

Matter of Yin Shin Leung v Seng
2019 NY Slip Op 30051(U)
January 3, 2019
Supreme Court, New York County
Docket Number: 654290/2013
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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IN THE MATTER OF THE APPLICATION OF YIN
SHIN LEUNG CHARITABLE FOUNDATION, DAVID
SENG, JAMES SENNG, and JOSEPH SENNG
Petitioners,

Index No. 654290/2013

For an Order Dissolving Cathay Properties
Corporation Pursuant to N.Y. Bus. Corp.
Law § 1104-A

-against-

MARIA SENNG, PETER SENNG, and WILLIAM
SENG,

Respondents.

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Masley, J.:

In motion sequence number 006, respondents Maria Seng
(Maria), Peter Seng (Peter), and William Seng (William), move,
pursuant to CPLR 3212, for summary judgment dismissing
petitioners Yin Shin Leung Charitable Foundation (YSL), David
Seng (David), James Seng (James), and Joseph Seng's (Joseph)
claims in their entirety. In motion sequence 007, petitioners
move, pursuant to CPLR 3212, for partial summary judgment on its
petition for dissolution of Cathay Properties Corporation (CPC).
The motions are consolidated for disposition.

Background

Parties

The individual parties in this proceeding to dissolve CPC
are the children of Seng Ping Ling and Yuet Ngor Fung.
Petitioner YSL is a Hong Kong entity founded by the Seng family
patriarch, Seng Ping Ling, "for the purpose of sponsoring,
developing, promoting, and encouraging participation in public

services which are charitable or educational" (NYSCEF Doc. No. 1, petition ¶ 5). Petitioners David and Joseph are councilors of YSL; petitioner James was a councilor until he resigned in 2015 (NYSCEF Doc. No. 218, aff of David Seng at ¶ 14).

CPC is a closely-held family-owned corporation also founded by Seng Ping Ling for the purpose of purchasing, leasing, managing and selling real estate. Currently, petitioners hold five of the eleven outstanding common shares of CPC; specifically, YSL holds two outstanding common shares, inherited from Seng Ping Ling's estate, and David, James, and Joseph each hold one common share (*id.* at ¶ 15; Izower-Fadde aff at ¶ 24). CPC's remaining shareholders are respondents William and Maria and nonparties Helen Seng (Helen) and Judy Seng (Judy) (petition ¶¶ 12-17). Maria and Helen each hold two shares and William and Judy hold one (*id.*). Maria, Peter, and William are CPC's directors (NYSCEF Doc. No. 218, aff of David Seng at ¶ 16; Izower-Fadde aff at ¶ 26; 29).

Seng Family Business History

In 1955, Seng Ling Ping created nonparty Gloria Weaving & Knitting Factory (Gloria) in Hong Kong to manufacturing clothing (NYSCEF Doc No 183, aff of David Seng, ¶ 5). Gloria is currently controlled and managed by David and Joseph (*id.* at ¶ 23; NYSCEF Doc. No. 164, aff of William Seng at ¶ 6). After establishing Gloria, Seng Ping Ling expanded his business to the United States, where he formed Cathay Import and Export (CIE) and SSG Fashions Ltd. (SSG). CIE later merged into SSG. SSG is owned by

a family trust, Seng & Sons Trust (Trust) (*id.* at ¶ 25). Peter, William, and Maria were appointed as nominees to hold SSG's shares on behalf of the Trust (*id.*).

In 1976, Seng Ping Ling formed another entity, Seng & Son Partnership (S&S). S&S was formed for the purpose of acquiring a townhouse on East 37th Street in Manhattan (Townhouse) (NYSCEF Doc. No. 164, aff of William Seng, 15; petition ¶ 19). CPC owns a 91.67% ownership interest in S&S (petition ¶ 18; answer ¶ 18). Peter Seng owns the remaining interest (*id.*).

The Townhouse is a mixed-use residential building consisting of five floors and separate cellar. Respondents allege that Seng Ping Ling directed that the first floor of the Townhouse be reserved for use by the Seng family without payment of rent. It is undisputed that the first floor remains, to this day, reserved for the Seng family; however, petitioners argue that the only family members benefitting from the rent-free use of the space are the respondents. Respondents also allege that Seng Ping Ling directed and approved SSG's relocation from a rented commercial space into the Townhouse's cellar on a rent-free basis.

In 1991, CPC borrowed money from the Trust to purchase six condominium units in Great Neck, New York (Units) (Condo Loan) (petition ¶ 44; NYSCEF Doc. No. 164, aff of William Seng at ¶ 17). In 1992, Maria, allegedly at Seng Ping Ling's direction, emigrated to the United States to work with William in operating SSG. Respondents allege that Seng Ping Ling directed Maria to live in Unit 5L for her lifetime rent free.

In 2003, Seng Ping Ling suffered a stroke. Unable to continue to run the Seng family businesses, Seng Ping Ling's children took over operations and disputes among the siblings started to arise shortly thereafter. In March 2004, James and David transferred approximately \$16 million out of the Trust. It is alleged that they did so without the knowledge of the other trustees or beneficiaries.

On January 24, 2006, Seng family matriarch, Yuet Ngor Fung, filed a court proceeding in Hong Kong to appoint a committee to oversee and manage Seng Ping Ling's assets. The Hong Kong Court granted this request and appointed a three-member committee (the Committee). The Committee reviewed the affairs of Gloria, SSG, CIE, the Trust, S&S, and CPC, including Maria's rent-free use of Unit 5L, SSG's rent-free use of the Townhouse's basement, and the Seng's family's rent-free use of the Townhouse's first floor (NYSCEF Doc. No. 156, Deposition of Maria Seng at 51-52; NYSCEF Doc. No. 157, Deposition of David Seng at 155-156). The review focused on the years 2003 through 2007. After the review was completed in 2007, the Committee continued to oversee and manage Seng Ping Ling's assets until his death in 2009 (NYSCEF Doc. No. 157, Deposition of David Seng at 157).

On February 9, 2007, the Committee and professionals from KPMG, who assisted in the Committee's review, met with David, James, Joseph, Maria, and William to discuss the Committee's review of CPC, S&S, SSG, and CIE (NYSCEF Doc. No. 175, Appendix 2). Also, in February 2007, petitioners were provided with a

"Q&A Chart," which listed the Committee's questions regarding CPC, S&S, SSG, and CIE along with William's answers (NYSCEF Doc. No. 176). The Q&A Chart details William's answers in regard to the status of the Units and Townhouse. Specifically, William's responses were "[o]ne of the condo is occupied by Maria Seng" (id. at 4, Question 19) and "the building is in good condition and it has 4 stories and a basement. We are using deeds of the building and land. The basement as our main office. First floor is reserved for our parents and members of our family" (id. at 5, Question 22).

This same year, David, James, and Joseph demanded that CPC pay back the remainder owed on the Condo Loan (see NYSCEF Doc. No. 182, William Seng aff, exhibit BB; NYSCEF Doc. No. 183, William Seng aff, exhibit CC, ¶ 90). Respondents allege that also around this time, they were blocked by petitioners from investigating the \$16.5 million transfer out of the Trust. Thus, there was a deadlock in the Trust's management and function.

On October 15, 2007, Peter, William, Maria, and Henry (Henry present by power of attorney granted to William) held a trustees' meeting. Sheldon Schwartz, identified as "secretary" in the meeting minutes, was also present. Jimmy and David were absent. At the meeting, the present trustees resolved to have CPC establish an interest bearing bank account for the benefit of the Trust, into which CPC would place loan principal and interest repayments (NYSCEF Doc. No. 181, William Seng aff, exhibit AA). It was further resolved that proceeds in this "special account"

would be used to pay legal expenses (*id.*). The minutes of this meeting were emailed to David (*id.*). On November 12, 2008, CPC's shareholders, including Jimmy, David, and Joseph, held their annual meeting, in which the status of the Condo Loan was detailed, including legal fees paid out of the special account (NYSCEF Doc. No. 185, William Seng aff, exhibit FF).

During 2008-2009, petitioners and respondents were engaged in litigations in Hong Kong, centering on the \$16.5 million transfer, the Condo Loan, and CPC's use of the special account. These litigations were resolved by April 20, 2010 order on consent (Consent Order) (NYSCEF Doc. No. 186, William Seng aff, exhibit GG). The 2010 Consent Order provided for the appointment of Bank of East Asia Limited as the sole trustee; required David James, and Joseph to return the \$16.5 million with interest; directed the repayment of the Condo Loan; and directed the closing of the special account (*id.*).

In March 2013, petitioners, as executors of Seng Ping Ling's estate, retained Grant Thornton to investigate CPC and S&S (NYSCEF Doc. No. 152, petition, ¶ 20). On May 15, 2013, the estate transferred its ownership interest in CPC to YSL; YSL continued the investigation (*id.* at ¶ 21). On August 30, 2013, Grant Thornton issued a report estimating the fair market value of CPC and S&S (NYSCEF Doc. No. 162, William Seng aff, exhibit KK).

On December 12, 2013, petitioners commenced this proceeding for dissolution of CPC and for breach of fiduciary duty.

Analysis

Motion Sequence Number 006

In their petition for dissolution, petitioners allege that respondents are wasting and misusing CPC's assets. Specifically, petitioners allege the following instances of misappropriation and waste: Maria's rent free use of Unit 5L; the respondents' authorization of the rent-free use of the Townhouse's basement and first floor; and the legal fees paid on behalf of the respondents out of the "special account" described below.

Respondents assert that petitioners' claims are barred by the six-year statute of limitations. Respondents argue that petitioners admit to knowing for more than six years before the filing of their petition how CPC's real estate assets were being used and never objected, and that a special account was set up in which legal fees would be paid out of.

The limitations period for dissolution is six years (CPLR 213 [1]; see also *DiPace v Figueroa*, 223 AD2d 949, 952 [3rd Dept 1996]). The limitations period is measured from the "instances of alleged wrongdoing adverted to by [the petitioner] as grounds for dissolution" (*Di Pace v Figueroa*, 223 AD2d at 952). Since petitioners filed their petition on December 12, 2013, only claims accruing after December 12, 2007 are timely.

Based on the evidence submitted by respondents, it is clear that petitioners knew, at the latest, in February 2007 of the alleged wrongdoings supporting their claims, i.e., that Maria lived rent free in Unit 5L; that the first floor of the Townhouse was reserved for Seng family's use rent free; and that SSG was

occupying the Townhouse's basement rent free (NYSCEF Doc. No. 157, Izower-Fadde aff, exhibit F, David Seng's deposition at 146:6-8, 149:12-150:3 [learned in February 2007 Maria was not paying rent], 152:5-155:2 [learned in February 2007 the Townhouse's first floor was reserved for family¹ and SSG used the basement]; NYSCEF Doc. No. 158, Izower-Fadde aff, exhibit G, Joseph Seng's deposition at 57:20-58:1 [stating it was David who liaised with the Committee and he relied on David], 156:3-12 [learned from Committee of the rent free uses]; NYSCEF Doc. No. 159, Izower-Fadde aff, exhibit H, James Seng's deposition at 77:10-78:15 [learned in 2007 meeting with the Committee about the rent free use of Unit 5L and of the Townhouse's rent free use]). Petitioners' own words in their depositions directly contradict their claim that the wrongdoings were not uncovered until the Grant Thornton Investigation in 2013.

In regard to the third alleged wrongdoing, wasting and diverting CPC's assets to pay for respondents' personal legal fees, dissolution based on this claim is also untimely. The special account from which these legal fees were paid was opened in October 2007 pursuant to a resolution passed at a trustees meeting (NYSCEF Doc. No. 181, William Seng aff, exhibit AA). On November 16, 2007, David wrote a letter acknowledging the meeting and the resolutions passed, a copy was sent to James (NYSCEF Doc. No. 182, William Seng aff, exhibit BB). On December 10, 2007,

¹ David admits to staying in the Townhouse in 2002 (*id.* at 152:5-12).

another letter was sent to by James, David, and Joseph to the Committee, acknowledging the resolutions passed and their concerns (*id.*). Again, petitioners were aware of respondents' actions and disapproved, but yet waited over six years to bring their claim.

Petitioners argue that their claims are tolled because respondents did not openly repudiate their fiduciary duties until 2013. In action involving an underlying breach of a fiduciary relationship, the statute of limitations "period does not begin to run until the fiduciary has openly repudiated his or her obligation or the relationship has been otherwise terminated" (*Westchester Religious Inst. v Kamerman*, 262 AD2d 131, 131 [1st Dept 1999] [citations omitted]). However, since petitioners were aware of respondents' alleged wrongdoings, it was evident to them, prior to December 2007, that respondents repudiated their fiduciary duties.

Petitioners also argue that the continuing wrong doctrine applies to respondents' repeated wrongful conduct and tolls the limitations period. "The [continuous wrong] doctrine is usually employed where there is a series of continuing wrongs and serves to toll the running of a period of limitations to the date of the commission of the last wrongful act" (*Henry v Bank of Am.*, 147 AD3d 599, 601 [1st Dept 2017] [internal quotation marks and citations omitted]). "The doctrine may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct. The distinction is between a single

wrong that has continuing effects and a series of independent, distinct wrongs" (*id.* [internal quotation marks and citations omitted]). Further, "[t]he doctrine is inapplicable where there is one tortious act complained of since the cause of action accrues in those cases at the time that the wrongful act first injured plaintiff and it does not change as a result of continuing consequential damages" (*id.* [internal quotation marks and citations omitted]).

Here, the wrongdoings complained of are the respondents' decisions to allow (1) Maria to occupy Unit 5L rent free, (2) to reserve the first floor of the townhouse for the Seng family's use, (3) to allow SSG to occupy the Townhouse's basement rent free and (4) to open a special account in which CPC was to make payments into to pay legal fees; all of this decisions occurring prior to the six years from when the petition was filed. The decisions, themselves, are the alleged wrongful acts that injured petitioners; the fact that rent was never collected and that legal fees were paid from the special account established are continuing damages from the single wrongs.

While the breach of fiduciary duty underlies the dissolution claim, petitioners also bring a separate claim for breach of fiduciary duty seeking monetary damages. In New York, when claims for breach of duty seek money damages, a three-year statute of limitations applies (*Kaufman v Cohen*, 307 AD2d 113, 118 [1st Dept 2003]). Thus, to the extent that petitioners seek monetary damages on their breach of fiduciary duty claim, it too

is time barred for the reasons stated above.

As the petition seeking dissolution of CPC and damages for breach of fiduciary is dismissed as time barred, petitioners' motion for partial summary judgment (motion sequence number 007) is denied as moot.

Accordingly, it is

ADJUDGED that the application is denied and the petition is dismissed with costs an disbursements to respondents; and it is further

ADJUDGED that respondents Maria Seng, Peter Seng, and William Seng, having addresses at _____, _____, and _____, respectively, do recover from petitioners Yin Shin Leung Charitable Foundation, Devid Seng, James Seng, and Joseph Seng, having addresses at _____, _____, and _____, respectively, costs and disbursements in the amount of \$ _____, as taxed by the Clerk of the Court, and that respondents shall have execution therefor.

Dated: January 3, 2019

ENTER: 
HON. ANDREA MASLEY