

Siew Kheng Chu v Yap Chee Wei

2010 NY Slip Op 30834(U)

March 17, 2010

Supreme Court, Queens County

Docket Number: 24455/2008

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

	x	Index Number <u>24455</u> 2008
SIEW KHENG CHU a/k/a JOANN, et al.		
- against -		Motion Dates <u>December 16,</u> 2009
YAP CHEE WEI, a/k/a LOUIE, et al.		Motion Cal. Numbers <u>4</u>
	x	Motion Seq. Nos. <u>3</u>

The following papers numbered 1 to 19 read on this motion by plaintiffs Shew Kheng Chu a/k/a Joann, and Kok Huwa Lee for an order granting summary judgment in favor of plaintiffs as to their claim of breach of implied contract, and seek to recover monthly payments of \$10,000.00, payable from April 2008 to the present, and for an order directing defendants to make monthly payments of \$10,000.00 a month during the pendency of this action; and for an award of costs and disbursements. Defendants cross-move for an order staying the proceedings in this action and in the action previously consolidated for the purpose of a joint trial, entitled Siew Kheng Chu a/k/a Joann, and Kok Huwa Lee et al for the Judicial Dissolution of Good Luck Produce Inc., et al, (Index No 19092/08), pending the completion of the ADR program.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Affidavits-Exhibits(1-7).....	1-7
Opposing Affirmation-Affidavits.....	8-11
Reply Affirmation.....	12-13
Notice of Cross Motion-Affirmation-Exhibit(A).....	14-17
Opposing Affirmation.....	18-19

Upon the foregoing papers the motion and cross motion are determined as follows:

Defendants' cross motion for a stay is denied. The order for mediation arose in the action commenced under Index Number 19092/2008, and the parties have not sought alternative dispute resolution in the within action. Therefore a stay of this action pending resolution of the mediation proceedings is not warranted.

Defendants may not move in this action for a stay of the action commenced under Index Number 19092/2008.

Plaintiffs' motion for summary judgment on the third cause of action for breach of an implied contract is denied. Plaintiffs Chu and Lee are married to one another, and they operated a retail and fruit business known as Excellent Fresh Fruit and Vegetable Market Inc. (Excellent). Plaintiffs allege in their complaint that the defendants solicited the plaintiffs for the purpose of entering a business agreement with Good Luck Products Inc., and that in April 2004 plaintiffs agreed to enter an agreement with defendants Yap Chee Wei (Louie), Siew Onn Chang (Onn), Yim Kwan Lee (Cathy), Yeon Fah Yeow (Fah), whereby each individual would own 16 2/3 percent of Good Luck Produce Inc. Plaintiffs allege that they each purchased two shares each in said corporation for the sum of \$110,000.00 a share; that it was agreed that the shareholders of Good Luck Produce Inc. would pay Ms. Chu \$10,000.00 a month as a royalty/consultant fee; that Chu and Lee would each receive a weekly salary of \$1,000.00; and that all of the shareholders would each receive monthly dividends equal to 1/6 of the profits.

It is alleged that the parties also formed other corporations, all of which had oral operating agreements, and that the plaintiffs provided technical, financial and client related know-how in the operation of all five corporations. Plaintiffs allege that by April 2006 Good Luck Produce Inc. was making a profit and they each received a weekly salary of \$1,000.00 as well as dividends, and Chu also received monthly payments of \$10,000.00. Plaintiffs allege that in April 2008 the individual defendants terminated the payment of the monthly royalty/consultation fee without the plaintiffs' consent.

It is undisputed that as to all of corporations, no shareholder's certificates were ever issued, and the parties did not execute written shareholders' agreements.

Plaintiffs in their third cause of action for breach of an implied in fact contract allege that the parties intended to operate under a certain course of dealings which gave rise to a binding contract, including the scheduling of payments and amounts due to the plaintiffs, and seek to recover damages.

Plaintiff Chu now seeks to recover monthly royalty fees of \$10,000 a month which have accrued since April 2008, and seek an order directing defendants to continue to pay all such fees during the pendency of this litigation. Plaintiffs assert that the defendants orally agreed to the sum of \$10,000.00 as a royalty fee, so long as Good Luck Produce remained in business; that royalty fee payments were made in the sum of \$10,000.00 by check from February 2005 until April 2008; that Good Luck Produce is still in business and that the defendants breached this agreement when they terminated the monthly payment of \$10,000.

Plaintiffs Chu states that royalty fees consisting of payments of \$10,000.00 a month as were tendered to her by the defendants from February 2005 to March 2007; that these payments were contingent only upon the corporations remaining in business; and that these payments were made as the defendants stood to benefit from the merging of their business with her business, as she was well established and well versed in the wholesale fruit and vegetable business, and possessed connections, customers and vendors which served as consideration to the defendants. Plaintiff Chu, in support of her claim has submitted certain checks payable to her in October 2005, November 2005, and December 2005, with a memo line of "royalty fees", as well as the defendants' electronic records which show monthly payments from February 2005 to April 2008, for a "royalty" fee" totaling \$10,000.00 a month.

Plaintiff Lee has submitted a nearly identical affidavit in which he states the royalty fee was to be paid to Chu.

Plaintiffs have also submitted a copy of an unexecuted business agreement, and assert that the parties orally agreed to be bound by this agreement, as well as an affidavit from Sabrina Lee, the attorney who drafted said agreement. Ms. Lee states that on April 16, 2004 the plaintiffs asked her to prepare stock certificates for Good Luck Produce and a business agreement between Good Luck Produce and Excellent; that based upon the information provided by the plaintiffs she prepared these agreements in May 2004; and that on May 25, 2004 Chu informed her that the parties felt that the paperwork was superfluous and unnecessary, and she and Lee were uncomfortable with requiring a written and signed agreement from the defendants and that they trusted the defendants to do what they had promised.

In opposition, defendants Yeow and Lee have submitted affidavits in which they state there was never a discussion or agreement with the plaintiffs to prepare a business agreement; that they never met or discussed any such agreement with Sabrina Lee; and that they was unaware of the agreement or Sabrina Lee's affidavit until the commencement of this action. Defendant Lee further states that there was no agreement to pay the plaintiffs any fees or

money for the merger of Excellent and Good Luck Produce, and that plaintiffs continued to operate Excellent independently for another 2 or 3 years after joining Good Luck Produce; that Chu and Lee received \$10,000.00 a month for a certain period as a commission for their appearances and work at Hunt's Point Market, and that these payments were terminated when the plaintiffs stopped appearing at and aggressively working at Hunt's Point Market. Defendant Lee states that no special consideration or meaning was given to the words "royal fee" in the bookkeeping entries and that it was not meant to represent payments due to plaintiffs because of the merger of the parties respective businesses. Defendant Lee states that contrary to plaintiffs' assertions, defendant Yeow was already well versed and well established in the fruit wholesale and retail business for many years prior to plaintiffs' involvement with Good Luck Produce, and had already established numerous contacts, connections, customers and vendors, so that plaintiffs' instructional contributions were minimal.

Although plaintiffs both seek summary judgment on the third cause of action, it is clear that only Ms. Chu alleges that she was entitled to the payment of \$10,000 a month as a royalty fee, and that the parties do not claim that they are entitled to any other payments. Therefore, as plaintiff Lee has not stated a claim for breach of an implied contract, his request for summary judgment on the third cause of action is denied.

A royalty is defined as "1.[a] payment made to an author or inventor for each copy of a work or article sold under a copyright or patent; 2. Oil & gas. A share of the product or profit from real property, reserved by the grantor of a mineral lease, in exchange for the lessee's right to mine or drill on the land"(Black's Law Dictionary, 8th ed. 2004). Here, although the plaintiffs use the term "royalty" or "royal fee", the payments described by plaintiffs are not royalties. Rather, the payments appear to be a consulting fee or additional compensation.

To the extent that plaintiffs allege that the individual defendants agreed to pay Chu the sum of \$10,000.00 a month so long as Good Luck remained in business, the court notes that defendants have raised the statute of frauds as an affirmative defense in their answer, and that plaintiffs have not established that the alleged oral agreement, which appears to require payment for an indefinite term, is not barred by the statute of frauds (GOL § 5-701).

Plaintiffs may not rely upon the unexecuted agreement in order to establish the terms of the alleged oral agreement, as it was not signed by the parties to be charged(GOL § 5-701). At the most, it is evidence of a proposed agreement between Good Luck and Excellent, for the payment of a monthly consulting fee of \$10,000.00 to Excellent by Good Luck Produce, with a personal guarantee by the individual defendants. However, it is not evidence of an

agreement by the individual defendants to make monthly payments of \$10,000.00 to Ms. Chu, individually.

Neither the copies of checks nor the data sheet submitted by plaintiffs are sufficient to establish the terms of the alleged oral agreement. Defendants do not dispute that monthly payments were made to Ms. Chu in the sum \$10,000.00 up until April 2008. However, the documentary evidence merely establishes that the payments were made by the corporation, Good Luck Produce. The data sheet lists “royal fee” payments to Chu was generated by the corporation and all of the checks submitted here with a memo line notation of “royal fee” were drawn on the account of Good Luck Produce. This, however, does not constitute evidence of an oral agreement between Ms. Chu and the individual defendants.

In addition, the check drawn on the account of Siew Onn Chan, dated December 9, 2005 in the sum of \$8,000.00, payable to Chu, bears no notations on the memo line. Therefore said check is insufficient to establish the existence of an agreement between Ms. Chu and defendant Chan.

Finally, the parties conflicting affidavits raise triable issues of fact as to whether the parties entered into an oral agreement in their individual capacities to pay Ms. Chu the sum of \$10,000.00 a month, as well as the duration of such an agreement. In view of the foregoing plaintiffs’ motion for summary judgment on the cause of action for breach of an implied agreement is denied, and defendants’ cross motion for a stay is denied.

Dated: March 17, 2010

J.S.C.