

**Chiang v Northern Murray Equity, Inc.**

2013 NY Slip Op 31332(U)

June 14, 2013

Sup Ct, Queens County

Docket Number: 19447/12

Judge: Timothy J. Dufficy

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

**Short Form Order**

**NEW YORK SUPREME COURT - QUEENS COUNTY**

**PRESENT: HON. TIMOTHY J. DUFFICY**  
**Justice**

**PART 35**

-----X  
**CHING T. CHIANG,**

**Plaintiff,**

**-against-**

**NORTHERN MURRAY EQUITY, INC., CHING LIANG, KUO HIS CHIANG AND CHING KUO CHIANG,**

**Defendants.**

**Index No.: 19447/12**  
**Mot. Cal. Date: 3/11/13**  
**Mot. Cal. No. 16**  
**Mot. Seq. 2**

-----X

The following papers numbered 1 to 11 read on this motion for an order dismissing the complaint on the grounds of documentary evidence, and failure to state a cause of action pursuant to CPLR 3211(a)(1), (3) (7) and 3016; and disqualifying plaintiff’s counsel.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Memorandum of Law-Exhibits..	1-8
Opposing Affirmation-Affidavit of Service.....	9-10
Reply Affirmation-Affidavit of Service.....	11

Upon the foregoing papers the motion is determined as follows:

Plaintiff Ching T. Chiang commenced the within action against Northern Murray Equity Inc., Ching Liang Chiang, Kuo His Chiang and Ching Kuo Chiang, on September 19, 2012, and alleges three causes of action for breach of fiduciary duty, fraud, corporate waste, diversion and self dealing, and a fourth cause of action for declaratory judgment. The plaintiff and defendants Ching Kuo Chiang and Ching Liang Chiang are brothers. Defendant Kuo His Chiang is the wife of defendant Ching Liang Chiang.

Defendant Northern Murray Equity Inc. (NME) was formed in December 1994 and is the owner of real property known as 150-50/52 Northern Boulevard, 150-54/60 Northern Boulevard and 39-04 Murray Street, Flushing, New York. The plaintiff alleges that the defendants ran NME for fifteen years and ignored all corporate formalities; that at the time,

NME was formed it had two shareholders, the plaintiff who owned 49% of the 200 outstanding shares of corporate stock, and Ching Liang Chiang who owned 51% of the 200 outstanding shares of corporate stock.

The plaintiff alleges that the defendants doctored the corporate records to reflect that defendant Ching Liang Chiang owned fifty-one (51) shares of common stock; that plaintiff owned fifty-nine (49) shares of common stock; and that defendant Ching Kuo Chiang owned one hundred (100) shares of common stock, rather than the percentages allegedly owned by the plaintiff and Ching Liang Chiang. The plaintiff alleges that Ching Kuo Chiang demanded that his brother Ching Liang Chiang give him 50% of the corporation, and that he consented to this demand; and that Ching Liang Chiang has been running the corporation for the past seventeen years, using his brother Ching Liang Chiang as a “front and dupe”. The plaintiff alleges that no shareholders meeting were held for seventeen years; that when NME attempted to obtain a bank loan to finance construction or renovation of the real property, the first shareholder meeting was held in June, 2012, at which time the plaintiff discovered his brothers had changed the ownership interests in the corporation, without his consent, and in violation of NME’s certificate of incorporation and the Business Corporation Law.

In the fourth cause of action, the plaintiff alleges that defendant Ching Kuo Chiang was not an original shareholder and that he did not pay the corporation for any shares of stock; that the corporation’s tax returns only list Ching Liang Chiang and the plaintiff, and state that they respectively own 51% and 49 % of the total outstanding shares of stock; and that Ching Kuo Chiang is holding himself out as a officer and shareholder of the corporation. The plaintiff therefore seeks a declaration to the effect that a that Ching Kuo Chiang is not a shareholder of the corporation, and that plaintiff has a 49% shareholder interest in the corporation.

The defendants served a Verified Answer and interposed nineteen affirmative defenses and three counterclaims and cross-claims against a non-party. The Court notes, however, that the defendants did not commence a third-party action as required by CPLR 1007.

It is well established that on a motion to dismiss, pursuant to CPLR 3211(a)(7), “the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference” (*AG Capital*

*Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; see *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The court’s “sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail” (*Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; see also *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Leon v Martinez*, 84 NY2d at 87-88; *Tom Winter Assoc., Inc. v Sawyer*, 72 AD3d 803 [2010]; *Uzzle v Nunzie Court Homeowners Assn. Inc.*, 70 AD3d 928 [2010]; *Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703 [2010]). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration (see *Morone v Morone*, 50 NY2d 481 [1980]; *Gertler v Goodgold*, 107 AD2d 481 [1985], affirmed 66 NY2d 946 [1985]).

“When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (*Guggenheimer v Ginzburg*, 43 NY2d at 275). This entails an inquiry into whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding it (see, *id.*; accord, Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3211:25, at 39)” (*Gershon v Goldberg*, 30 AD3d 372 [2006], quoting *Doria v Masucci*, 230 AD2d 764,765 [2d Dept 2006]; *lv. to appeal denied* 89 NY2d 811 [1997]).

The plaintiff concedes that his first, second and third causes of action improperly mixes direct and derivative causes of action against the defendants and that he lacks standing to assert such derivative claims directly against the defendant shareholders (see *Abrams v Donati*, 66 NY2d 951 [1985]). Therefore, that branch of the defendants’ motion which seeks to dismiss the first, second and third causes of action is granted. The plaintiff may replead his derivative claims, should he deem it necessary.

That branch of the defendants’ motion which seeks to dismiss the fourth cause of action for declaratory judgment, is denied. Contrary to the defendants’ assertions, this cause of action does not improperly mix direct and derivative causes of action. Rather, the plaintiff in a straight forward fashion seeks a determination that he is a 49% owner of the outstanding

shares of stock in the corporation, that defendant Chang Liang Chiang is a 51 % owner of the outstanding shares of stock in the corporation and that Chang Kuo Chiang is not a shareholder of the corporation. Notably, the defendants' in their notice of motion do not seek to dismiss the complaint on the grounds of statute of limitations. Furthermore, as the plaintiff alleges that he was unaware of any purported change in the ownership of the shares of stock until June, 2012, this claim is not barred by the statute of limitations. Finally, the plaintiff need not await the outcome of an accounting prior to seeking a declaration as to the ownership of the shares of stock in NME.

Turning now to that branch of the defendants' motion which seeks to disqualify plaintiff's counsel, "[t]he 'disqualification of an attorney is a matter which rests within the sound discretion of the court and will not be overturned absent a showing of abuse' " (*Mondello v Mondello*, 118 AD2d 549, 550 [2d Dept 1986], quoting *Schmidt v Magnetic Head Corp.*, 101 AD2d 268, 277 [2d Dept 1984]; see *Wells Fargo Bank, N.A. v Caro*, 82 AD3d 880, 881 [2d Dept 2011]). A party's entitlement to be represented in ongoing litigation by counsel of his own choosing, however, is a valued right which should not be abridged absent a clear showing that disqualification is warranted. (*Bentz v Bentz*, 37 AD3d 386 [2nd Dept. 2007].)

The Rules of Professional Conduct, which were promulgated as joint rules of the Appellate Divisions of the Supreme Court, effective April 1, 2009, and which supersede the former Part 1200 (Disciplinary Rules of the Code of Professional Responsibility), specifically, Rule 1.7(a) provides that, "Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that . . . the representation will involve the lawyer in representing differing interests." (Rules of Professional Conduct [22 NYCRR 1200.0] Rule 1.7 [a].) Paragraph (b) sets forth necessary conditions that allow an attorney to represent parties with differing interests.<sup>1</sup>

---

<sup>1</sup>The ABA's Model Rules of Professional Conduct prohibits lawyers from representing multiple clients where the client's interests are directly adverse or there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client unless the lawyer reasonably believes that he will be able to provide competent and diligent representation to each affected client; the representation is not prohibited by law; the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation; and each affected client gives informed consent,

“Disciplinary rules are not to be mechanically applied in considering motions to disqualify counsel (*United States ex rel. Sheldon Elec. Co. v Blackhawk Heating & Plumbing Co.*, 423 F Supp 486 [US Dist Ct, SD NY 1976 ]), nor will a violation of professional ethics automatically result in disqualification (*Grant Co. v Haines*, 531 F2d 671, 677 [2d Cir 1976]). However, the Court of Appeals has noted that “with rare and conditional exceptions, the lawyer may not place himself in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship” (*Matter of Kelly*, 23 NY2d 368, 376 [1968]) ” (*Schmidt v Magnetic Head Corp.*, 101 AD2d at 277).

Here, plaintiff’s counsel John D. Lovi, an attorney with the law firm of Steptoe & Johnson, LLP, represents NME’s commercial tenants in three separate landlord-tenant action commenced by NME in the Civil Court, Queens County. This Court, in an order dated April 4, 2013, granted the plaintiff’s request to stay the trial of the landlord tenant matter entitled *Northern Murray Equity, Inc. v Seung Hee Chun et al.* (Index No L & T 71951/2012) which is pending in Civil Court, Queens County. Counsel for plaintiff states that he intends to replead the plaintiff’s derivative causes of action on behalf of NME. Therefore, counsel’s claim that his clients are not adverse to each other and are aligned against a common adversary, NME, is incorrect. Rather, it is clear that the simultaneous representation of NME’s tenants, and the representation of a shareholder of NME, who also seeks to replead his derivative causes of action on behalf of the corporation, presents a conflict of interest.

The fact that there is a conflict in the instant case does not end this Court’s inquiry. Even where the court finds that “a reasonable lawyer would conclude that . . . the representation will involve the lawyer in representing differing interests” (Rules of Professional Conduct [22 NYCRR 1200.0] Rule 1.7 [a]), concurrent representation may still occur, if “(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one

---

confirmed in writing ( Model Rules of Professional Conduct R. 1.7[a] [2010]).

client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.” (Rules of Professional Conduct [22 NYCRR 1200.0] Rule 1.7 [b]).

Here, there is no evidence that Mr. Lovi, or his law firm, fully disclosed to both clients the implications of simultaneous representation as well as the advantages and risks involved, and obtained their consent in writing to such representation. Under these circumstances, Mr. Lovi and his law firm may not continue to represent the plaintiff in this action.

Accordingly, the defendants’ motion is granted to the extent that the first, second, and third causes of action are dismissed. That branch of the defendants’ motion which seeks to disqualify John Lovi, Esq., and the law firm of Steptoe & Johnson, LLP, from representing the plaintiff in this action, is granted. All proceedings in this action are stayed for a period of thirty (30) days from the date of service of this Order together with Note of Entry, so that the plaintiff may retain new counsel.

**Dated: May 14, 2013**

.....  
**TIMOTHY J. DUFFICY, J.S.C.**