

Wong v Moy

2009 NY Slip Op 32394(U)

October 5, 2009

Supreme Court, New York County

Docket Number: 601048/08

Judge: Barbara R. Kapnick

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

PRESENT: Kapnick
Justice

PART 29m

Benny Wong et al

INDEX NO. 601048/af

MOTION DATE _____

- v -

MOTION SEQ. NO. 003

Elma Moy et al

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

FILED
OCT 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/5/09

[Signature]
BARBARA R. KAPNICK J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

-----x
BENNY WONG and L&W DEVELOPMENT, INC.,

Plaintiffs,

-against-

ELMA MOY and FLORENTINE MUSIC &
TUTORIAL, INC.,

Defendants.

-----x
BARBARA R. KAPNICK, J.:

DECISION/ORDER
Index No. 601048/08
Mot. Seq. No. 003

FILED
OCT 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

In this action, plaintiffs sought to recover damages for: (i) breach of contract, claiming that Benny Wong's former business partner, defendant Elma Moy, breached a Shareholder Agreement dated October 30, 2006 by failing to pay her share of certain costs associated with the relocation and construction of the business, a radio station (first cause of action); (ii) fraud (second cause of action); and (iii) breach of fiduciary duty (third cause of action).

Plaintiffs also sought to enjoin and restrain the defendants from prosecuting a related summary proceeding.

By Decision/Order dated April 13, 2009, this Court granted a motion by defendants to dismiss the Complaint in its entirety, finding, inter alia, that: (i) the first cause of action was barred by the terms of a "merger provision" contained in a subsequent

Agreement dated August 31, 2007;¹ and (ii) the second cause of action failed to state a cause of action for fraud because plaintiff had failed to demonstrate that he justifiably relied on defendant Moy's alleged misrepresentation.

This Court, therefore, denied as moot that portion of plaintiffs' motion seeking to remove the summary proceeding, *Florentine Music & Tutorial, Inc. v. Chinese American Holding, Inc. a/k/a Chung Wah Commercial Broadcasting Company, Inc.*, L&T Index No. 064987/08, from the Civil Court, New York County, for consolidation in this Court with the instant action.

Plaintiffs now move by Order to Show Cause for an order granting plaintiffs leave to reargue, and upon reargument, (i) reinstating the first and second causes of action on behalf of

¹ The August 31, 2007 Agreement provides, in relevant part, as follows:

2. Upon the signing of this agreement, Moy shall not be responsible for any claims, taxes, and liabilities of CWCB [Chung Wah Commercial Broadcasting Company Incorporated] or CAMH [Chinese American Media Holding Incorporated] or any of its affiliates, subsidiaries or branches (referred to [as] The Business). Wong shall be fully responsible for the post 8/31/07 responsibilities of the Business.

* * *

9. Any prior discussion or representation in contrary to the provisions set forth herein shall be deemed merged into and be controlled by this agreement.

plaintiff Benny Wong only, and (ii) granting plaintiff's motion to remove and consolidate the summary proceeding.²

Based on the papers submitted and the oral argument held on the record on July 30, 2009, leave to reargue is granted.

Upon reargument, this Court finds that the August 31, 2007 Agreement is ambiguous and subject to different interpretations as to whether or not the parties intended to extinguish Moy's prior obligation to pay her share of the business' relocation and construction costs. *See, generally, DiLorenzo v State Motors, Inc.*, 22 AD3d 630 (2nd Dep't 2005). Therefore, this Court finds that it was premature to dismiss the first cause of action.

In addition, this Court finds that the issue of whether or not Wong justifiably relied on Moy's alleged misrepresentation presents an issue of fact which precludes the dismissal of the second cause of action. *See, Braddock v Braddock*, 60 AD3d 84 (1st Dep't 2009); *app withdrawn*, 12 NY3d 780 (2009).

² In the Order to Show Cause signed on July 2, 2009 this Court granted a temporary restraining order staying all proceedings in the L&T Matter.

Accordingly, those portions of this Court's April 13, 2009 Decision/Order dismissing plaintiff Wong's first and second causes of action are vacated.

Defendant shall serve an Answer to the first and second causes of action in the Complaint within 30 days of service of a copy of this Order with Notice of Entry.

Counsel for plaintiff has confirmed by letter dated August 5, 2009 that the tenant of the subject premises (the second floor at 384 Broadway, New York, New York) has fully vacated the premises. Thus, possession of the premises is no longer at issue.

However, this Court finds that the monetary claims remaining in the summary proceeding are inextricably intertwined with the claims asserted herein. Accordingly, that portion of the motion seeking to remove and consolidate the summary proceeding is granted.

The Clerk of the Civil Court, New York County, upon receipt of a copy of this order with notice of entry and upon payment of the proper fees, if any, shall transfer to the Clerk of the Supreme Court, New York County, all of the papers on file in the summary proceeding (L&T Index No. 064987/08).

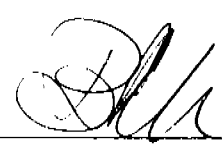
The Clerk of the Supreme Court, New York County, upon receipt of a copy of this order with notice of entry, shall, without further fee, assign an index number to the file transferred pursuant to this order.

The Clerk of the Trial Support Office shall restore the instant action to the active inventory of IA Part 39 and shall place the aforesaid actions upon the trial calendar for a joint trial upon payment of the appropriate calendar fees, the filing of a Note of Issue and Statement of Readiness in each action, and service of a copy of this order with notice of entry.

Counsel shall appear for a status conference in IA Part 39 on December 9, 2009 at 10:00 a.m. in order to schedule discovery.

This constitutes the decision and order of this Court.

Dated: October 5, 2009



BARBARA R. KAPNICK
J.S.C.

FILED BARBARA R. KAPNICK
OCT 09 2009 J.S.C.
COUNTY CLERK'S OFFICE
NEW YORK