

Chi Hung Ngo v Chi Vy Ngo

2017 NY Slip Op 32739(U)

December 22, 2017

Supreme Court, New York County

Docket Number: 154173/2016

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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CHI HUNG NGO,

Index No. 154173/2016

Plaintiff

- against -

DECISION AND ORDER

CHI VY NGO a/k/a CHIVY NGO, NEW ANGLE
REALTY CORP., and 69 CLINTON NPG, LLC,

Defendants

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LUCY BILLINGS, J.S.C.:

I. GROUND FOR DEFENDANTS' MOTION

Defendants Chi Vy Ngo and New Angle Realty Corp., the two remaining defendants, move to vacate the order dated September 20, 2017, granting plaintiff summary judgment on these two defendants' liability for plaintiff's 49% share of defendant corporation's proceeds. C.P.L.R. § 5015(a). Defendants expressly do not move to reargue plaintiff's motion for partial summary judgment based on the court's oversight or misapprehension of any evidence or claims in defendants' opposition to plaintiff's motion. C.P.L.R. § 2221(d). See Windham v. New York City Tr. Auth., 115 A.D.3d 597, 600 (1st Dep't 2014); Social Serv. Empls. Union, Local 371 v. New York City Bd. of Correction, 93 A.D.3d 454, 454 (1st Dep't 2012); Hernandez v. St. Stephen of Hungary School, 72 A.D.3d 595, 595 (1st Dep't 2010).

The court did not grant plaintiff's motion based on defendants' default in appearing for oral argument of the motion,

but instead fully considered defendants' opposition, as reflected in the order, and heard no oral argument from either side.

Therefore C.P.L.R. § 5015(a)(1) is inapplicable, leaving defendants the alternatives of C.P.L.R. § 5015(a)(2)-(4).

Defendants' reliance on C.P.L.R. § 5015(a)(4) confuses lack of jurisdiction with plaintiff's lack of standing or capacity to sue. Therefore, even if defendants' defense were meritorious that plaintiff is not a shareholder in New Angle Realty or, if he is, he must sue derivatively, but did not, such a defense would not be a basis to vacate the partial summary judgment. E.g., CNB Realty v. Stone Cast, Inc., 127 A.D.3d 1438, 1439 (3d Dep't 2015). In any event, this defense lacks merit, as explained below.

II. THE GROUND OF FRAUD, UNDER C.P.L.R. § 5015(a)(3)

Any reliance on C.P.L.R. § 5015(a)(3) is also misplaced, as the fraud defendants claim is simply that plaintiff's evidence on which the court granted partial summary judgment was false, which defendants had a full opportunity to discredit through their own controverting evidence in opposition. See Weinstock v. Handler, 251 A.D.2d 184, 184 (1st Dep't 1998); Rossrock Fund II, L.P. v. Norin Corp., 128 A.D.3d 1046, 1047 (2d Dep't 2015); Cohen v. Marshall, 1 Misc. 3d 867, 869-70 (Civ. Ct. N.Y. Co. 2003). Defendants do not claim a fraud that deprived them of the opportunity to present their defenses. See WA Rte. 9, LLC v. PAF Capital LLC, 136 A.D.3d 522, 522 (1st Dep't 2016); Yeun-Ah Choi v. Shoshan, 136 A.D.3d 506, 506 (1st Dep't 2016); Nahzi v.

Lieblich, 89 A.D.3d 630, 630 (1st Dep't 2011); Callwood v. Cabrera, 49 A.D.3d 394, 394-95 (1st Dep't 2008). That opportunity does not extend after the court has considered their evidence and granted partial summary judgment. Cohen v. Marshall, 1 Misc. 3d at 869. To allow evidence not offered in opposition, but casting doubt on or even squarely contradicting plaintiff's evidence that produced the judgment sought to be vacated, to establish "fraud" under C.P.L.R. § 5015(a)(3) would obliterate any distinction between § 5015(a)(3) and § 5015(a)(2) and the requirement under § 5015(a)(2) that the evidence be newly discovered. Any evidence that is presented in support of vacatur under § 5015(a)(2) and hence would change the result inevitably will be contradictory to the evidence that supported the original result. Evidence supporting vacatur under § 5015(a)(2), however, must have been unavailable previously. Id. at 870.

Under C.P.L.R. § 5015(a)(3), moreover, similarly to § 5015(a)(2), the fraud must have been undiscoverable before the judgment. Molina v. Chladek, 140 A.D.3d 523, 524 (1st Dep't 2016); Weinstock v. Handler, 251 A.D.2d at 184; H & Y Realty Co. v. Baron, 193 A.D.2d 429, 430 (1st Dep't 1993); HSBC Bank USA, N.A. v. Ashley, 104 A.D.3d 975, 976 (2d Dep't 2013). If plaintiff had prior actual or constructive knowledge that defendants were misrepresenting facts or otherwise engaging in misleading conduct, he may not succeed under § 5015(a)(3). Richard B. v. Sandra B.B., 209 A.D.2d 139, 144 (1st Dep't 1995); H & Y Realty Co. v. Baron, 193 A.D.2d at 430; Dick v. State Univ.

Constr. Fund, 125 A.D.3d 1487, 1488 (4th Dep't 2015); Cohen v. Marshall, 1 Misc. 3d at 871. Defendants do not claim they were unaware of any of the new facts they present to support vacatur of the judgment, even if documentary evidence of those facts was unavailable.

III. THE GROUND OF NEWLY DISCOVERED EVIDENCE, UNDER C.P.L.R. § 5015(a)(2)

Defendants' principal basis for vacatur of the partial summary judgment is that new evidence requires denial of plaintiff's motion for that judgment. C.P.L.R. § 5015(a)(2). The court granted plaintiff partial summary judgment based on his authenticated stock certificate, signed by defendant Ngo as well as plaintiff, showing that he owned 49% of the shares of New Angle Realty, N.Y. Bus. Corp. Law (BCL) § 508(a); Gallant v. Kanterman, 249 A.D.2d 59, 62 (1st Dep't 1998), as well as the Verified Answer's admission that "Plaintiff and CHIVY were sole shareholders in NEW ANGLE." V. Compl. ¶ 6. See V. Answer ¶ 6. The court recognized that defendants alleged an offset or counterclaim for funds that plaintiff owed to defendant Ngo or to another corporation he owned: "a significant amount of money for fraudulently stealing the majority ownership of another company they were involved with together," not New Angle Realty. V. Answer at 4. That claimed obligation, however, did not affect the admitted validity of plaintiff's interest in defendant corporation.

Defendants now present two voided stock certificates and the Certificate of Incorporation of New Angle Realty and plaintiff's

deposition testimony. Although defendants claimed they needed further disclosure to defeat partial summary judgment, C.P.L.R. § 3212(f), other than the "documents that purportedly transferred ownership of the Company [New Angle Realty] from Defendant CHIVY to plaintiff," this disclosure all pertained to the other business, a restaurant, in which they were involved. Aff. in Opp'n of Chivy Ngo ¶ 22 (Jan 11, 2017). See Aff. in Opp'n of Joseph C. Cacciato, Esq., ¶¶ 25-26 (Jan. 10, 2017). The documents regarding ownership of New Angle Realty, however, other than the stock certificate plaintiff presented to support his motion for his 49% interest, were in defendants' possession or control, and none show a transfer of ownership "from Defendant CHIVY" to plaintiff, as demonstrated by New Angle Realty's corporate documents that defendants themselves now present.

The voided stock certificates are ## 1 and 2. Defendants admit that ## 3 and 4 are valid, #3 being the certificate for defendant Ngo's 51% of the shares, and #4 having been presented by plaintiff supporting his motion for his 49%. Although the certificates show plaintiff is the secretary of the corporation and defendant Ngo is the president, neither party attests to his authority to issue the initial shares. The Certificate of Incorporation shows that attorney Warren Wang incorporated New Angle Realty and thus issued its initial shares.

Defendants claim plaintiff's deposition testimony admits that plaintiff paid no consideration for his shares, in violation of BCL § 504(a), see Torres v. Speiser, 268 A.D.2d 253, 253 (1st

Dep't 2000), invalidating his shares and status as a shareholder in New Angle Realty, and depriving him of standing to claim any share in defendant corporation. Not only does the invalidation of plaintiff's status as a shareholder fly in the face of the Answer's admission, but plaintiff's deposition reveals that the mother of plaintiff and defendant Ngo, who are brothers, contributed the funds for the formation of New Angle Realty and the issuance of the corporation's shares and divided them between the brothers, 49% for the younger son, and 51% for the older. See Nahzi v. Lieblich, 89 A.D.3d at 630. Thus she gave the consideration for both brothers' shares. Defendants never claim the funds came from a different source or otherwise indicate that she made no such contribution.

Defendants nonetheless urge that plaintiff's shares lacked consideration because they were a gift from his mother and that she lacked any capacity to transfer them to him because she herself never owned them. These grounds for invalidating plaintiff's shares not only contradict the Answer's admission, but also would apply equally, of course, to defendant Ngo's shares. Defendants' suggestion further ignores the Certificate of Incorporation, showing that attorney Warren Wang incorporated New Angle Realty and thus issued its initial shares, and the reality explained by plaintiff's deposition testimony and not rebutted by defendants: the mother gave her sons in the first instance not the actual shares themselves, but the funds or other assets used to fund the corporate shares.

Even if defendants claim plaintiff owes defendant Ngo an amount in addition to this contribution, an amount defendant Ngo alleges was due him from a prior business endeavor, this additional payment owed is insufficient to invalidate, due to an absence of consideration, the admitted shares of plaintiff in New Angle Realty. While defendants insist that consideration must be paid, they concede that the amount is immaterial for the issuance of valid shares under BCL § 504(a). As defendants point out, a certificate for shares "may not be issued until the amount of the consideration therefor determined to be stated capital pursuant to section 506 . . . has been paid." BCL § 504(h). See Torres v. Speiser, 268 A.D.2d at 253. Therefore the very fact that plaintiff's stock certificate was issued signifies that consideration for it was paid. Consideration was paid by the mother's assets given to her sons.

The only potential issues are whether plaintiff orally promised defendant Ngo more in addition to that consideration and, if he did promise more, whether he paid it. The order granting plaintiff partial summary judgment, on liability only, recognizes these potential factual questions. Even if New York Uniform Commercial Code (UCC) § 8-113(a), enforcing contracts or modification of a contract for a sale or purchase of securities whether oral or evidenced by a signed writing or authenticated record, applies to an initial issuance of securities, here the agreement for the issuance of shares to plaintiff was not oral. The authenticated, signed, written certificate, without condition

or limitation, evidences the agreement, to which defendants allege no later modification, oral or written. Nevertheless, even though defendants may have used plaintiff's nonpayment of an additional \$300,000 to justify closing plaintiff off from the proceeds of New Angle Realty, whether his additional payment was in any way connected to New Angle Realty and its shares is inconsequential to defendants' entitlement to be made whole. MAP Mar. Ltd. v. China Constr. Bank Corp., 78 A.D.3d 614, 614 (1st Dep't 2010); 207 Realty Assoc., LLC v. New York State Div. of Hous. & Community Renewal, 45 A.D.3d 364, 365 (1st Dep't 2007). Since defendants specify no time by which plaintiff was to pay the \$300,000, defendants will be made whole if they prevail on their counterclaim that plaintiff owes them that amount.

IV. THE CLAIMED LACK OF STANDING

Since plaintiff has established, as defendants admit, that he is a shareholder, with standing and capacity to sue defendants for his entitlements as a shareholder, the remaining question is whether he sought recovery for a wrong against the corporate defendant New Angle Realty, for which he must sue derivatively on the corporation's behalf. Lama Holding Co. v. Smith Barney, 88 N.Y.2d 413, 424 (1996); MatlinPatterson ATA Holdings LLC v. Federal Express Corp., 87 A.D.3d 836, 839 (1st Dep't 2011); Rogers v. Ciprian, 26 A.D.3d 1, 6 (1st Dep't 2005); Evangelista v. Slatt, 20 A.D.3d 349, 350 (1st Dep't 2005). Defendants waived any lack of standing by plaintiff, however, when their Answer omitted that affirmative defense. Fossella v. Dinkins, 66 N.Y.2d

162, 167 (1985); Wells Fargo Bank, NA v. Edwards, 95 A.D.3d 692, 692 (1st Dep't 2012); Security Pac. Natl. Bank v. Evans, 31 A.D.3d 278, 278 (1st Dep't 2006); CNB Realty v. Stone Cast, Inc., 127 A.D.3d at 1439.

In any event, the only claim in the complaint susceptible of an interpretation that plaintiff seeks to remedy a harm to the corporation is the fourth claim seeking reversion to New Angle Realty of its real property that defendant Ngo sold to former defendant 69 Clinton NPG, LLC, see Dragon Inv. Co. II LLC v. Shanahan, 49 A.D.3d 403, 404 (1st Dep't 2008), a claim on which plaintiff expressly did not move for summary judgment. He moved for summary judgment on his first and second claims, for his 49% of the proceeds that defendant Ngo had converted from the sale he had fraudulently consummated, and fifth claim, for his 49% of the proceeds from the rental of New Angle Realty's real property before it was sold. None of these claims is for a wrong to New Angle Realty. They are all for wrongs against plaintiff as an individual shareholder. MatlinPatterson ATA Holdings LLC v. Federal Express Corp., 87 A.D.3d at 839.

V. CONCLUSION

In sum, the court originally considered that the offset or counterclaim defendants claimed against plaintiff for funds owed to another corporation in which he held no interest, but which he converted to his own use, was insufficient to invalidate his stock certificate and his shareholder status that the Answer admitted. None of defendants' new evidence, even if it was

undiscoverable before the court awarded plaintiff partial summary judgment, changes that conclusion. American Comm. for Weizmann Inst. of Science v. Dunn, 10 N.Y.3d 82, 95-96 (2008); Ryan v. Zherka, 140 A.D.3d 500, 501 (1st Dep't 2016); WA Rte. 9, LLC v. PAF Capital LLC, 136 A.D.3d at 522; MAP Mar. Ltd. v. China Constr. Bank Corp., 78 A.D.3d at 614-15. See Nahzi v. Lieblich, 89 A.D.3d at 630; 207 Realty Assoc., LLC v. New York State Div. of Hous. & Community Renewal, 45 A.D.3d at 365. That judgment on liability, for plaintiff's discrete claims only, preserved defendants' offset and did not dismiss their counterclaim, which also may proceed to trial upon the service and filing of a note of issue. Therefore the court denies defendants' motion for a vacatur based on newly discovered evidence, C.P.L.R. § 5015(a)(2); American Comm. for Weizmann Inst. of Science v. Dunn, 10 N.Y.3d at 98; Ryan v. Zherka, 140 A.D.3d at 501; WA Rte. 9, LLC v. PAF Capital LLC, 136 A.D.3d at 522; MAP Mar. Ltd. v. China Constr. Bank Corp., 78 A.D.3d at 614-15, as well as on the other grounds for the reasons explained above.

DATED: December 22, 2017



LUCY BILLINGS, J.S.C.

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