relief, are there any allegations that the Kims have done, or are about to commit an act which would cause irreparable harm to the Plaintiffs, and neither the Complaint, nor the Amended Complaint seek injunctive relief. In addition, the action is for money damages, for which injunctive relief is inappropriate.

Opposition of Youn Tae Yoo

Defendant Yoo submits an affidavit and memorandum of law in opposition to the motion for injunction. The affidavit portrays Plaintiffs as sophisticated investors who introduced Lee to him. He denies any complicity in a plot to defraud Plaintiffs of \$6,150,000, and insists that whatever financial arrangements were made, including the acceptance of a financing statement instead of a mortgage on the Roosevelt Property, was entirely the decision of the Plaintiffs and Lee. The choice of a UCC filing as opposed to a mortgage was based upon a calculation of savings on the mortgage tax and the interest rate was raised from 18% to 20% to account for the additional risk.

He claims that Plaintiffs received the following as security for their loans:

- Mortgage on New Jersey (Mockler) Property;
- UCC financing statements on two buildings in Queens;
- UCC financing statement on building in Chelsea neighborhood of Manhattan;
- Mortgage on hotel in Canada;
- Pledges of Stock in Roosevelt Avenue Corporation and Goldstone Management;
- Personal Guaranty.

Plaintiffs and Lee negotiated a Discharge of Mortgage on the New Jersey Property in exchange for Mortgages on the Queens Properties, but Cho allegedly destroyed the Discharge

before it was recorded. Yoo alleges that Plaintiffs have not established a likelihood of success against him, or that they will suffer irreparable injury in the absence of an injunction. Neither have they shown that the balance of equities is in their favor, and, on the contrary, the grant of such injunction against Yoo would force him to close his business.

The memorandum of law sets forth the standards for the issuance of a preliminary injunction, and claims that they have not been met in this action. In addition, Plaintiffs have not shown that they will suffer irreparable harm in the absence of an injunction, and that they have an adequate remedy at law for monetary damages, and that they have not established actual damages at this point.

*Affirmation of Counsel for Queens Co. Receiver with Respect to Stay*

Counsel for the Court-appointed Receiver in the Queens Foreclosure Proceeding states that the Defendants Lee and Roosevelt have used the Order of this Court dated May 11, 2009 as justification for their refusal to turn over to the Receiver the sum of \$517,600 representing security deposits pursuant to the Order of Hon. Jaime A. Rios, J.S.C. The affirmation points out that the Order Appointing a Receiver was issued in December 2008, well before the temporary restraining order contained in the May 11, 2009 Order.

*Affirmation of Thomas Kim in Opposition to Motion on behalf of Village Group 30*

Village Group 30, Inc. is a corporation formerly owned by Daniel Lee. Village Group is Plaintiff in a Queens County action pending against Kyusung Cho and Yoon Tae Yoo, the Plaintiffs in this action. In that action they are seeking a Discharge of Mortgage on the New Jersey Property, which Cho signed in return for two mortgages on 150-24 Northern Boulevard, Flushing, NY (Roosevelt Property) and 552 W. 24<sup>th</sup> Street, New York, NY (Chelsea Property).

Counsel claims that Cho executed the Discharge, but because Yoo, the notary, did not have his notary stamp, the parties left without the document being notarized. Yoo promised to complete the notarization and forward the document, but before he could do so, Cho took the Discharge and has refused to return it. The existence of the unsatisfied mortgage precludes sale of the property and because the property is undeveloped, it generates no income with which to pay the mortgage.

Village Group 30 is no longer owned by Lee, since he turned over its stock ownership to a number of investors. It was at the request of the investors that Lee agreed to remove the

mortgage, leading to the previously stated-facts.

Village claims that Plaintiffs have no claim against it. The mortgage on the property was replaced by two other mortgages, and it is they who are entitled to relief in the form of a fully-executed Discharge from Cho.

Reply Affirmation in Further Support of Injunctive Relief

Counsel reiterates the circumstances surrounding the loans totaling \$6,150,000. In July 2007, the First Loan of \$2,000,000 was secured by a security interest in the Roosevelt Property and a Mortgage on the Mockler Property. In November 2007 Mr. Cho loaned an additional \$1,000,000. No payments have been made on account of these loans.

In January 2008 Mrs. Cho loaned an additional \$3,000,000 to Lee and the Lee Defendants in return for a promissory note and stock pledge agreement for shares in property known as the Goldstone Property. Lee personally guaranteed the second loan. On June 3, 2008 Lee provided Mrs. Cho with additional security interest in the Roosevelt Property and a mortgage on 552 W. 24<sup>th</sup> Street. These are claimed to be as additional security for the second loan.

Counsel claims that the Discharge of the Mortgage on the Mockler Property was not in exchange for the security interest in the Roosevelt Property and the mortgage on the Chelsea Property; rather, Lee was supposed to satisfy the \$3,000,000 mortgage in exchange for the Discharge, which he did not do. He claims that Village Group 30's claim that they have performed is without merit.

Plaintiffs' position is that they have shown a likelihood of success on the merits, that they will suffer irreparable harm if an injunction not granted, and that the balance of equities favors Plaintiffs.

Reply Affirmation in Further Support of Injunctive Relief against Defendant Yoo

In this submission Plaintiff reiterates a previously requested default judgment against the Lee Defendants and Defendant Yoo, based upon late service of their responses to the motion. As counsel correctly states, the motion was adjourned to enable Plaintiffs to submit reply papers. As stated by counsel, they have nothing further to add and rely on their previously served application for injunctive relief, but reiterates that they have shown likelihood of success on the merits, irreparable harm in the event of a denial of the injunction, and a balancing of equities in their favor.

There are certainly conflicting stories as to how Mr. Lee and Plaintiffs became involved in these transactions, whose idea it was to accept a security interest as opposed to a mortgage on the Roosevelt Property, and whether the signed but not notarized Discharge of the Mortgage on the Mockler Property was in exchange for other forms of security or payment of the \$3,000,000 principal balance of the mortgage.

Application of Defendants Richard Sun Jin and Do Young Kim to Vacate and Modify May 11, 2009 Order

This application on behalf of Defendants is for a modification or vacatur of the restraint on the above-named Defendants insofar as it is “(o)rdered, that pending further order of the Court, defendants are hereby enjoined, restrained and prohibited, or any person acting on their behalf, from transferring any and all assets of defendants.” It is noted that by stipulation dated May 27, 2009, these Defendants were authorized to draw no more than \$10,000.00 per month for living expenses from any previously restrained account. The Court will nevertheless deal with the application as one seeking to vacate the temporary restraining order in its entirety.

Motion on behalf of Richard Sun Jin and Do Young Kim for Dismissal

Motion Sequence # 3 is on behalf of the above defendants for dismissal pursuant to Civil Practice Law and Rules §§ 3211 (a)(1) and 3211 (a) on the ground that the complaint fails to state a cause of action against them. The affidavit of the individual Defendants assert that the complaint has been filed without any allegation of conduct on their part which would justify any recovery against them. To the contrary, they claim that they are, similar to Plaintiffs, victims of Defendant Lee and his affiliated companies. Among the Plaintiffs’ claims is that their counsel, Defendant Yoo, was negligent in permitting other subsequent loans obtain priority over theirs. These Defendants are the mortgagees in one of these loans.

The Defendants claim, and the complaint and amended complaint do not allege, that Plaintiffs borrowed money from them, that they had any contractual relationship with the Plaintiffs, or that they received any money from Plaintiffs. They had no participation in any fraud or scheme to induce Plaintiffs to invest with Lee, or that they made any representation to Plaintiffs with respect to any of the transactions involved in this proceeding.

The Plaintiffs oppose the motion to dismiss, claiming that the complaint adequately states causes of action against the moving Defendants in that it details how they participated in a

“Ponzi scheme” to defraud Plaintiffs out of \$6,150,000, orchestrated by the Lee Defendants and Defendant Yoo. The claim is that the Kim Defendants filed a \$3,200,000 “purported mortgage” against the Roosevelt Property on January 3, 2008, while Plaintiffs received only a security interest involving the Roosevelt Property on or about January 22, 2008. They claim further that Defendant Lee issued a confession of judgment to Kim Defendants on September 30, 2008, which was assessed against the Roosevelt Property, and this confession was satisfied by the \$3,200,000 mortgage which was senior to the mortgage eventually filed on behalf of Plaintiffs.

Plaintiffs allege that it was likely the \$3,000,000 received from them which enabled Lee to resolve the confession of judgment, and subordinated Plaintiffs’ interest to the \$3,200,000 Kim mortgage.

The Kim Defendants reply that they have a long-standing relationship with Lee and the Lee Defendants, who were indebted to them in the amount of \$8,000,000. The mortgage in the amount of \$3,200,000, coupled with the confession of judgment in the amount of \$4,800,000 account for this indebtedness.

They point out that the mortgage of \$3,000,000 issued to the Plaintiffs was dated in June, 2008, but not recorded until October, placing them behind the Kim mortgage, but through no fault of the Kims.

## DISCUSSION

### Motion Sequence # 1

The issuance of preliminary injunctions is governed by Civil Practice Law and Rules § 6301, which provides as follows:

A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff’s rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.

As with attachments, which are governed by Article 62 of the Civil Practice Law and Rules, standards sufficient for a pleading will not sustain the imposition of an injunction. The showing on an application must be convincing, and show that it is either a cause of action for specific subject matter, or a cause of action for a permanent injunction. Movant must show a likelihood of success on the merits, irreparable harm in the absence of an injunction, and the balancing of equities in his favor. Importantly, if the movant has an adequate remedy at law, the application for injunctive relief should be denied.

Plaintiff's application is consistent with a claim for attachment under Civil Practice Law and Rules § 6201 (3), where "the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts;" The mere fact that a party is assigning or disposing of property is not adequate to justify an attachment. (*Laco X-Ray Systems, Inc. v. Fingerhut*, 88 A.D.2d 425, 429 [2d Dept. 1982]). The party seeking relief must submit evidence that the intention was to defraud a creditor or frustrate the enforcement of any judgment rendered in its favor.

The complaint in this action alleges 13 causes of action, for each of which Plaintiffs demand damages in the amount of \$6,150,000. None of the causes of action seek a permanent injunction. By its Order to Show Cause, the Plaintiff seeks an Order enjoining all defendants from removing funds from any bank, brokerage firm, or other institution; from disposing, transferring, encumbering, altering or alienating any and all of Defendants assets; directing all Defendants to disclose the location of any and all of their assets, and whether they have been transferred, encumbered, pledged, sold or otherwise hypothecated, and if so, the location of such assets.

A reading of the Verified Complaint and the Amended Verified Complaint makes it clear that the Plaintiffs Complaint targets their attorney and the Lee Defendants for involving them in loans totaling \$6,150,000. They are reflected by Promissory Notes dated November 27, 2007 and January 22, 2008. There is another Note dated June 3, 2008, which was accompanied by a mortgage on the Roosevelt Property. The Plaintiffs contend that they were deprived of priority of lien by initially accepting a financing statement on the property, instead of a mortgage, and that by the time their mortgage against the Roosevelt Property was filed, they were fifth in line, and in

a less secure position than they would otherwise have been if they had filed a mortgage on that property when the money was first extended.

There is nothing any of the Defendants are doing, or threatening to do, which will alter their priority. Plaintiffs' references to the creation of false mortgages by some of the Defendants so as to deprive Plaintiffs of their lien priority are not substantiated in any way. To the contrary, the Defendants who have cross-moved, have shown evidence of at least \$3,000,000 advanced to the Lee Defendants, and acknowledgment by the Lee Defendants of pre-existing indebtedness to them of \$8,000,000 as early as April 2006. They claim that they are similarly victims of Lee and the Lee Defendants.

Plaintiffs have not adequately established likelihood of success on the merits, irreparable injury, or the weight of equities in their favor, as they are required to do. (*Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 [1990]). They did not demand a mortgage on the Roosevelt Property for the first loan, and only obtained it, either as security for the second loan, or as a replacement of security when they agreed to discharge the mortgage on the Mockler Property in New Jersey. The arrangements which they made for security for the promissory notes they received were made by them, certainly not by Defendants who had nothing to do with them. While it is true that their security may be jeopardized by the foreclosure proceeding in Queens, the claim that loan priorities were gerrymandered to their detriment is simply a matter of speculation.

The most important factor which Plaintiffs have failed to establish in order to obtain injunctive relief is irreparable injury. The action is for money damages only and the remedy is an action on the various notes or foreclosure of mortgages or other liens. Money is fungible, and there is no way to conclude that money in any accounts maintained by any of the Defendants is the very same money which Plaintiffs advanced to Defendants. Where a party can be made whole by money damages, injunctions are inappropriate. (*Credit Agricole Indosuez v. Rossiyskiy Kredit Bank*, 94 N.Y.2d 541 [2000]).

The motion for imposition of a temporary injunction is denied.

Motion Sequence # 2

This motion by Richard Sun Jin and Do Young Kim to vacate or modify the May 11, 2009 restraining order, as modified by stipulation, is granted. For the reasons previously stated,

the Plaintiffs seek only monetary damages in their 13 causes of action. They can be made whole by money damages, and, for this reason, the imposition of a temporary injunction would be inappropriate. *Id.*

Motion Sequence # 3

By this motion Defendants Richard Sun Jin and Do Young Kim seek dismissal of the Amended Complaint on the grounds that it fails to state a cause of action against them and based upon another action pending. In determining a motion to dismiss for failure to state a cause of action, the Complaint must be given a liberal interpretation so as to determine whether or not, taken as a whole, and considering affidavits in support of its allegations, it can be read to make out a claim under any theory of law. (*Breytman v. Olinville Realty, LLC*, 54 A.D.3d 703, 703—704 [2d Dept. 2008]); (*Leon v. Martinez*, 84 N.Y.2d 83, 87 [1994]).

As previously noted, the Amended Verified Complaint does not mention these Defendants in any of the 13 Causes of Action. The thrust of the Complaint is that Lee and the Lee Defendants manipulated the liens on the property in such a way as to render the security of the Plaintiffs in the Roosevelt Property effectively meaningless. They also blame their former attorney for suggesting their choice of a UCC financing statement as opposed to a mortgage on the occasion of the first loan to Lee and Lee Defendants. The moving Defendants had no contact with the Plaintiffs, and the sole reason for their being named as Defendants seems to be that they interposed a \$3,200,000 mortgage which has priority over the Plaintiffs' \$3,000,000 mortgage on the Roosevelt Property.

The First — Seventh, and the Tenth — Thirteenth Causes of Action very clearly involve allegations of misrepresentations and breaches of fiduciary duty. Since there is no evidence that these moving Defendants had any direct contact with the Plaintiffs, these causes of action are dismissed. The Eighth Cause of Action, Conspiracy to Commit Conversion, and the Ninth Cause of Action, Aiding and Abetting, can, giving the Plaintiff the greatest leeway, be considered to allege a cause of action against the moving Defendants.

The motion to dismiss the Complaint by Richard Sun Jin and Do Young Kim is granted to the extent that the First — Seventh and the Tenth — Thirteenth Causes of Action are dismissed as to them. The motion is denied to the extent that the Eighth and Ninth Causes of

Action are not dismissed. This is without prejudice to renewal upon the completion of discovery.

A Preliminary Conference (see NYCRR 202.12) shall be held on October 8, 2009, at 9:30 A.M., before the undersigned in the Supreme Court of Nassau County.


Counsel for all parties are reminded that this matter has been assigned to the Commercial Division of the Supreme Court of Nassau County and the parties are directed to follow the Rules of this Division.

This constitutes the Decision and Order of the Court.

Dated: September 8, 2009



J.S.C.

**ENTERED**  
SEP 11 2009   
NASSAU COUNTY  
COUNTY CLERK'S OFFICE