

Kang v Jun Hee Lee

2010 NY Slip Op 30745(U)

March 29, 2010

Supreme Court, Nassau C ounty

Docket Number: 022354/2009

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 8

WILLIAM KANG and BIG PLUS PRINTING &
PACKAGING CORP., d/b/a BIG PLUS AMERICA,

Plaintiffs,

INDEX NO.: 022354/2009
MOTION DATE: 01/15/2010
MOTION SEQUENCE: 001, 002,
and 003

-against-

JUN HEE LEE and JOHN DOE,

Defendants.

The following papers read on this motion:

Order to Show Cause, Affirmation, Affidavit & Exhibit Annexed	1
Order to Show Cause, Affirmation, Affidavit & Exhibits Annexed	2
Notice of Motion, Affidavit & Exhibits Annexed	3
Memorandum of Law in Support of Motion to Dismiss	4
Affirmation in Opposition of Sean Yoo, Esq. & Exhibits Annexed	5
Affirmation in Partial Opposition of Sean Yoo, Esq. & Exhibit Annexed	6
Reply Affirmation of Daniel J. Weisberg, Esq. & Exhibits Annexed	7

PRELIMINARY STATEMENT

There are three motions before the Court:

1. Plaintiff seeks an Order directing defendants, or persons acting on their behalf,
 - to cease and desist attempts to change the signature authority on the bank account of Big Plus Printing & Packaging Corp., d/b/a Big Plus America (“Big Plus America”);

- to cease and desist contacting clients of Big Plus; and,
 - to cease and desist from representing themselves as the owners of Big Plus;
2. Nominal Plaintiff Big Plus seeks to intervene as a necessary party;
 3. Defendant Jun Hee Lee moves pursuant to Civil Practice Law & Rules § 3211
- (a)(8)
- for an Order dismissing the Amended Summons and Amended Verified Complaint; and,
 - for denial of plaintiff's motion for injunctive relief based on failure of plaintiff to effectuate service of process upon Jun Hee Lee.

BACKGROUND

One could hardly imagine a circumstance in which the ownership of the shares and assets of a corporation is more directly disputed. Plaintiff Kang sets out his claim to be the sole owner of the shares of Big Plus America in his affidavit.¹ He claims to have created Big Plus America in or about March, 2001, and to have been the sole shareholder from that time until October 29, 2009, when he claims to have been duped into relinquishing his interest in the company.

On or about October 28, 2009 Lee approached him with an unknown party ("John Doe"), whom he represented as an investor from Korea who wished to provide needed capital to his business. He claims to have been told that the Korean Currency Exchange rules required the company to be in the name of a Korean national, and Lee and "Doe" defrauded him into signing documents to accomplish this transfer.

These documents are an affidavit dated October 29, 2009² in which Kang acknowledges surrender of Certificate No. 7 of Big Plus America, representing 200

¹ Attached to Motion # 1.

² Exh "B" to Motion # 2.

shares of the corporation, because he was never the rightful owner of the stock. The cancelled and surrendered certificate is dated the same day.³ To the contrary, the following certificates in Big Plus Printing & Packaging Corp. were issued to Lee on the following dates:

Certificate Number	Shares	Dated
1	200	3/23/01
2	200	5/22/01
3	200	7/11/01
4	200	8/22/01
5	50	4/1/02
6	272	2/11/04
7	200	3/29/04
7	200	4/6/04
7	200	5/6/04
7	200	7/14/04
7	200	7/16/04
7	200	10/22/04
7	200	11/11/04
7	200	5/25/05 ⁴

The affidavit in support of Motion # 2 also attaches a series of what it describes as a series of ten wire transfer notices totaling \$910,919, between March 23, 2001 and September 23, 2005. These are alleged to be funds submitted from Big Plus Cre, Inc., a

³ Exh. "C" to Motion # 2.

⁴ Exh. "E" to Motion # 2. There is no stated explanation for the existence of eight Certificate No. 7's. Sean Yoo, Esq., challenges the authenticity of the certificates, claiming they total more than the amount of authorized shares. See, Affirmation of Sean Yoo in Partial Opposition at ¶ 45, et seq.

Korean corporation owned by Lee, to provide working capital for Big Plus America.⁵ Counsel for Khang disputes the authenticity of these purported wire transfers confirmations.⁶

Counsel for plaintiff objects to the motion by Big Plus America to intervene, primarily on procedural grounds.⁷ He claims that intervention is inappropriate because Big Plus America is already a party and intervention is only proper where a non-party who has not been impleaded wishes to be a party as either a plaintiff or defendant. He describes Big Plus America as a stakeholder, who, as the holder of an asset claimed by two or more parties, should commence an interpleader action, so as to avoid conflicting determinations.

Counsel also challenges the efficacy of Mr. Chae's affidavit on behalf of Big Plus America, since he was named Vice president only after the series of transactions giving rise to the claim, and therefore, is without personal knowledge of the facts.

DISCUSSION

Motion # 1 for Injunctive Relief against Defendants Lee and Doe

Service of process upon foreign defendants poses problems which require compliance with federal law, most pointedly the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters.

The affidavits of service submitted by Plaintiff in support of Motion # 1 are attached to Motion # 3, the motion to dismiss on behalf of Defendant Lee.⁸ The first is an affidavit signed by one Woo Sang Gil attesting to personal service of an Amended Summons and Complaint upon Lee on December 9, 2009. Service is alleged to have been

⁵ Affirmation of Daniel J. Weisberg, Esq., attached to Motion # 2 at ¶ 6.

⁶ Affirmation in Partial Opposition of Sean Yoo, Esq. at ¶ 56 et seq.

⁷ *Id.* at ¶ 16 et seq.

⁸ Exh. "C" to Motion Sequence No. 3.

made at the third floor of the Geobuk Building, in Seoul, Korea. The signature is notarized by one Cho Kwang Je, for whom a Notarial Certificate is provided. The Order to Show Cause is claimed to have also been personally served upon Mr. Lee at the same address on December 9, 2009, the same date as the Summons and Complaint. Defendant Lee denies being present at the building at the date and time alleged.⁹

Service of process abroad must comply with U.S. law regarding extraterritorial service of process. Both the United States and Republic of Korea are signatories to the Hague convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters. 20 U.S.T. 361 — 373, T.I.A.S. No. 6638 U.N.T.S. 163 (1965). Among signatories, use of the Convention's procedures is mandatory.¹⁰

Knowing that the Republic of Korea is a signatory to the Convention, the next line of inquiry is whether or not it has made any modifications or reservations concerning the Convention's proceedings. For example, Article 10 of the Service Section provides as follows:

Provided the State of destination does not object, the present Convention shall not interfere with -

a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly

⁹ Affidavit of Lee attached to Motion Sequence No. 3.

¹⁰ *Casa De Cambio Delgado, Inc. v. Casa De Cambio Purpla, S.A. de C.V.*, 196 Misc.2d 1 (Sup. Ct. Queens Co. 2003).

through the judicial officers, officials or other competent persons of the State of destination.

Korea has objected to the foregoing provisions of the Hague Service Convention.¹¹ Under these circumstances, service is relegated to use of the Central Authority.¹² There is no evidence that Plaintiff has made service by coordination with the National Court Administration.

As a practical matter, even if service by alternative means under Article 10 were authorized, Defendant has denied that he was present at the location at which service was allegedly made, which would mandate a traverse hearing. But since such personal service, without the intervention of the Central Authority, is not authorized in the Republic of Korea, it is simply void.

Plaintiffs' motion to enjoin defendants Lee and "John Doe" from taking action with respect to changing the signatory authority on the bank account of Big Plus America, from contacting clients and customers of Big Plus America, and representing themselves as the legal owners of Big Plus America is denied for lack of jurisdiction, without prejudice to renewal upon compliance with the requirements of the Hague Convention, including exceptions taken by Republic of Korea.

Motion Sequence No. 2 on behalf of Big Plus Printing & Packaging Corp. to Intervene

Big Plus America contends that plaintiff Kang has no authority to act on behalf of it, and that they are a necessary party to the proceedings, since it is the ownership of the corporation, and the right to deal with customers of Big Plus America which have been placed in issue by this action on behalf of Kang. Cross-movant submits a series of documents in support of the claim that plaintiff is not authorized to act as an owner of Big Plus America:

¹¹ Exh. "D" to Motion Sequence No. 3.

¹² *Id.*

- Affidavit of William Kang dated October 29, 2009, in which he surrenders Stock Certificate No. 7 in Big Plus America on the ground that he was never the rightful owner of the stock;¹³
- Copy of cancelled Stock Certificate No. 7 for Big Plus America;¹⁴
- Copy of Stock Certificate No. 1 issued to Jun Hee Lee dated March 23, 2001, for 200 of 200 authorized shares without par value;¹⁵
- Series of Liberty Bank of New York Incoming Wire Notifications to Big Plus America, originated by Jun Hee Lee;¹⁶
- Corporate resolution of November 2, 2009 designating Jun Hee Lee as President and Hyuk kil Chae as Vice President;¹⁷
- U.S. Corporation Income Tax Return 2008.¹⁸

Intervention may be of right¹⁹ or by permission.²⁰ A party is entitled to intervene as of right when their property interest may be affected.²¹ Intervention is to be liberally permitted.²² In either event, the application for intervention must be accompanied by a

¹³ Exh. "B" to Motion Sequence No. 2.

¹⁴ Exh. "C" to Motion Sequence No. 2.

¹⁵ Exh. "D" to Motion Sequence No. 2.

¹⁶ Exh. "E" to Motion Sequence No. 2.

¹⁷ Exh. "F" to Motion Sequence No. 2

¹⁸ Exh. "H" to Motion Sequence No. 2, showing Plaintiff Kang as 100% owner.

¹⁹ Civil Practice Law and Rules § 1012

²⁰ Civil Practice Law and Rules § 1013.

²¹ *Teleprompter Manhattan of CATV Corp. v. State of New York Board of Equalization and Assessment*, 34 A.D.2d 1033 (3d Dept. 1970).

²² *Matter of Eberlin v. Herman*, 18 A.D.3d 1068 (1st Dept. 1963).

proposed pleading setting forth the claim of the proposed intervenor.²³ No such proposed pleading has been submitted by movant. The Second Department has taken the position that this requirement is jurisdictional, and that the trial court is not authorized to grant a motion to intervene in the absence of such a pleading.²⁴

Despite the fact that the property of Lee, who claims to be the owner of Big Plus America, is at risk, the Court is limited by the directive of the Appellate Court, and the motion is denied. The matter is not appropriately one for interpleader. Neither Kang nor Lee are stakeholders, in possession of the corporate assets of Big Plus Printing America, which they are asking to post with the Court. The motion must be made by the party whose property is subject to being affected by the pending litigation. According to the documents submitted, the competing parties are Kang and Lee.

While Lee has not yet effectively been made a defendant, because of the failure of plaintiff to comply with the Hague Convention in making service, it is Lee who claims to be the owner of the assets of Big Plus America, which are placed at risk by the allegations of the plaintiff. Lee is therefore a proper party, whereas the corporation, which is the property in dispute, is not a necessary party to the controversy. Permitting a corporation whose ownership is in issue to appear presupposes that the party representing the corporation has authority to do so; and who has actual authority is the ultimate matter in controversy.

If for no other reason, the motion to intervene is denied for failure to annex a pleading which would clarify the involvement of Big Plus America. More fundamentally, however, the corporation is an inanimate creature of the law, which can only act through its lawful owners and their representatives. At the present time, these parties are unknown, and the participation of the corporation as a party to the litigation is

²³ Civil Practice Law and Rules § 1014.

²⁴ *Colonial Sand and Stone Co., Inc. v. Flacke*, 75 A.D.2d 894 (2d Dept. 1980).

unnecessary.

The motion to intervene in Motion Sequence No. 2 is denied.

Motion Sequence No. 3 - Defendant Lee's Motion to Dismiss and Opposition to Plaintiffs' Motion

Lee moves for dismissal pursuant to Civil Practice Law & Rules § 3211 (a) (8), on the basis of lack of personal jurisdiction. Because the Republic of Korea does not recognize that portion of the Geneva Convention which authorizes service by an independent process server, the service as depicted in the affidavits of service of both the Summons and Complaint and the Order to Show Cause are inadequate under applicable law. In addition, defendant Lee controverts the personal receipt, claiming that he was not present at the premises at which service was allegedly made, which would require a hearing. Even if personal service were to be established, however, personal jurisdiction would not attach because of the failure to make service through the Central Authority.

The motion by Lee to dismiss the complaint for failure to obtain personal jurisdiction of Lee is granted, without prejudice to renewal upon completion of proper service.

This constitutes the Decision and Order of the Court.

Dated: March 29, 2010



J.S.C.

ENTERED
APR 01 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE