

Chi Hung Ngo v Chi Vy Ngo

2018 NY Slip Op 32379(U)

September 21, 2018

Supreme Court, New York County

Docket Number: 154173/2016

Judge: Lucy Billings

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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 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
-----x

LUCY BILLINGS, J.S.C.:

I. PROCEDURAL BACKGROUND

Defendants Chi Vy Ngo and New Angle Realty Corp., the two remaining defendants, move to vacate the note of issue served by plaintiff June 5, 2018, and to compel his production of documents previously requested by defendants. C.P.L.R. § 3124; 22 N.Y.C.R.R. § 202.21(e). They requested the documents sought in demands to plaintiff dated August 31, 2016, August 8, 2017, and January 8, 2018. In August 2016 defendants requested invoices and receipts for any renovations plaintiff made to New Bo Ky Restaurant, 80 Bayard Street, New York County, since 2012 and a list of the persons used to perform those renovations. In August 2017 defendants specifically requested "a verified statement setting forth the address of HONG KONG CONSTRUCTION COMPANY, listed as the contractor who performed the renovations for plaintiff." Aff. in Supp. of Joseph C. Cacciato Ex. D, at 1. In January 2018 defendants requested documents showing New Bo Ky Restaurant's gross and net annual profits since 2008 and the tax

returns filed for the restaurant since 2008.

II. THE NEED FOR PRODUCTION OF OUTSTANDING DISCLOSURE

Defendants allege an offset against plaintiff's claims and a counterclaim for funds that plaintiff owed to defendant Ngo; "a significant amount of money for fraudulently stealing the majority ownership of another company they were involved with together," New Bo Ky Restaurant, not defendant New Angle Realty. V. Answer at 4. While that claimed obligation does not bear on the validity of plaintiff's interest in defendant corporation, a counterclaim may encompass any claim by either defendant against plaintiff, C.P.L.R. § 3019(a), "even if such claims do not arise out of the transaction or occurrence from which the plaintiff's claim arises." Crawford v. Burkey, 93 A.D.3d 1134, 1135 (3d Dep't 2012). See Matter of Eshaghian, 144 A.D.3d 1154, 1155 (2d Dep't 2016); Reszka v. Collins, 136 A.D.3d 1299, 1300 (4th Dep't 2016). Therefore plaintiff's expenditures for and the value of renovations to the restaurant, witnesses to those facts, and the restaurant's income and profits before and since the time that defendant Ngo alleges plaintiff committed his fraud and misappropriation or conversion of defendant Ngo's ownership interest in the restaurant are relevant to his offset and counterclaim. C.P.L.R. § 3101(a); Forman v. Henkin, 30 N.Y.3d 656, 661 (2018); SNI/SI Networks LLC v. DIRECTV, LLC, 132 A.D.3d 616, 617 (1st Dep't 2015); Matter of Steam Pipe Explosion at 41st St. & Lexington Ave., 127 A.D.3d 554, 555 (1st Dep't 2015). Plaintiff's sole objection to the documents showing these facts

requested in August 2016 and January 2018, that they relate to plaintiff's restaurant business that is not part of his action, is inapposite.

Regarding the address of Hong Kong Construction Company, plaintiff responded that "I do not have the addresses of Hong Kong Construction." Cacciato Aff. in Supp. Ex. B, at 2 ¶ 1. C.P.L.R. § 3020(1)(i) requires that, upon service of a demand as here, a party must produce "any designated documents . . . which are in the possession, custody or control of the party." Plaintiff's response indicates that he did not currently possess or hold custody of any address for Hong Kong Construction, but does not specify that an address for that entity is beyond his control and unobtainable by him. It is plausible that, if plaintiff simply knew an owner or officer of the entity and engaged it through that person and then paid for its construction work in cash, plaintiff would not possess any documents bearing its address. Plaintiff's deposition provided defendants the opportunity to inquire about such circumstances and why plaintiff must have possessed an address or need not have possessed it. Plaintiff's inability to obtain the address of an entity he was able to retain to perform renovations, however, particularly if it was an entity incorporated or authorized to conduct business in New York, strains credulity.

III. CONCLUSION

Defendants thus have shown that plaintiff's certificate of readiness for trial accompanying his note of issue falsely

certified that disclosure was complete, when plaintiff had not responded as necessary to defendants' requests for documents as set forth above, and plaintiff therefore failed to comply with 22 N.Y.C.R.R. § 202.21(b) in a fundamental respect. 22 N.Y.C.R.R. § 202.21(e); Varga v. Villa Josefa Realty Corp., 28 A.D.3d 389, 390-91 (1st Dep't 2006); Cromer v. Yellen, 268 A.D.2d 381, 381 (1st Dep't 2000). While plaintiff's erroneous certificate of readiness provides grounds to vacate his note of issue, 22 N.Y.C.R.R. § 202.21(e); Deephaven Distressed Opportunities Tradings, Ltd. v. 3V Capital Master Fund Ltd., 90 A.D.3d 499, 500 (1st Dep't 2011); Nielsen v. New York State Dormitory Auth, 84 A.D.3d 519, 520 (1st Dep't 2011); Varga v. Villa Josefa Realty Corp., 28 A.D.3d at 391; Cromer v. Yellen, 268 A.D.2d at 381, defendants have neither claimed nor shown that they need extended time to review the documents they have requested. This evidence bearing on defendants' counterclaim likely will not be introduced until a later stage of the trial.

Consequently, the court grants defendants' motion to compel disclosure as follows, but denies their motion insofar as it seeks to vacate the note of issue. C.P.L.R. § 3124. See 22 N.Y.C.R.R. § 202.21(d); Ortiz v. Arias, 285 A.D.2d 390, 390-91 (1st Dep't 2001). As set forth on the record September 21, 2018, by September 25, 2018, by delivery to defendants' attorney, plaintiff shall produce the following documents and information:

1. All documents in his possession, custody, or control responsive to defendants' request II(C) dated August 31,

2016, including invoices and receipts for any renovations plaintiff made to New Bo Ky Restaurant since 2012 and a list of the persons used to perform those renovations;

2. All documents his possession, custody, or control responsive to defendants' requests II(A) and (B) dated January 8, 2018, including documents showing New Bo Ky Restaurant's gross and net annual profits since 2008 and the tax returns filed for the restaurant since 2008; and

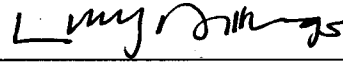
3. Any address for Hong Kong Construction that plaintiff has been able to obtain.

Insofar as plaintiff responds that no document or information in a category specified above is in his possession, custody, or control, plaintiff shall deliver to defendants' attorney by September 25, 2018, an affidavit setting forth the following:

1. Where the document or information was likely to be kept or found;
2. What efforts plaintiff made to preserve the document or information after service of defendants' answer;
3. Whether the document or source of the information was destroyed or lost and how;
4. Where the search for the document was conducted, the extent and thoroughness of the search, and the time spent conducting the search; and
5. What efforts were made to obtain the information, the extent and thoroughness of the efforts, and the time spent on those efforts.

Vazquez v. Lambert Houses Redevelopment Co., 110 A.D.3d 450, 451-52 (1st Dep't 2013); Henderson-Jones v. City of New York, 87 A.D.3d 498, 505 (1st Dep't 2011).

DATED: September 21, 2018



LUCY BILLINGS, J.S.C.

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