Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **ALLAN B. WEISS** IA PART__ 2__

HUI XING WANG, Shareholder of CONEY ISLAND BUFFET, INC., Suing in the Right of CONEY ISLAND BUFFET, INC.

Index Number: 21501 2010

Plaintiff

Motion Date: May 9, 2013

-against-

Motion Seq. No.: __3____

SHENG WANG ZHANG, et al.

Defendant

The following papers numbered 1 to__9__ read on (A) this motion by plaintiff Hui Xing Wang (HXW) for (1) an order restoring this case to the trial calendar, (2) summary judgment on the first and second causes of action asserted against defendant Su Zhen Zhang (SZZ), defendant Xiao Ting Chen (XTC), defendant Xin Hua You (XHY), and defendant Xiao Tuan Zheng (XTZ) (collectively the defendant shareholders), (3) summary judgment against defendant Sheng Wang Zhang (SWZ), (4) summary judgment against defendant Double Lee, Inc. and (5) a default judgment against the remaining defendants, (B) on this cross motion by defendant Zeng Sheng Lin (ZSL), defendant Ting Zheng (TZ), and defendant Double Lee, Inc. for (1) an order dismissing the complaint against defendant ZSL and defendant TZ pursuant to CPLR 3211(a)(8), (2) an order dismissing the complaint against defendant ZSL and defendant TZ pursuant to CPLR 3211 (a) (7), and (3) summary judgment dismissing the complaint against defendant Double Lee, Inc. (C) on this cross motion by defendant SWZ and the defendant shareholders dismissing the complaint pursuant to CPLR 3211(a)(10) for failure to join necessary parties, and (D) on this cross motion by defendant Jimmy Zheng (JZ) for (1) an order dismissing the complaint against him pursuant to CPLR 306-b and 308 and (2) an order dismissing the complaint against him pursuant to CPLR 3211(a)(7)

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Upon the foregoing papers it is ordered that the motion and cross-motions are disposed of as follows:

I. The Facts

In June 2004, Tin Sing Lo and defendant Sheng Zhang (SZ) organized Coney Island Buffet, Inc. (CIB) for the purpose of operating a Chinese restaurant, and in August, 2004, the corporation assumed the lease as a tenant at premises located at 1409 Mermaid Avenue, Brooklyn, New York. Eventually, the shareholders of CIB became defendant SZZ (the wife of SZ), having a 15% interest, defendant XTC, having a 10% interest, defendant XHY, having a 15% interest, defendant XTZ, having a 15% interest, Yong Xiang Wang (YXW), having a 15% interest, plaintiff HXW having a 20% interest, and TSL having a 10% interest. The plaintiff contributed $92,000 toward the expense of opening the restaurant. In or about 2007, defendant SZ and defendant XHY offered to buy the corporation for $360,000, but their offer was rejected.

On or about September 11, 2008, the Health Department closed the restaurant after it failed an inspection. According to the plaintiff, at a board meeting, some of the defendant shareholders wanted to dissolve CIB, but he and TSL objected to that course of action. According to the plaintiff, CIB could hire a firm for $2,000 to clear the violations, and he proposed that CIB do so. Defendant SZ and the defendant shareholders rejected the plaintiff's proposal, and the restaurant remained closed. On the other hand, according to defendant XHY, the shareholders unanimously voted to end the corporation because it was unprofitable. The defendant shareholders further allege that the violations would have cost CIB approximately $15,000 to clear and that no shareholder was willing to contribute money to make the effort. Defendant XHY stopped issuing checks to the landlord, and, as a result, the landlord began eviction proceedings.

In December, 2008, the Marshall evicted CIB from the premises. Although no corporate resolution was ever presented, CIB was in fact dissolved thereafter.

On January 12, 2009, defendant Double Lee Buffet, Inc. (Double Lee 1), whose shareholders were defendant ZSL and defendant TZ, entered into a lease for the premises. These defendants belonged to the same family as some of the CIB shareholder defendants, but none of the shareholder defendants had an interest in Double Lee 1. According to the plaintiff, CIB had at least $16,728 in assets, including restaurant equipment, office equipment, furniture and fixtures. Double Lee 1 allegedly took possession of some or all of these assets without compensation to CIB. On the other hand, Double Lee 1 alleges that it rightfully took possession of the assets from the landlord after CIB was evicted.

After the plaintiff began this action, a new corporation, defendant Mermaid Avenue Buffet, Inc., was incorporated for the purpose of operating the restaurant at the premises, and Double Lee 1 was dissolved. Mermaid Avenue Buffet, Inc., operated by a cousin of one of the shareholders of Double Lee 1, had all the same employees as Double Lee 1.Yet another corporation, defendant Double Lee Buffet, NY, Inc. (Double Lee 2) was subsequently formed to take over from Mermaid Avenue Buffet, Inc.

II. The Complaint

The plaintiff began this derivative action by the filing of a summons and complaint on August 24, 2010. The first cause of action is asserted against shareholders and officers of CIB for breach of fiduciary duty. The plaintiff theorizes that they breached a fiduciary duty owed to him and the corporation (1) by not clearing the Health Department violations against CIB and allowing the restaurant to close and to be evicted, (2) by depriving him of his share of corporate funds and profits, and (3) by transferring the assets of CIB to Double Lee 1 without consideration. The second cause of action is for misappropriation of CIB's assets, the third cause of action is for conspiracy, the fourth cause of action is for a violation of BCL 624, the fifth cause of action is for conversion, the sixth cause of action is for unjust enrichment, the seventh cause of action is asserted against defendant ZSL and defendant TZ for aiding and abetting a breach of fiduciary duty, and the eighth cause of action is asserted against defendant Jimmy Zheng (JZ) for aiding and abetting a breach of fiduciary duty.

III. The Motion by Plaintiff HXW

That branch of the motion by plaintiff HXW which is for an order restoring this case to the trial calendar is granted without opposition

That branch of the motion by plaintiff HXW which is for summary judgment against the defendant shareholders on the first and second causes of action for breach of fiduciary duty is denied. The main allegations of the first and second causes of action concern the refusal of the defendant shareholders to clear the violations against CIB, their decision to allow CIB to go out of business, and the subsequent incorporation of Double Lee to operate the restaurant. Summary judgment is not warranted where, as in the case at bar, there is an issue of fact which must be tried. (*See*, *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986].) It is true that the "relationship between shareholders in a close corporation, vis a vis each other, is akin to that between partners and imposes a high degree of fidelity and good faith" (*Fender v. Prescott*, 101 AD2d 418, 422[1984] , affd. 64 NY2d 1077, 1079 [1985]; *Brunetti v. Musallam* 11 AD3d 280[2004].) "The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct***." (*Rut v. Young Adult Institute, Inc*., 74 AD3d 776, 777 [2010].) In the case at bar, summary judgment is precluded by issues of fact and credibility pertaining to the second element. On the one hand the plaintiff alleges that the defendant shareholders failed to clear the violations on the restaurant for the purpose of depriving him of his interest in CIB while, on the other hand, the defendant shareholders allege that no shareholder of CIB was interested in contributing money for the purpose of allowing the business to continue. The court notes that there are also issues of fact pertaining to whether any of the defendant shareholders committed acts of misappropriation against CIB.

That branch of the motion which is for summary judgment against defendant SWZ on the first and second causes of action is denied. Defendant SWZ was not a shareholder of CIB, but rather an officer, and the plaintiff apparently alleges that SWZ aided and abetted the defendant shareholders in breaching their fiduciary duty. The elements of a cause of action for aiding and abetting a breach of fiduciary duty include a breach of fiduciary duty, the defendant's knowing inducement or participation in the breach, and damages resulting therefrom. (*Bullmore v. Ernst & Young Cayman Islands,* 45 AD3d 461 [2007].) Summary judgment is precluded by issues of fact pertaining to each of these elements.

That branch of the motion which is for summary judgment against defendant Double Lee 1 on the fifth cause of action (conversion) and sixth cause of action (unjust

enrichment) is denied. There are issues of fact pertaining to whether Double Lee 1committed acts of misappropriation of CIB's assets.

That branch of the motion which is for a default judgment against the remaining defendants is denied without prejudice to renewal. CPLR 3215, "Default judgment," provides in relevant part: "***(f) Proof. On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 or subdivision (a) of rule 316 of this chapter, and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party ***. *** Proof of mailing the notice required by subdivision (g) of this section, where applicable, shall also be filed." (*See*, *Henriquez v. Purins*, 245 AD2d 337 [1997]; *Zelnick v. Bidermann Industries, USA, Inc*., 242 AD2d 227 [1997]; *Mullin v. DiLorenzo*, 199 AD2d 218 [1993].) In the case at bar, the plaintiff failed to submit an affidavit of merit by a party with knowledge of the facts pertaining to each of the defaulting defendants.

IV. The Cross Motion by defendant Zeng Sheng Lin (ZSL), Ting Zheng (TZ) and defendant Double Lee 1

That branch of the cross motion by defendant ZSL and Defendant TZ which is for an order dismissing the complaint against them pursuant to CPLR 3211(a)(8) is granted. The plaintiff may serve a supplemental summons and an amended compliant upon defendant ZSL by delivering the papers to his attorney.

On August 20, 2012, the court permitted the plaintiff to join ZSL and TZ as additional defendants. These defendants now move for the dismissal of the action against them because the plaintiffs failed to serve supplemental summonses upon them with amended complaints. CPLR 305(a) provides in relevant part: "Where *** a new party is joined in the action and the joinder is not made upon the new party's motion, a supplemental summons specifying the pleading which the new party must answer shall be filed with the clerk of the court and served upon such party." (*See*, *Benn v. Losquadro Ice Co., Inc*., 65 AD3d 655 [2009].) The plaintiff admits the failure of in personam jurisdiction, and requests the court to order expedient service pursuant to CPLR 308(5) because ZSL has moved to an unknown location in China. The request is reasonable. However, there is no need for expedient service upon defendant TZ since his attorney affirms that TZ "currently lives at 69 Bay 20th Street, Brooklyn, New York."

That branch of the cross motion by defendant ZSL and defendant TZ which is for an order dismissing the complaint against them pursuant to CPLR 3211(a)(7) is denied as moot.

That branch of the cross motion by defendant Double Lee 1 which is for summary judgment dismissing the complaint against it is denied. There are issues of fact concerning whether the defendant rightfully took possession of CIB assets from the landlord after the eviction .

V. The Cross Motion by defendant SWZ and the defendant shareholders

The cross motion by defendant SWZ and the defendant shareholders is granted unless the plaintiff serves a supplemental summons and an amended complaint upon CIB joining it as a party defendant within twenty days of the service of a copy of this order with notice of entry.

The movants argue that this action must be dismissed for failure to join YXW and TSL, shareholders of CIB, Mei Fen Lin, the former bookkeeper of CIB, and CIB as necessary parties. CPLR 1001, " Necessary joinder of parties," provides in relevant part: " (a) Parties who should be joined. Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." (*See*, *Spector v. Toys ""R" Us, Inc.,* 12 AD3d 358 [2004].) Insofar as YXW and TSL are concerned, the plaintiff does not allege wrongful conduct against them, and their joinder is not necessary for the plaintiff to obtain complete relief against the other shareholders. Moreover, YXW and TSL will not be inequitably affected by a judgment in this case. It is true that the prayer for relief seeks the imposition of a constructive trust "on all revenue generated by Defendants on [sic: in] operating of the Chinese Buffet." The plaintiff makes clear in the sixth cause of action that he is seeking the imposition of a constructive trust on "all of the property Defendants have wrongfully obtained." The plaintiff does not allege that YXW and TSL wrongfully obtained any property. Insofar as MFL is concerned, she merely served as CIB's bookkeeper, and, as the plaintiff points out, there is a difference between a witness and a defendant. Insofar as CIB is concerned, "[a] corporation is a necessary party to a shareholders' derivative action since the cause of action belongs to the corporation and any recovery must run in favor of the corporation, the suing shareholder being only a nominal plaintiff." (82 NYJur2d , "Parties," § 104.) The corporation on whose behalf the derivative plaintiff sues "is ordinarily an indispensable party in a derivative suit" and "should be joined as a defendant." *(Tobias v Tobias*, 192 AD2d 438, 440 [1993] .)

VI. The Cross Motion by defendant JZ

That branch of the cross motion by defendant JZ which is for an order dismissing the complaint against him pursuant to CPLR 3211(a)(8) is granted. The "affidavit of attempted service" signed by the plaintiff's process server does not show that he made service of a supplemental summons and an amended complaint on defendant JZ in any manner authorized by CPLR 308.

That branch of the cross motion by defendant JZ which is for an order dismissing the complaint against him pursuant to CPLR 3211(a)(7) is denied as moot.

Dated: August 30, 2013

J.S.C.