

Estate of Tecson v Okgil Cho
2014 NY Slip Op 32782(U)
October 24, 2014
Supreme Court, New York County
Docket Number: 650462/2012
Judge: Saliann Scarpulla
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39**

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ESTATE OF STEPHEN L. TECSON,

Plaintiff,

DECISION and ORDER

- against -

Index No. 650462/2012
Motion Seq. No. 001

OKGIL CHO and K TOWN 32 CORP,
Defendants.

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For the Plaintiff:
Brian M. DeLaurentis, PC
36 W. 44th Street, Suite 911
New York, NY 10036

For the Defendants:
Ronald S. Ramo, Esq.
135-25 114th Street
Queens, NY 11420

HON. SALIANN SCARPULLA, J.:

In this action to recover on a promissory note, for corporate dissolution, for an accounting and for breach of fiduciary duty, Karen C. Rozenblatt (“Rozenblatt”), in her capacity as administratrix of the Estate of Stephen L. Tecson (“Tecson”) (the “Estate” or “plaintiff”) moves by order to show cause for appointment of a receiver for the business of defendant K Town 32 Corp., d/b/a Seoul Garden (“K Town”), and/or summary judgment for breach of the promissory note, plus interest; dissolution of K Town, or in the alternative, compelling defendants K Town and Okgil Cho (“Cho”) (collectively the “defendants”) to purchase plaintiff’s stock in K Town.

As alleged in the complaint, in or around the summer of 2008, Tecson agreed to invest in a new Korean restaurant plan with Cho. It is further alleged that Cho and

Tecson agreed that Tecson would invest \$200,000 in the new venture. Of that amount, it is alleged that \$100,000 was to be a loan, and \$100,000 would be an equity investment.

Plaintiff alleges that Tecson provided Cho “with the \$200,000 cash investment” during summer 2008. K Town was incorporated on or around October 1, 2009. Shortly thereafter, K Town began operating the “Seoul Garden” restaurant at 34 W. 32nd Street, New York, NY.

Plaintiff alleges that during December 2009, Tecson and Cho documented Tecson’s investment in writing; pursuant to the written terms of the investment, Tecson received a 20% ownership stake in K Town, and Cho owned the remaining 80%. It is further alleged, that Tecson received a promissory note for \$100,000 from Cho (the “note”). As alleged in the complaint, the note did not bear interest, but repayment was to begin on December 26, 2009.

Plaintiff alleges that no payments were made under the note until August 2010, when Tecson demanded in writing that the note be repaid in full. Plaintiff further alleges that Tecson thereafter received a payment of \$30,000, the only repayment he received. When he demanded repayment under the note, it is alleged, Tecson also requested to examine K Town’s books and records. The documents he received, however, were all in Korean.

Tecson died on May 22, 2011. Thereafter, Rozenblatt was appointed administratrix of his estate.

On this motion, plaintiff seeks damages in the amount of \$70,000, the unpaid balance of the promissory note. In addition, plaintiff seeks dissolution of K Town, pursuant to N.Y. General Business Law (“Gen. Bus. L.”) § 1104-a, alleging Cho is guilty of illegal, fraudulent and /or oppressive actions towards plaintiff, including but not limited to: inaccurate tax reporting; keeping the corporate books and records in a foreign language not understood by plaintiff; refusing to provide information he is legally required to tender upon demand; and failing to distribute any profits of the business. Plaintiff also alleges that Cho has been looting, wasting and/or diverting the property and assets of the corporation for his own personal purposes, and that corporate dissolution is the only feasible way for plaintiff to expect a fair return on the investment.

If not awarded summary judgment, plaintiff requests that a receiver be appointed to control all assets of K Town. As an owner of 20% of the corporate shares, plaintiff argues, and based on the documents produced in discovery – specifically bank records – defendants have committed “wholesale tax evasion and that the business is run as a ‘cash’ business.” Plaintiff asserts that a review of the bank statements produced in discovery, and submitted in support of the order to show cause, show no payments for payroll, sales tax, social security or payroll tax, salary to Cho or profit distributions, nor do the bank statements show cash deposits. Plaintiff also alleges, on information and belief, that defendants’ employees are working at K Town illegally, “probably because of their immigration status.”

Plaintiff also asserts that defendants have no books and records of account, no records of profits and expenses other than what can be seen in the bank statements, and that there are no sales tax returns produced which would allow revenue to be estimated.

In opposition, defendants argue that the amount plaintiff claims is owed by defendants is barred by the past consideration doctrine. Defendants further maintain that the parties' communications indicate that the defendants only owed Tecson \$100,000, which was repaid in full in 2010. Defendants argue that the plaintiff is not entitled to appointment of a receiver because when Tecson was repaid the \$100,000, the repayment extinguished any interest Tecson had in K Town. Defendants claim that the note and stock purchase agreement were not two separate transactions documenting a total \$200,000 investment by Tecson as plaintiff asserts, but rather that Tecson lent Cho \$100,000 total, conditioned on receiving a personal guaranty of repayment from Cho and 20% of the business profits of K Town. Defendants also claim that Tecson and Cho agreed orally that when Tecson's \$100,000 investment was repaid, Tecson would lose his 20% interest in the profits of K Town.

There is no dispute that in an email message dated July 29, 2010, Tecson contacted Cho's wife, Yeunsil Cho via email. The message states:

My cardiologist advised me to undergo heart surgery, but my health insurance company does not cover the procedure. I need my \$100k investment in Ktown back to pay for the procedure. All my savings [sic] was given up fore the restaurant and I don't have other alternatives. I don't want to go into debt; as it is my condo is on collateral for the Home

Equity Loan which you have borrowed in full. Please arrange the transfer of funds ASAP.

Mrs. Cho responded in email dated July 29, 2010, in pertinent part:

I told Okgil about your situation and he said that he will send you the money asap. But we can't afford the whole \$100k immediately. First of all we will send \$30,000. within next week. . . . Okgil and I will ask our parents for our need (your rest \$70grant) so don't worry. [W]e are sure it will be done withing this year. . . [W]e will give the 20 percent of whole income of K-town until December 2010.

Defendants submit copies of canceled checks which show that Cho paid Tecson \$30,000 August 5, 2010, \$30,000 on September 20, 2010, and \$20,000 on December 5, 2010 and December 23, 2010, for a total of \$100,000. In addition, defendants submitted copies of check dated March 1, 2010, August 5, 2010, December 9, 2010, December 31, 2010, January 30, 2011, and February 15, 2011, for a total of \$19,726.69, which defendants claim represent Tecson's income distributions for 2010.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

Here, the terms of the note are clear and unambiguous, and therefore will be enforced according to its terms. *See Continental Ins. Co. v. 115-123 West 29th St. Owners Corp.*, 275 A.D.2d 604, 605 (1st Dep't 2000) ("It is well settled that when the terms of an agreement are clear and unambiguous, the court will not look beyond the four corners of the agreement and will enforce the writing according to its terms").

In support of the order to show cause, plaintiff submitted a copy of the promissory note, dated December 18, 2009, signed by Cho as "Borrower" and Tecson as "Lender."

The note provides, in pertinent part, that:

For Value Received, the Borrower hereby promises to pay to the Lender the principal sum of \$100,000 by [date] N/A. . . . Payments will commence the week following the execution of this Note and continue thereafter on the Monday of each week until the Lender has provided written demand to the Borrower. Following written notice, the balance owing under the Note shall be paid within 31 days.

The note does not provide for either a payment schedule or interest accruals.¹ Plaintiff alleges that payments did not begin the week following the execution of the note, but rather only began after Tecson's July 29, 2010 email.

Contrary to the allegations in the complaint that Tecson only received one \$30,000 payment, plaintiff also submitted copies of multiple canceled checks from Cho or K Town to Tecson, and plaintiff acknowledges that defendants repaid \$119,726.69.

¹The portion of the note form where the parties could provide terms for the applicable interest rate and schedule of payment are filled in with "N/A."

Defendants maintain that this represents repayment of the \$100,000 investment, and Tecson's share of the profits for 2010.

However, relying only on the copies of canceled checks submitted with the motion papers, plaintiff now asserts that Tecson lent an additional \$109,676.16 to defendants. Plaintiff concludes that the total outstanding balance owed to plaintiff is \$198,060.44, of which at least \$98,060.44 is the outstanding balance of the note, and \$100,000 of the indebtedness is allocated to the 20% stock interest. The \$119,726.69, plaintiff implies, is to be applied first to the other moneys allegedly lent to defendants.

There is nothing alleged in the complaint about any additional money allegedly lent to defendants, nor does plaintiff submit any loan documentation or other writings referencing additional loans or investments. As plaintiff fails to submit anything other than canceled checks, there is nothing to support the claim that these additional payments from Tecson to defendants were intended to be a loan, investments or gifts.

As the \$100,000 payments which Tecson received subsequent to his July 29, 2010 demand may be loan repayments, and Tecson has submitted checks reflecting other payments going back and forth between the parties, there is a question of fact as to how much money Tecson lent and which debts have been repaid. As such, plaintiff has failed to make a prima facie showing of breach of the promissory note, and summary judgment as to the first cause of action is denied.

Plaintiff also moves by order to show cause for appointment of a receiver. Plaintiff must make a “clear evidentiary showing warranting the drastic remedy of appointment of a receiver, which is to be invoked only where necessary for the protection of the parties, and upon a clear showing of a danger of irreparable loss.” *Moran v. Moran*, 77 A.D.3d 443, 445 (1st Dep’t 2010). *See also Hoffman v Hoffman*, 81 A.D.3d 600 (2d Dep’t 2011) (“The appointment of a temporary receiver is an extreme remedy which can only be invoked in cases in which the moving party has made a clear evidentiary showing of the necessity for conservation of the property and protection of the interests of the movant”).

In support, plaintiff submits a copy of the executed stock purchase agreement, dated December 16, 2009, between Cho as seller, and Tecson as purchaser. It states that Cho was the 100% owner of the shares of common stock of K Town, and that he agreed to sell 20% of his shares to Tecson for \$100,000. The stock purchase agreement also states that it “may not be changed orally.”

Plaintiff also submits copies of defendants’ bank statements and canceled checks, and argues that what is not reflected in these documents – payments for taxes, social security, payroll and profit distributions – establishes that defendants are tax evaders, and employers of illegal immigrants. There is nothing else in the record before me to support these allegations. Plaintiff’s scant submissions and conclusory allegation do not establish a clear evidentiary showing warranting the drastic remedy of appointing a

receiver. *See Moran*, 77 A.D.3d 443 at 445; *Hoffman*, 81 A.D.3d at 600 (“conclusory assertions that the defendant was liquidating properties and hiding the proceeds from [plaintiff] were insufficient to warrant the appointment of a receiver”); *Serdaroglu v. Serdaroglu*, 209 A.D.2d 606, 608 (2d Dep’t 1994) (conclusory allegations insufficient to warrant the appointment of a receiver). The showing made here is “insufficient to establish, by clear and convincing evidence, a danger of irreparable loss or material injury to the corporation or its assets,” and therefore fails to establish the basis for appointment of a temporary receiver. *McBrien v. Murphy*, 156 A.D.2d 140 (1st Dep’t 1989).

Plaintiff also moves for summary judgment on its second cause of action, for dissolution pursuant to Gen. Bus. L. §1104-a. Section 1104-a “provides a mechanism for shareholders of at least 20% of the outstanding shares of a non-publicly traded corporation to petition for its dissolution when those in control of the corporation engage in illegal, fraudulent or oppressive actions toward the complaining shareholders or misappropriate corporate assets.” *Matter of Clever Innovations, Inc. (Dooley)*, 94 A.D.3d 1174, 1176 (3d Dep’t 2012). “The circumstances that give rise to dissolution fall into two general classifications: mistreatment of complaining shareholders (subd [a], par [1]), or misappropriation of corporate assets (subd [a], par [2]) by controlling shareholders, directors or officers.” *In re Kemp & Beatley, Inc.*, 64 N.Y.2d 63, 70 (1984).

Here, plaintiff alleges that defendants are guilty of illegal, fraudulent and /or oppressive actions towards plaintiff, including but not limited to: inaccurate tax reporting;

keeping the corporate books and records in a foreign language not understood by plaintiff; refusing to provide information that it is legally required to tender upon demand; and failing to distribute any profits of the business. Plaintiff also alleges that Cho has been looting, wasting and/or diverting the property and assets of the corporation for his own personal purposes, and that corporate dissolution is the only feasible way for plaintiff to expect a fair return on the investment.

Defendants argue that plaintiff does not meet the threshold for seeking dissolution under section 1104-a, because Tecson is no longer a 20% shareholder of K Town. Defendants submit the affidavits of Cho, Mrs. Cho, and Hee Sok Chung ("Chung"). Chung states that he "assisted" Cho in the creation of K Town, and that on December 16, 2009, Tecson and Cho "related" to him that "Tecson invested \$100,000 in K Town[], in exchange Mr. Tecson was to receive 20% of the profits of the enterprise and a \$100,000 promissory note from Mr. Cho personally to guarantee repayment of the original \$100,000 investment." The affidavits submitted by Cho and Mrs. Cho's affidavits contain largely the same allegations, although Mrs. Cho does not claim to have been present during the negotiations or execution of the agreements, nor does she even allege to have been told of these dealings by either Tecson or Cho. All three affidavits also state that Tecson and Cho orally agreed that upon repayment of the \$100,000- investment, Tecson would relinquish his 20% interest in K Town. Defendants assert that in light of their repayment

of the \$100,000 investment, Tecson was no longer a shareholder, and plaintiff cannot, therefore, bring this cause of action.

Through the submissions on this motion, plaintiff has made a prima facie showing that Tecson was a 20% shareholder of K Town. The terms of the stock purchase agreement are unambiguous, and therefore the court need not resort to extrinsic evidence. *First Acquisition Funding LLC v. 1st Alliance Lending, LLC*, 2014 N.Y. App. Div. LEXIS 6629, 2014 NY Slip Op 06675 (1st Dep't Oct. 2, 2014).

The defendants' claim that the promissory note and stock purchase agreement were one, unified deal, and not two separate transactions, and that Tecson orally agreed to relinquish his shares upon repayment of the note is not supported by sufficient evidence. The affidavits of Mrs. Cho and Chung are inadmissible hearsay. Moreover, by the clear terms of the stock purchase agreement, it cannot be modified orally, so defendants' may not allege an oral modification of the stock purchase agreement. Nor is there anything on the face of either the note or stock purchase agreement to support defendants' contention that the two documents are part of one transaction, or that repayment of the loan would lead to Tecson losing his stake in K Town.

However, plaintiff fails to make a prima facie showing of misappropriation of corporate assets by Cho. Plaintiff alleges mismanagement of corporate assets, failure to make proper tax and payroll payments, and employment of illegal immigrants. Plaintiff offers nothing to substantiate these very serious allegations other than absences from bank

statements, and conclusory allegations in an attorney affirmation.² This is insufficient to establish prima facie entitlement to corporate dissolution. Accordingly, plaintiff's motion for summary judgment on its second cause of action for corporate dissolution is denied.

I have considered the remaining arguments, and find them to be without merit.

In accordance with the foregoing, it is

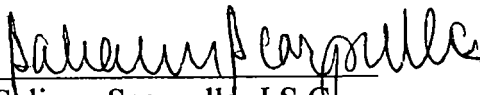
ORDERED that the motion by plaintiff by order to show cause for appointment of a receiver for the business of defendant K Town 32 Corp., and/or summary judgment on the first and second causes of action of the complaint, or in the alternative for an order compelling defendants to purchase plaintiff's stock in K Town 32 Corp., is denied; it is further

ORDERED that counsel for all parties are directed to appear for a status conference at 60 Centre Street, Room 208, on December 10, 2014 at 2:15pm.

This constitutes the decision and order of this Court

Date: New York, New York
October 24, 2014

ENTER:


Saliann Scarpulla, J.S.C.

² Plaintiff's assertion in reply that defendant's lack of opposition to these allegations is tantamount to a concession that the allegations are true, is unavailing. Where a movant on summary judgment fails to meet its initial burden, the quality of the submissions in opposition is irrelevant. *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 852 (1985); *Nationwide Prop. Cas. v. Nestor*, 6 A.D.3d 409, 410 (2d Dep't 2004) (the movant's burden "cannot be satisfied merely by pointing out gaps in the" opposition's case).