

<b>William NG v Steven NG</b>
2014 NY Slip Op 30372(U)
February 6, 2014
Supreme Court, New York County
Docket Number: 114291/10
Judge: Barbara Jaffe
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

-----x  
WILLIAM NG and CHOUK NG,

Plaintiffs,

- against -

Index No. 114291/10

Mot. seq. no. 002

**DECISION AND ORDER**

STEVEN NG, individually and as fiduciary of CHOUK  
KING CO. INC., and TIEN YICK CO. INC.; and WILSON  
NG, individually and as fiduciary of CHOUK KING CO.  
INC, and TIEN YICK CO. INC.,

Defendants.  
-----x

BARBARA JAFFE, J.:

**For plaintiffs:**

Stephen A. Agus, Esq.  
Agus & Partners, P.C.  
75 Maiden Lane, Ste. 607  
New York, NY 11428  
212-376-5756

**For defendants:**

Howard Poch, Esq.  
Poch & Luckow, P.C.  
15 Maiden Lane, Ste. 1601  
New York, NY 10038  
212-344-4184

Defendants move pursuant to CPLR 3211 and 3212 to dismiss the complaint. Plaintiffs oppose and cross-move to restore plaintiff Chouk Ng's original claim to this action, granting an order to consolidate, for summary judgment, and in the alternative, to be granted leave to amend. Defendants oppose.

I. BACKGROUND

Plaintiff William Ng and defendants Steven Ng and Wilson Ng are brothers; plaintiff Chouk Ng is their father. In their complaint dated March 11, 2011, plaintiffs allege that on or about January 1, 2000 defendants improperly seized and thereafter maintained exclusive control over Chouk King Co. Inc.'s (Chouk King) and Tien Yick Co. Inc.'s (Tien Yick) corporate and financial documents and diverted funds for their own benefit, all in derogation of plaintiffs'

rights as legal and equitable owners and officers of the corporations. In the first and second causes of action, plaintiffs seek an accounting of all corporate affairs from the year 2000 to the present, and for half of all net profits for this period. Their third cause of action is for conversion, and in their fourth cause of action, plaintiffs seek to enjoin defendants from transferring corporate assets and to allow plaintiffs to resume normal work activities. (NYSCEF 48).

On or about April 27, 2011, Tien Yick was dissolved. (NYSCEF 60).

By stipulation dated May 13, 2011 and signed by both Chouk and his attorney, Chouk withdrew as plaintiff in the action, without prejudice. (NYSCEF 57).

On or about November 2, 2011, William served a subpoena duces tecum upon defendants' accountant for corporate documents and tax records. In support of their motion to quash the subpoena, defendants proffered an affidavit from Chouk dated December 29, 2011, identifying himself as an officer and shareholder of the corporations, and denying that William ever held any interest in them. He alleged that upon learning of the instant action, he demanded to be removed from it, and that he opposed William's attempt to seek damages or inspect records. Chouk also maintained that the contents of the affidavit were read to him in Cantonese by an acquaintance. (NYSCEF 58).

On or about January 25, 2012 Chouk King was dissolved. (NYSCEF 59).

By decision and order dated April 17, 2012, the justice previously presiding in this part granted defendants' motion to quash the subpoena, except to the extent that he ordered defendants to produce for *in camera* review records containing shareholder information, as well as any documentation regarding the history of the corporations' structure and leadership. He

stated that any unexplained gaps in the documentation would warrant an inference that William was likely a shareholder or officer during any period of time for which no documents were provided. (NYSCEF 52).

On May 23, 2012, following the *in camera* review of the documents produced by defendants, the court stated on the record that defendants had fully complied with his order, that the documents constituted the complete history of all shareholder transactions, that there was no evidence that William was a shareholder or beneficiary of the corporations, and that consequently, William had no standing to demand production of the documents. The court also observed that as the corporations were family-run, the absence of minutes or other records and corporate formalities was of no moment. (NYSCEF 53).

On or about June 11, 2012, Chouk served defendants with a written demand to inspect the corporate books and records. (NYSCEF 54).

On or about July 18, 2012, Chouk commenced a new action against defendants, alleging that their failure to respond to his demand violated New York Business Corporation Law § 624, and leveling the causes of action set forth in the prior action. (NYSCEF 50).

At an examination before trial (EBT) held on January 16, 2013 and with the aid of a Cantonese interpreter, Chouk identified himself as 100 percent owner of both corporations, claimed he does not understand English, and retreated from his earlier opposition to William's action. He testified that he initially managed the corporations with his wife, and that William managed them for approximately 10 years commencing in 1984. Thereafter, Wilson managed the corporations. Chouk also testified that despite his repeated requests, Wilson failed to produce records or otherwise report to him about corporate activities, and he denies authorizing

Steven to manage anything. Chouk maintains that he signed the stipulation to discontinue at Steven's behest at plaintiffs' counsel's office without inquiring as to its contents, and that while he was in the hospital recovering from triple bypass heart surgery, he signed the affidavit in support of the motion to quash at defendants' request and without any explanation from defendants and without the assistance of an interpreter. (NYSCEF 46).

## II. CONTENTIONS

In support of their motion to dismiss pursuant to CPLR 3211, defendants rely on William's failure to offer any evidence of his standing as a shareholder, as well as the court's of-record findings on May 23, 2012. They argue that there is no common-law right to an accounting for the recovery of a rightful share of net profits, that William fails to plead facts sufficient to support causes of action for conversion or for an injunction, and that his action is barred under the statute of frauds and statute of limitations. (NYSCEF 29, 63).

In support of their motion for summary judgment pursuant to CPLR 3212, defendants proffer affidavits from Steven and Wilson denying that William ever had an interest in the corporations. (NYSCEF 30, 31).

William contends that defendants' failure to maintain records pursuant to BCL § 624(g) and the findings set forth in the April 2012 order warrant an inference that he is a shareholder. (NYSCEF 44, 65). He also claims to have been the head officer and managing agent of the corporations for years, that he is currently listed with the Department of State as the party authorized to accept service on behalf of Chouk King, and that he received regular disbursements of proceeds from the corporations' net profits before defendants' takeover 10 years ago. In light of the recent dissolution of the corporations, William fears that defendants

\* 5]  
will continue to transfer corporate assets. (NYSCEF 45)

### III. DEFENDANTS' MOTION

#### A. Documentary evidence (CPLR 3211[a][1])

Pursuant to CPLR 3211(a)(1), a party may move to dismiss a pleading on the ground that it has a defense based on documentary evidence, although such a motion will only be granted if the evidence conclusively establishes a defense to a claim as a matter of law. (*Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]).

The court's May 23, 2012 findings, as well as William's failure to provide documentation, do not constitute documentary evidence within the meaning of the statute. (*See Palmieri v Biggiani*, 108 AD3d 604, 607 [2d Dept 2013] [court orders, transcripts of hearings submitted pursuant to CPLR 3211(a)(1) did not resolve all factual issues as matter of law]; *Fontanetta v John Doe 1*, 73 AD3d 78, 84-86 [2d Dept 2010] [affidavits, deposition testimony, do not constitute documentary evidence within meaning of statute]; *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 270-271 [1<sup>st</sup> Dept 2004] [same]).

#### B. Standing (CPLR 3211[a][3])

Pursuant to CPLR 3211(a)(3), a cause of action may be dismissed where a party lacks legal capacity or standing to sue. On such a motion, the allegations pertaining to a plaintiff's capacity must be accepted as true. (*Lazar v Merchants' Nat. Properties, Inc.*, 45 Misc 2d 235, 236 [Sup Ct, New York County 1964], *affd* 23 AD2d 630 [1<sup>st</sup> Dept 1965]). The critical issue when determining standing to sue is whether the party has suffered an "injury in fact," or whether it has an actual legal stake in the matter being litigated and a concrete interest in commencing the action. (*Socy. of Plastic Ind., Inc. v County of Suffolk*, 77 NY2d 761 [1991]).

Here, William alleges he is an equitable and legal owner of the corporations, and that defendants have improperly prevented him from collecting his share of net profits. Assuming the truth of his allegations, he has sufficiently pleaded an injury in fact.

C. Statute of limitations and statute of frauds (CPLR 3211[a][5])

As defendants cite no case law or statute in support of this portion of their motion to dismiss, it is fatally conclusory.

D. Failure to state a cause of action (CPLR 3211[a][7])

Pursuant to CPLR 3211(a)(7), a party may move for an order dismissing a cause of action against it on the ground that the pleading fails to state a cause of action. In deciding the motion, the court must liberally construe the pleading, accept all the alleged facts as true, and accord the non-movant every possible favorable inference, ascertaining only whether the allegations fall within any cognizable legal theory. (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

1. Accounting

To state a cause of action for an accounting, the plaintiff must allege the existence of a confidential or fiduciary relationship, and a breach of duty imposed by that relationship concerning property in which the plaintiff has an interest. (*Weinstein v Natalie Weinstein Design Assoc., Inc.*, 86 AD3d 641, 643 [2d Dept 2011]). Shareholders of a closely-held corporation owe fiduciary duties to one another which may give rise to an action for an accounting. (*Unitel Telecard Distrib. Corp. v Nunez*, 90 AD3d 568, 569 [1<sup>st</sup> Dept 2011]). A shareholder possesses a common-law right to inspect the corporation's books and records, now codified in BCL § 624. (*Crane Co. v Anaconda Co.*, 39 NY2d 14, 18 [1976]; *O'Brien v O'Brien*, 75 AD2d 641 [2d Dept 1980], *lv denied*, 51 NY2d 710).

Here, William has pleaded that he is a shareholder, and that defendants have improperly withheld corporate records from him.

## 2. Conversion

Property is converted when a person, intentionally and without authority, exercises control over it in a manner that interferes with another's right to possess it. (*Colavito v New York Organ Donor Network, Inc.*, 49-50 [2006]). The two elements of conversion are: 1) the plaintiff's possessory interest in the property, and 2) the defendant's control over the property or interference with it, in derogation of the plaintiff's rights. (*Id.* at 50).

Here, William alleges that he is a shareholder, and that defendants have usurped control of the corporations, diverting funds belonging to the corporation for their own personal gain, thus depriving him of his rightful share of profits. He sufficiently alleges a cause of action for conversion. (*See Lemle v Lemle*, 92 AD3d 494 [1<sup>st</sup> Dept 2012] [minority shareholder's allegations that other shareholders used funds for personal gain and for benefit of others who did little or no work for corporation sufficiently stated conversion claim]).

## 3. Injunctive relief

A party seeking a preliminary injunction must establish: 1) a likelihood of success on the merits, 2) irreparable harm in the absence of an injunction, and 3) a balance of the equities in favor of the injunction. (*Doe v Axelrod*, 73 NY2d 748, 750 [1988]). Irreparable harm is defined as the "substantial prejudice caused by the acts sought to be restrained if permitted to continue *pendente lite*." (*Chrysler Corp. v Fedders Corp.*, 63 AD2d 567, 569 [1<sup>st</sup> Dept 1978]).

Assuming the truth of William's allegations, if an injunction is not granted, defendants will continue depleting corporate assets for their own personal gain, which would work

irreparable harm upon him as an alleged shareholder of both corporations. At this early pleading stage, William has sufficiently stated a cause of action for injunctive relief. (*See Elow v Svenningsen*, 58 AD3d 674 [2d Dept 2009] [complaint construed liberally sufficiently pleaded cause of action to enjoin obstruction of easement]; *Bd. of Managers of Crest Condominium v City View Gardens Phase II, LLC*, 35 Misc 3d 1223[A], 2012 NY Slip Op 50826[U], \*12 [Sup Ct, NY County 2012] [finding that plaintiff sufficiently alleged cause of action for injunctive relief regardless of the underlying merits of its claim]).

#### E. Summary judgment

A party seeking summary judgment must demonstrate, *prima facie*, that it is entitled to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314 [2004]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial, as “mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient.” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the movant does not meet this burden, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853). The movant cannot meet its burden by merely highlighting gaps in its opponent’s case; it must affirmatively establish the merit of its own claim or defense. (*Mennerich v Esposito*, 4 AD3d 399, 400 [2d Dept 2004]). Courts may not assess credibility on a motion for summary judgment, and the facts must be viewed in the light most favorable to the nonmoving party. (*Forest*, 3 NY3d 314; *Ferrante v Am. Lung Assn.*, 90 NY2d 623, 631 [1997]).

Here, defendants’ contentions in their affidavits that William was never a shareholder or

officer is disputed by William, who thereby raises a triable issue of fact.

#### IV. PLAINTIFFS' CROSS-MOTION

##### A. Summary judgment

Absent any proof substantiating his claims, William has failed to establish, *prima facie*, his entitlement to judgment as a matter of law on any of his causes of action. And, as defendants complied with the court's April 2012 order, William's request that his shareholder status be inferred is without merit.

##### B. Consolidation and vacatur of Chouk's stipulation of discontinuance

Actions involving common questions of law or fact may be consolidated upon motion of a party. (CPLR 602[a]). Whether to consolidate is a decision within the sound discretion of the trial court. (*Matter of Hill v Smalls*, 49 AD2d 724 [1<sup>st</sup> Dept 1975], *lv denied* 38 NY2d 893 [1976]). When judicial economy may be served, consolidation is preferred; however, where the rights of a party are substantially prejudiced, consolidation is disfavored. (*Matter of Progressive Ins. Co. [Vasquez - Countywide Ins. Co.]*, 10 AD3d 518, 519 [1<sup>st</sup> Dept 2004]; *Raboy v McCrory Corp.*, 210 AD2d 145, 147 [1<sup>st</sup> Dept 1994]).

Here, defendants argue that they will be substantially prejudiced by allowing Chouk to withdraw his stipulation of discontinuance given his second action for the same relief, but do not allege that they will be prejudiced by consolidating the two actions. Absent prejudice, the two actions are properly consolidated.

Generally, a court may not vacate a stipulation of discontinuance on motion; a plenary action is necessary to seek such relief. (7B Carmody-Wait 2d § 47:56; *Moshe v Town of Ramapo*, 54 AD3d 1030 [2d Dept 2008]).

C. Amendment of pleadings

Plaintiffs fail to attach their proposed pleadings. (See CPLR 3025[b] [motion to amend shall be accompanied by proposed pleading clearly showing changes to be made]).

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss plaintiffs' complaint is denied; it is further

ORDERED, that defendants' motion for summary judgment dismissing the complaint is denied; it is further

ORDERED, that plaintiffs' cross-motion to consolidate is granted and the above-captioned action is consolidated in this Court with *Chouk Ng v Chouk King Co. Inc., et al.*, Index No. 652501/12, and the consolidated action shall bear the following caption:

-----  
WILLIAM NG and CHOUK NG,

Plaintiffs,

- against -

STEVEN NG, individually and as fiduciary of CHOUK KING CO. INC., and TIEN YICK CO. INC.; and WILSON NG, individually and as fiduciary of CHOUK KING CO. INC, and TIEN YICK CO. INC.,

Defendants.  
-----

It is further

ORDERED, that the pleadings in the actions hereby consolidated shall stand as the

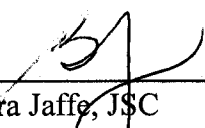
pleadings in the consolidated action; it is further

ORDERED, that upon service on the Clerk of the Court of a copy of this order with notice of entry, the Clerk shall consolidate the papers in the actions hereby consolidated and shall mark his records to reflect the consolidation, it is further

ORDERED, that the remainder of plaintiffs' cross-motion is denied in its entirety.

ORDERED, that plaintiffs are directed to serve a copy of this order with notice of entry upon the Clerk of the Trial Support Office (Room 158), who is hereby directed to mark the court's records to reflect the consolidation.

ENTER:

  
\_\_\_\_\_  
Barbara Jaffe, JSC

**BARBARA JAFFE**  
J.S.C.

DATED: February 6, 2014  
New York, New York