

A&N Food Mkt., Inc. v Fu-Cheng Chang

2014 NY Slip Op 33991(U)

June 23, 2014

Supreme Court, Queens County

Docket Number: 700107/14

Judge: Timothy J. Dufficy

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ORIGINAL

Short Form Order/Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

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A&N FOOD MARKET, INC.

Plaintiffs,

Index No.: 700107/14

Mot. Date: 6/12/14

-against-

Mot. Cal. No. 1

Mot. Seq. 1

FU-CHENG CHANG and FU-TUAN CHANG
YANG,

Defendants.

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FILED
JUN 26 2014
COUNTY CLERK
QUEENS COUNTY

The following papers numbered EF 7-15, 17-31 read on this motion by plaintiff **A&N FOOD MARKET, INC.** for an order directing the entry of a default judgment in its favor and the cross-motion by defendants **FU-CHENG CHANG and FU-TUAN CHANG YANG** for an order dismissing the plaintiff's complaint for failure to acquire personal jurisdiction over the defendants, or, in the alternative, extending their time to answer.

	<u>PAPERS</u> <u>NUMBERED</u>
Notice of Motion-Affirmation-Exhibits	EF 7-15
Notice of Cross-Motion-Affirmation-Exhibits	EF 17-21
Affirmation in Opposition-Exhibits	EF 22-28
Reply Affirmation	EF 29-31

Upon the foregoing papers, it is ordered that plaintiff **A&N FOOD MARKET, INC.'s** (A&N) motion is granted in all respects. Defendants **FU-CHENG CHANG** (Chang) and **FU-TUAN CHANG YANG's** (Yang) cross-motion for an order dismissing the plaintiff's complaint for failure to acquire personal jurisdiction over the defendants, or, in the alternative, extending their time to answer, is denied in all respects.

Plaintiff brings this action seeking to collect monies pursuant to a purchase-money loan. On or about January, 2008, the plaintiff loaned New K&S Supermarket, Inc.

(New K&S), a closely-held corporation, the sum of one million eight hundred thousand dollars (\$1,800.00.00) to purchase a supermarket in busy downtown Flushing, Queens. New K&S consists of six shareholders, one of which was Chang. The plaintiff also leased the premises to New K&S. Chang gave a personal guaranty on the loan and lease. Yang is Chang's sister. On or about January 7, 2011, after doing business for about 3 years, New K&S defaulted on the loan and lease. On or about February 7, 2011, the attorney for New K&S proposed a global settlement to cure the defaults, which was rejected by the plaintiff. On or about March 6, 2011, the parties signed a Confession of Judgment and Stipulation of Settlement of the within action. On January 9, 2012, Chang and her daughter, Wynee Lin, transferred her property in Little Neck to Wynee Lin and Yang, as joint tenants with right of survivorship, for no consideration. A "Judgment by Confession" signed by Chang and other shareholders was filed with the Queens County Clerk, on or about August 13, 2013, in the sum of \$1,614,227.20. About a month later, on September 9, 2013, Chang avers that she transferred ownership of the subject Flushing property from herself to her sister Yang, and Chang continued to reside there with her daughter (see affidavit of Chang at p. 3, paragraph 18).

Both defendants were served with the Summons and Complaint herein on January 27, 2014. The defendants/cross-movants Chang and Yang have not properly controverted the affidavit of service of process upon them in the within lawsuit. Chang's conclusory statements that Yang moved to Taiwan, China, in 2011, are unsupported and curious, given Chang's averment that Yang purchased a property in Little Neck, Queens in July, 2011. The physical description given by the process server could well be defendant Chang's daughter, who admittedly resides with her, and fits the description closely (see Black v Pappalardo, 132 AD2d 640 [2d Dept. 1987]; Bunin v. Hoffman, 244 AD2d 163 [1st Dept. 1997]). Moreover, the purchase of the Little Neck property by Yang soon after the her sister's default under the subject instrument, the recording of Chang as owner instead of Yang on that property, and the transfer of the Flushing property from Chang to Yang appear carefully calculated to obfuscate the efforts of anyone attempting to effectuate service upon Chang. The transfer of the Flushing property from Chang to Yang, shortly after the recording of the Confession of Judgment against Chang, smacks of bad faith, and fraud (Strachman v Palestinian Auth., 73 AD3d 124 [1st Dept. 2010]). The claim of defendant Chang that the Flushing property is not her "actual dwelling or "usual

place of abode" is belied by the record, including her own affidavit that attests that she resides there with her daughter (see Poet v. Kolenda, 142 A.D.2d 633 [2d Dept. 1988]). Moreover, based upon Chang's behavior, in improperly listing herself as owner of property purchased by Yang, and in making property transfers after defaulting on obligations, the Court holds and finds that both Chang and Yang are estopped from claiming that the Flushing address where they were served was not an actual abode or dwelling place under CPLR 308(2) (see Landco Mtge. Bankers, Inc. v Shinnecock Realty Corp., 2012 N.Y. Misc. LEXIS 1630 [Sup. Ct. Suffolk Co. 2012]; see generally, U.S. Bank Nat'l, Assoc. v Vanvliet, 24 AD3d 906 [3rd Dept. 2005]; Poet v Kolenda, *supra*; Cuomo v Cuomo, 144 AD2d 331 [2nd Dept. 1988]). The Stipulation of Settlement, which bears the caption of this matter, was clearly and admittedly executed by Chang. It states, in pertinent part: "that the action be and the same is hereby settled" (initial paragraph); and that "[t]his Court shall retain jurisdiction over this matter" (paragraph 17). A defect in personal jurisdiction may be waived (see e.g. CPLR 3211 [e]; Lomando v Duncan, 257 AD2d 649, 650 [2d Dept. 1999]), where, as here, a party submits to the court's jurisdiction by, *inter alia*, stipulating to settle an action. The Court notes that in that Stipulation, the defendants agreed that they had no viable defense and could not submit an answer in the subject action (paragraph 3).

Both defendants Chang and Yang also lack a meritorious defense to this action to collect on the subject guarantee and Confession of Judgment. Chang is a businessperson who operates a supermarket. She was represented by counsel with regard to the Confession of Judgment and the Stipulation of Settlement. Her affidavit in support of the instant cross-motion is written in English, without evidence that it was translated for her into another language. Thus, her claim of a lack of understanding of the English language must be rejected (see e.g. Chase Home Finance, LLC v Minott, 2014 N.Y. App. Div. LEXIS 1392; 2014 NY Slip Op 1427 [2d Dept. 2014]; Whitby v Whitby, 106 AD3d 729, 730 [2d Dept. 2013]; U.S. Bank Natl. Assn. v Slavinski, 78 AD3d 1167 [2d Dept. 2010]). Even if Chang were illiterate, clearly not the case here, an inability to understand the English language, without more, is insufficient as an excuse (see Abdulatif Abdulayev v Yadgarov, 105 A.D.3d 877 [2d Dept. 2013]).

As for Yang, the plaintiff made a *prima facie* showing that it was entitled to judgment as a matter of law on its cause of action to set aside the conveyance of the

Flushing property as fraudulent pursuant to Debtor and Creditor Law § 276. In opposition, Yang failed to raise a triable issue of fact. The plaintiff submitted clear and convincing evidence establishing that the conveyance of the Flushing and Little Neck properties to Yang were made following a default and Confession of Judgment, with the intent to hinder, delay, or defraud its ability to collect on its claim against Chang. The Flushing transfer was made one month after Chang executed a Confession of Judgment and Stipulation of Settlement, and for no consideration. Chang remained in residence at the subject property before and after the conveyances. “Based on these ‘badges of fraud,’ and the defendants’ failure to proffer any legitimate explanation for the conveyance, the defendants’ actual fraudulent intent is readily inferable, and the plaintiff is entitled to a judgment setting those conveyances aside, under Debtor and Creditor Law § 276 (see Machado v A. Canterpass, LLC, 115 AD3d 652, 653-654 [2d Dept. 2014]).

Accordingly, it is hereby,

ORDERED and ADJUDGED, that the transfer of the property at 154-25 58th Road, Flushing, New York 11355, from defendant Fu-Cheng Chang to defendant Fu-Tuan Chang Yang is hereby set aside and voided; and it is further,

ORDERED and ADJUDGED, that the transfer of the property at 45-21 Zion Street, Little Neck, New York 11362 to defendant Fu-Tuan Chang Yang is hereby set aside and voided; and it is further,

ORDERED AND ADJUDGED, that the Clerk is directed to enter a judgment hereupon against defendant **FU-CHENG CHANG**, in the sum of \$1,614,227.20, plus the costs and disbursements of this action; and it is further

ORDERED AND ADJUDGED, that the plaintiff’s request for attorneys’ fees is denied, the plaintiff having failed to demonstrate entitlement to such fees; and it is further

ORDERED AND ADJUDGED, that any other and further applications not specifically addressed herein are hereby denied.

This constitutes the opinion, decision, order, and judgment of the Court.

Dated: June 23, 2014



TIMOTHY J. DUFFICY, J.S.C.