

**TYT E. Corp. v Lam**

2014 NY Slip Op 32081(U)

August 5, 2014

Sup Ct, NY County

Docket Number: 601029/2010

Judge: Shirley Werner Kornreich

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

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TYT EAST CORP., JIN HUA RESTAURANT INC.,  
FEN ZHENG, YI QIU LIN, LU HUI QIU, QIU LIN,  
HANG ZHU, and HUI SHENG LIN, individually  
and representing 73.33% of the shareholders of  
TYT East Corp. and Jin Hua Restaurant Inc.,

Index No.: 601029/2010

**DECISION & ORDER**

Plaintiffs,

-against-

MICHAEL LAM, DAVID GAO, CHEN HUA,  
JOHN DOE # 1-10, JANE DOE # 1-10, and  
XYZ CORPORATION # 1-10, all names being  
fictitious and presently unknown,

Defendants.

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DAVID GAO and CHEN HUA a/k/a HUA CHEN,  
individually and derivatively as derivatively as  
shareholders of TYT EAST CORP., and JIN HUA  
RESTAURANT, INC.,

Third-Party Plaintiffs,

-against-

JI XIONG NI a/k/a JIXIONG NI a/k/a NI JI XIONG,  
LILI NI a/k/a LI LI NI, YAN ZHUANG a/k/a  
ZHUANG YAN, NEW MONEY LINK, INC.,  
HONG XING MANAGEMENT CORP., TYT EAST  
BROADWAY INC. d/b/a YUMMY YUMMY BAKERY,  
HONG WEI INTERNATIONAL MONEY TRANSFER  
CORP., PARK REGENT 88628 LLC, NEW EAST  
OCEAN INC., XIN HUI LIU, YAN YU LIU,  
CONNIE CHEN, JOHN DOE #1-10, JANE DOE #1-10,  
and XYZ CORPORATION # 1-10, all names being  
fictitious and presently unknown,

Third-Party Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Motion Sequence Numbers 007, 008, and 009 are consolidated for disposition.

Third-party defendants Yan Zhuang a/k/a Zhuang Yan (Zhuang) and Park Regent 88628 LLC (Park Regent) (collectively, the Park Regent Parties) move, pursuant to CPLR 3212, for summary judgment and dismissal of the claims asserted against them in the third-party action. Seq. 007. Third-party plaintiff David Gao (Gao) moves for partial summary judgment against third-party defendants. Seq. 008. Third-party plaintiff Chen Hua a/k/a Hua Chen (Chen) also moves for partial summary judgment against the third-party defendants. Seq. 009.<sup>1</sup> Gao and Chen oppose the Park Regent Parties' motion. The Park Regent Parties and plaintiff Hui Sheng Lin (Lin) oppose Gao and Chen's motions, and Lin also cross-moves for summary judgment. Seqs. 8 & 9. The remaining third-party defendants, listed in the above caption, did not oppose the summary judgment motions made against them. For the reason that follow, the Park Regent Parties' motion is denied, Gao's motion is granted, Chen's motion is granted, and Lin's cross-motion is denied.

### *I. Background*

The court assumes familiarity with its order dated January 8, 2013 (the 2013 Order) (Dkt. 98)<sup>2</sup> and the proceedings in the federal district and bankruptcy courts in the Southern District of New York.<sup>3</sup> Unless otherwise noted, the following facts are undisputed.

As discussed in the 2013 Order, this litigation concerns financial impropriates related to the Companies (TYT and JHR), which operated businesses in a net-leased building located at 35

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<sup>1</sup> Chen withdrew his motion as against plaintiff Hang Zhu and third-party defendant Xin Hui Liu. See Dkt. 315 (6/10/14 Tr. at 50). In the proposed judgment, discussed below, the parties shall ensure that judgment is only directed to be entered against the proper parties.

<sup>2</sup> All defined terms have the same meaning as in the 2013 Order.

<sup>3</sup> *United States v All Right Title and Interest in the Real Property & Appurtenances Thereto Known as 35-37 E. Broadway, New York, New York 10002*, No. 12-Civ-4034 (SDNY); *In re TYT E. Corp.*, No. 13-10864 (Bankr SDNY).

West Broadway, Manhattan (the Building). In short, Ni, along with his ex-wife (plaintiff Fen Zheng) and daughter (defendant Lili Ni), who are in default, and through the various third-party defendant individuals and corporations, allegedly used the Companies without regard to any serious corporate formalities to further their own personal and illegal corporate purposes. Ni's improprieties led to a federal immigration raid, criminal forfeiture of the Building, and TYT's bankruptcy.

In 2010, TYT sued Gao and Chen for its financial problems. Gao and Chen had collectively invested over \$800,000 in the Companies. The 2013 Order made clear that the allegations against Gao and Chen lacked merit, and, indeed, bordered on the frivolous. *See, e.g.* 2013 Order at 9 ("there is no vicarious liability for being a tortfeasor's son-in-law"). Gao and Chen, in turn, commenced the third-party action against Ni and his cohorts to hold them liable for the very fraudulent activities Gao and Chen were improperly accused of. Gao and Chen, alleging 15 causes of action,<sup>4</sup> seek: (1) the return of their investment; and (2) to hold Ni and his associates liable for looting the Companies.<sup>5</sup>

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<sup>4</sup> (1) breach of fiduciary duty; (2) unjust enrichment; (3) veil piercing; (4) fraud; (5) corporate mismanagement; (6) breach of fiduciary duty; (7) conversion; (8) conspiracy; (9) aiding and abetting breach of fiduciary duty; (10) an accounting; (11) constructive trust; (12) negligence; (13) violations of BCL § 720; (14) abuse of legal process; and (15) punitive damages.

<sup>5</sup> Gao's attorneys, Morrell Berkowitz and Pamela Gallagher of Gallet Dreyer & Berkey, LLP, deserve praise for the extraordinary work they have performed in this matter. This action has been subjected to countless delays and arguably sanctionable dilatory conduct by TYT's former counsel, which deferred the obvious outcome in this case for almost 4 years. Wading through the gargantuan volume of foreign language documents alone was a formidable task. As a result of their efforts, the record before the court clearly warrants summary judgment. Though, as discussed herein, some of the third-party defendants are making a final, last ditch effort to forestall judgment, there is simply no merit to their motion. Lin's counsel, Mr. Mouton, is cautioned that future bad-faith efforts to contravene the CPLR, the court's orders (e.g., making an untimely cross-motion that violates the court's January 23, 2014 order), and general notions of fair play (e.g., the last minute production of the promissory note, discussed herein) will not only merit denial of his motion, but will warrant sanctions (e.g., paying the third-party plaintiffs'

## II. Legal Standard

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

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costs of opposing the motion or an inquest into the legitimacy of the recently proffered note). It also should be noted that, though Mr. Mouton is relatively new to this case and may not have realized it, Lin's current denial that he is a principal of Park Regent contradicts Mr. Mouton's other clients' (Zhuang and Park Regent) answers to the contrary. Compare Dkt. 192 ¶ 85, with Dkt. 195 ¶ 3 and Dkt. 196 ¶ 3. The ethical implications of these contradictions are not before the court. Further, Winnie Mok, Esq. has been notarizing the affidavits submitted by Mr. Mouton. See, e.g., Dkt. 311 at 2. Ms. Mok is no stranger to this case, as she formerly represented the Park Regent Parties and (sometimes, though inexplicably not at others) appeared at conferences on their behalf. Hence, the notion that Mr. Mouton's clients have been without counsel or not on actual notice of their discovery obligations is patently implausible.

“In order to pierce the corporate veil, a plaintiff must show that the dominant corporation exercised complete domination and control with respect to the transaction attacked, and that such domination was used to commit a fraud or wrong causing injury to the plaintiff.” *Fantazia Int’l Corp. v CPL Furs New York, Inc.*, 67 AD3d 511, 512 (1st Dept 2009), citing *Morris v NY State Dep’t of Taxation & Finance*, 82 NY2d 135, 140 (1993). “Factors to be considered include the disregard of corporate formalities; inadequate capitalization; intermingling of funds; overlap in ownership, officers, directors and personnel; common office space or telephone numbers; the degree of discretion demonstrated by the allegedly dominated corporation; whether dealings between the entities are at arm’s length; whether the corporations are treated as independent profit centers; and the payment or guaranty of the corporation’s debts by the dominating entity. No one factor is dispositive.” *Id.*, citing *Freeman v Complex Computing Co.*, 119 F3d 1044 (2d Cir 1997).

### III. Discussion

There is substantial evidence in the record on these motions demonstrating that Ni did not adhere to corporate formalities with respect to any of his companies and that he essentially treated the Companies, along with Gao and Chen’s investments, as his personal bank account. As discussed below, TYT paid for the expenses of his other companies (some of which had nothing to do with the Building, such as the unrelated businesses across the street) and had no valid corporate reason to do so. In any event, since Ni has long been in default, he cannot refute Gao and Chen’s evidence of his fraud (which, in any event, is compelling). There is no need, therefore, to address each of the somewhat duplicative claims against Ni and the other defaulting third-party defendants since fraud – the gravamen claim – has been proven. To avoid any

ambiguity, Gao and Chen's counsel shall submit a joint proposed judgment to ensure that the relief granted is precisely targeted at the appropriate defendants. *See* Dkt. 315 (6/10/14 Tr. at 25-26) (setting forth which parties did not oppose the instant motions).<sup>6</sup>

Hence, the only remaining issues that merit discussion are the arguments made by three of Ni's co-conspirators who participated in these motions. To be sure, as this court held at oral argument, Lin and the Park Regent Parties were in default coming into this motion [*see* Dkt. 315 (6/10/14 Tr. at 24)], so denial of their summary judgment application is warranted on that ground alone. Nonetheless, as the arguments they proffer on this motion are baseless, the court dispenses with them to avoid further delay in this overly protracted litigation.

Lin and the Park Regent Parties rely primarily on a promissory note (the Note), reproduced below, proffered for the first time on the instant motions. *See* Dkt. 179. Though Gao and Chen explicitly demanded documents reflecting all loans made by TYT and Zhuang (*see, e.g.,* Dkt. 261 at 7-8), Lin and the Park Regent Parties did not produce the Note in discovery, nor did they respond to discovery demands. Lin and the Park Regent Parties, along with the other third-party defendants, have consistently defaulted on their discovery obligations and failed to appear at conferences, which is why they have long been in default. They have, in other words, willfully and contumaciously disregarded their discovery obligations. *See Fish & Richardson, P.C. v Schindler*, 75 AD3d 219, 221-22 (1st Dept 2010) (affirming this court's striking of defendant's answer where "defendant's pattern of noncompliance with court orders was willful, contumacious and in bad faith" and "[defendant failed] to offer a reasonable excuse for his dilatory behavior").

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<sup>6</sup> The proposed judgment should also address the disposition of the claims against Chen. *See* Dkt. 315 (6/10/14 Tr. at 28-30).

Lin and the Park Regent Parties cannot now rely on a supposedly game-changing financial document that they egregiously withheld in violation of numerous court orders. As the Court of Appeals recently reiterated, “[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity.” *CDR Creances S.A.S. v Cohen*, 2014 WL 1806913, 2014 NY Slip Op 03294 at \*13 (NY Ct App May 8, 2014), quoting *Kihl v Pfeffer*, 94 NY2d 118, 123 (1999) (“compliance with a disclosure order requires both a timely response and one that evinces a good-faith effort to address the requests meaningfully”) (emphasis added).

Lin and the Park Regent Parties failed to produce the Note for years and, for the first time, submit it on a motion for summary judgment. Moreover, their counsel, at oral argument, averred that his attempt at the classic sharp tactic of trial-by-ambush is perfectly permissible since Gao and Chen never formally moved to compel discovery. He is wrong. Not only were these documents (and all of the other requested discovery) repeatedly demanded and ordered to be produced at countless discovery conferences in this 2010 case, but a final chance was given to the individual third-party defendants to produce documents. Thus, in an order dated September 10, 2013 (Dkt. 132), the court directed a gratuitous re-serving of outstanding document demands on third-party defendants (who, by the way, were in default as of that conference). Production of the discovery was due on October 31, 2013, and a failure to produce such discovery would, the court ruled, result in a default judgment. Other than Lin, none of the other parties-in-default produced **any** documents. All Lin produced was a TYT stock certificate. *See* Dkt. 138 (“All I have is the enclosed stock certificate”).

In any event, the Note creates more problems for the third-party defendants than it purports to solve. A translation of the Note, provided by the Park Regent Parties' counsel, states:

This is to confirm receipt from [Zhuang \$200,000] in cash, to be used for payment of lease-signing expenses for the premises at 35-37 East Broadway. Said sum will be immediately re-paid upon receipt of investment funds from the shareholders. (Not to exceed 6 months).

Borrower:  
Ji Xiong Ni (Signed)  
October 14, 2008

*See* Dkt. 179.

The Park Regent Parties suggest that the Note proves that one of Ni's many defalcations of TYT's assets can be justified since, rather than Ni stealing TYT's money to give to Zhuang, Ni was simply repaying a loan Zhuang made to TYT. However, on its face, the Note says no such thing. The Note, instead, evidences a debt between Zhuang and Ni, not TYT. By arguing that the Note is proof that Ni's payment to Zhuang was a legitimate TYT corporate expenditure, the Park Regent Parties actually bolster the notion that Ni and TYT did not adhere to corporate formalities. Simply put, by averring that the Note between Zhuang and Ni evidences a TYT corporate debt, the Park Regent Parties implicitly concede that there is no real difference between TYT and Ni (a fact that the unrebutted evidence firmly proves). Hence, even if the Note were considered despite the discussed discovery abuses, it would be the nail in the coffin on Gao and Chen's veil piercing claims.

Indeed, Ni's disregard of cooperate formalities was pervasive. The unrebutted evidence proves that he diverted substantial cash from the company (e.g., siphoning money to his daughter Lili) and, in any event, failed to procure the requisite shareholder approval before entering into transactions of such value. *See* Dkt. 204 at 8 (TYT's Shareholders Agreement, ¶7, requiring

unanimous board approval for such transactions). As one particular egregious example, Ni (and his ex-wife, Zheng, who signed the checks) used TYT funds to pay rent for his other businesses in which neither TYT nor its shareholders (at least not Gao and Chen) had an interest. *See* Dkt. 211 (checks totaling approximately \$300,000); *see also* Dkt. 214 (Zheng's personal cash withdrawals totaling approximately \$90,000); *see also* Dkt. 212 (checks written from TYT to Park Regent). To wit, in a moment of rare candor at his deposition, Ni admitted that TYT had no right to pay for the expenses of Ni's other businesses since neither TYT, Gao, or Chen had any equity in or obligation to those businesses. *See* Dkt. 216 at 57-61 (Ni 5/18/12 Dep. Tr. at 197-201). Accordingly, it is

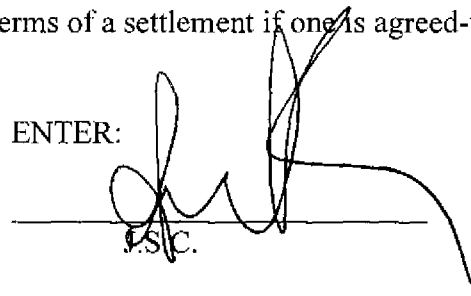
ORDERED that the summary judgment motions (Seq. 008 & 009) by third-party plaintiffs David Gao and Chen Hua are granted, and they shall submit a joint proposed order directing the Clerk to enter judgment in accordance with this decision and the hearing record by September 9, 2014; and it is further

ORDERED that the summary judgment motion (Seq. 007) by third-party defendants Yan Zhuang and Park Regent 88628 LLC and the cross-motion by plaintiff Hui Sheng Lin are denied for the reasons set forth herein and on the record at oral argument on June 10, 2014 (Dkt. 315); and it is further

ORDERED that before August 28, 2014, Gao, Chen, Zhuang, Park Regent, and Lin, along with their counsel, must meet and confer in person to attempt to reach a settlement so that the proposed judgment can incorporate the terms of a settlement if one is agreed-to.

Dated: August 5, 2014

ENTER:

  
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J.S.C.