

**Kin Lung Cheung v Nicosia**

2014 NY Slip Op 32176(U)

July 30, 2014

Sup Ct, Kings County

Docket Number: 501965/13

Judge: Mark I. Partnow

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 43 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 30<sup>th</sup> day of July, 2014.

P R E S E N T:

HON. MARK I. PARTNOW,  
Justice.  
-----X  
KIN LUNG CHEUNG, ET ANO.,

Plaintiffs,

- against -

Index No. 501965/13

FRANCES NICOSIA, ET ANO.,  
Defendants.  
-----X

The following papers numbered 1 to 9 read herein:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-3; 4-7 _____
Opposing Affidavits (Affirmations) _____	8 _____
Reply Affidavits (Affirmations) _____	_____
_____ Affidavit (Affirmation) _____	_____
Other Papers <u>Order to Show Cause</u> _____	<u>9</u> _____

Upon the foregoing papers: (1) plaintiff Kin Lung Cheung (Cheung) moves for an order (a) granting a default judgment against defendants Frances Nicosia (Frances) and Anna Nicosia (Anna) and (b) declaring, among other stated requests, that the purported life tenancy of Anna Nicosia does not impair the ability of Frances Nicosia to transfer or convey the

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premises located at 157 Franklin Street, Brooklyn, New York (the subject premises) to plaintiff pursuant to a certain contract of sale and directing specific performance; (2) defendants cross-move for an order vacating their default in answering the summons and verified complaint in the instant matter, denying plaintiff's motion for a default judgment, and dismissing plaintiff's action in its entirety against Anna Nicosia for failure to state a cause of action; and (3) plaintiff moves by Order to Show Cause for a preliminary injunction "temporarily and preliminarily" enjoining defendants from acting to evict plaintiffs Kin Leung Cheung and Asian Garden Inc. d/b/a Shanghai Lee Asian Cuisine from the subject premises pending the hearing of instant matter, and other related relief.<sup>1</sup>

### ***BACKGROUND AND CONTENTIONS***

The instant motion practice arises out of an action for certain remedies in connection with an aborted sale of real property. As stated in plaintiff's papers, the action was commenced by service of a summons and verified complaint on April 18, 2013, with service of same purportedly effectuated on upon defendants on April 24, 2013.

Defendant Frances Nicosia is the owner and landlord of 157 Franklin Street, Brooklyn. She claims that she and her sister Anna have lived there since 1930, when they were 2 years and 4 years old, respectively, and the property was owned by their parents. Anna denies ever having lived any place else, or ever having owned any other property. She asserts that Anna, who is 84 years old, has been suffering from Multiple Sclerosis for the past

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<sup>1</sup>The Order to Show Cause was signed on April 19, 2013 by Justice Bernard J. Graham, who struck language therein requesting a TRO.

20 years, is wheel-chair bound, and requires full-time care due to her illness. The apartment in which they live is adapted for her disabilities. She further avers that Anna has a life estate in the subject premises, and annexes a copy of the duly-recorded indenture to her papers evidencing this assertion.

Plaintiff Cheung operates a restaurant located on the ground floor of the subject premises. According to Frances, he took over the lease of Francis' former tenant, but did not execute an assignment or obtain consent thereto. Consequently, Anna contends that the five-year lease, which commenced on January 1, 2008 and which has not been renewed or extended, ended on December 31, 2013, and plaintiff, who is an unapproved assignee, is now a month-to-month tenant.

In July of 2012, Cheung approached Frances to purchase the subject premises. According to Frances, he offered \$1.15 million, which she purportedly agreed to accept. Subsequently, Cheung advised her he was having difficulty obtaining financing, and asked her to contract at a price of \$950,000, with the contract to be amended at closing for the \$200,000 difference. Cheung stated that he was in the process of selling properties in China to raise the funds in order to purchase the subject premises. Frances states that she agreed to this arrangement, and on December 15, 2012, the contract of sale, a copy of which is annexed as an exhibit to the parties' papers, was signed by Frances, as seller, and Cheung, as purchaser. It is clear from the exhibits that both sides were represented by counsel for that part of the transaction. The mortgage contingency provision therein states that plaintiff

was to obtain a loan commitment in the amount of \$665,000 within 60 days.

On or about February 12, 2013, Cheung obtained a loan commitment from AsiaBank in the amount of \$570,000.

According to Frances, at the time she entered into the contract of sale, she was unaware of Anna's life estate in the subject premises, and only became aware of it at the time of the title examination.<sup>2</sup> She asserts that plaintiff demanded that the life estate be terminated prior to closing, but that Anna refuses to agree to release her life estate or give her consent to sell the property, and she lacks any legal authority to sign the contract of sale on Anna's behalf. Consequently, on or about March 20, 2013, under a claim that she is unable to deliver clear marketable title, and pursuant to paragraph 33 of the Rider to the contract of sale, she terminated the contract and refunded the down payment to plaintiff's then-attorney.

Thereafter, on or about March 28, 2013, plaintiff, though present counsel, refused to deposit the down payment check and issued a demand for closing of the contract, and, on March 29, 2013, returned the check to defendant's then-attorney.

In addition to denying that she is in breach, defendant claims that plaintiffs may not maintain this action for specific performance because they failed to serve a proper "time is of the essence" demand prior to declaring a breach.

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<sup>2</sup>Anna's life estate was created at the time of their mother's death in 1968.

For his part, Cheung contends that he has met all of the legal requirements necessary to establish his entitlement to specific performance of the contract of sale. He further disputes, in reply to defendants' cross motion, any purported lack of knowledge on defendant's part concerning the life estate.

As to jurisdiction, defendants deny that they were served with the summons and complaint, and counsel, in his affirmation, alleges that when Frances first met with him, she had only the Order to Show Cause and indicated that such was what was served on her, and that there was no summons and complaint among the papers. In her affidavit, as mirrored by counsel's affirmed assertions, Frances, who does not contest receiving the Order to Show Cause, claims that she gave counsel all papers she received from the process server, and the summons and complaint was not among the documents. Counsel further avers that the only time he came to know that the summons and complaint were allegedly served was at the time Frances called him to report that she had been served with a notice of motion for a default judgment dated July 24, 2013.

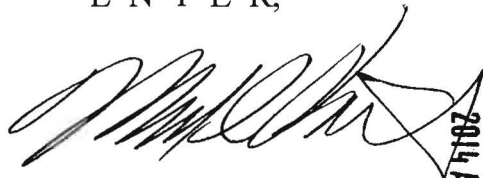
In her affidavit, Anna, who, in concord with Frances's assertions, states that she is 84 years old, suffers from Multiple Sclerosis, and has had the apartment equipped for her disabilities, also denies that she was ever served with the summons and complaint, and further denies that she is a proper party to this action. In addition, she states that she does not wish to release her life tenancy, and does not consent to the sale of the subject premises.

In examining the annexed affidavits of service, the court notes that there is a paucity of information contained therein.

Although it is well recognized that the bare denial of service is insufficient to rebut prima facie proof of proper service (see *European American Bank v Abramoff*, 201 AD2d 611 [1994]; see also *Wunsch v Cerwinski*, 36 AD3d 612 [2007]), the circumstances presented here concerning service of the summons and verified complaint raise issues which warrant a traverse hearing (see *Johnson v Deas*, 32 AD3d 253, 254 [2006] [where the documentary evidence raises issues of fact as to proper service, even the absence of defendant's sworn denial of service is not fatal]). Accordingly, the court directs that counsel for the parties, via conference call, promptly contact chambers for the purpose of scheduling a hearing to determine the validity of plaintiff's claims that proper service was effectuated and whether the court has obtained personal jurisdiction over defendants. The instant motions, including Anna's motion to dismiss for failure to state a cause of action, as well as plaintiff's Order to Show Cause seeking injunctive relief, are held in abeyance pending said hearing, and further order of this court.

The foregoing constitutes the decision and order of the court.

E N T E R,



J. S. C.

HON. MARK I PARTNOW  
SUPREME COURT JUSTICE



KINGS COUNTY CLERK  
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