

WZ USA, LLC v United Rest. Group Intl. Inc.
2019 NY Slip Op 32067(U)
July 5, 2019
Supreme Court, New York County
Docket Number: 655015/2018
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY PART IAS MOTION 48EFM

Justice

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INDEX NO. 655015/2018

WZ USA, LLC, and QIPAI INVESTMENT LLC,

MOTION DATE

Plaintiffs,

MOTION SEQ. NO. 001

- v -

UNITED RESTAURANT GROUP INTERNATIONAL, INC., UNITED RESTAURANT GROUP, INC., LUMOS KITCHEN WEST, LLC, R&M CENTURY, INC. D/B/A SHANGHAI CUISINE, KIN ASIAN BISTRO INC. D/B/A CARMA EAST, POKEE NY, INC. D/B/A POKEE, LUMOS KITCHEN EAST, QIFAN LLC D/B/A RAILWAY, DUMPLING 516 HUDSON NY, INC. D/B/A BENEDICTS, QIFAN LI, CHRISTIAN VEGA, and ZHENLING TAO,

DECISION + ORDER ON MOTION

Defendants.

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Masley, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 33, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 87

were read on this motion to/for INJUNCTION/RESTRAINING ORDER

In motion sequence 001, plaintiffs WZ USA, LLC (WZ USA) and QiPai Investment, LLC (QiPai) move pursuant to CPLR 6301 for a preliminary injunction restraining defendants United Restaurant Group International, Inc. (URGI), United Restaurant Group, Inc. (URG), Lumos Kitchen West, LLC, R&M Century Inc. d/b/a Shanghai Cuisine, Kin Asian Bistro, Inc. d/b/a Carma East, Pokee NY, Inc. d/b/a Pokee, Lumos Kitchen East, Qifan LLC d/b/a Railway (Qifan), Dumpling 516 Hudson NY, Inc. d/b/a Benedicts, Qifan Li (Li), Christian Vega and Zhenling Tao (Tao) from (1) transferring or withdrawing any funds from their accounts, or (2) transferring or disposing of any of their property pending the outcome of this litigation. (NYSCEF Doc. No. 18.)

Background

Plaintiff WZ USA is limited liability company, the President and sole shareholder of which is Irene Wang. (NYSCEF Doc. No. 1 at ¶¶ 1, 32.) Plaintiff QiPai is a limited liability company, the President and sole shareholder of which is Xiao Shen (Shen). (NYSCEF Doc. No. 1 at ¶¶ 2, 15.)

In March 2018, Wang and Li met to discuss the numerous restaurants and bars owned by defendants URGI and URG. (*Id.* at ¶¶ 33-36.) Li represented herself as the managing director of URGI and represented URG as a subsidiary of URGI, and the parent company of a number of other corporations that cumulatively owned nine restaurants, a brewery, a bar, and half of a club in Manhattan and Brooklyn. (*Id.* at ¶¶ 36 & 40.) Li urged Wang to invest in URGI, stating that URGI's shares would soon be traded publicly and she would be provided with all financial documents as soon as she invested. (*Id.* at ¶¶ 42-43.) In April 2018, defendant Christian Vega, who represented himself as the Chief Executive Officer of URGI, provided Wang with a flow chart depicting the structure of URGI and its associated corporations as well as a chart tracing the cash flow between all of the corporations. (NYSCEF Doc. No. 1 at ¶¶ 45-47.) Wang was also directed to URGI's filings with the Securities Exchange Commission (SEC), all of which indicated various shareholders whom Li and Vega indicated had invested in URGI. (*Id.* at ¶ 48.) In April 2018, Wang, as the President of WZ USA, made an initial investment of \$165,000 into URGI, and entered into a Subscription Agreement (Subscription Agreement) pledging another investment of \$1,100,000. (*Id.* at ¶¶ 50-51.)

In April 2018, Wang began working in Shanghai Cuisine (Shanghai), one of the restaurants owned by URGI. (*Id.* at ¶ 54.) Shanghai was the most profitable restaurant

owned by URGI. (*Id.* at ¶ 55.) In May 2018, Wang was given partial access to a Chase Bank account, the only signatory of which had previously been Li. (*Id.* at ¶¶ 56 & 63.) Two months later Wang discovered that all of WZ's initial investment was gone. (*Id.* at ¶ 57.) Li explained the withdrawals as business expenses, but Wang's own calculations indicated that this was unlikely. (*Id.* at ¶ 58.) Wang requested further financial documents and only received old TD Bank statements. (*Id.* at ¶ 62.) Wang discovered that many of the transactions from this account were used by Li and Vega for personal expenses. (*Id.*)

In July 2018, Wang attended the first and only board meeting of URGI's board members. (*Id.* at ¶¶ 67,78.) There, she learned that URGI never actually owned the brewery or the nightclub despite being told otherwise. (*Id.* at ¶ 68.) Additionally, with the sole exception of Shanghai, all of the other restaurants owned by URGI were either operating at a loss or closed. (*Id.* at ¶ 67-72.) Moreover, Li, without Wang's knowledge or consent, took out a business loan using Wang's name and social security number on one of the restaurants URGI was supposed to already own at the time of Wang's investment. (*Id.* at ¶ 73.)

Six months earlier, in November 2017, Li had approached Shen with the same story: she was seeking investors in URGI, which owned five restaurants and one bar in Manhattan and Brooklyn. (*Id.* at ¶¶ 16-19.) Pursuant to Li's urging, Shen, through QiPai, invested \$250,000 into URGI in exchange for 2,750,000 shares in URGI. (*Id.* at ¶ 23.) In January 2018, Shen also entered into a Subscription Agreement with URGI and a Shareholder Agreement with URG, which Li represented as a wholly owned subsidiary of URGI. (*Id.* at ¶¶ 24-25.) In total, QiPai invested \$500,000 into URGI and URG in January 2018. (*Id.* at ¶¶ 29-30.) In reviewing the bank accounts, Shen discovered that

Li had actually: (1) transferred \$150,000 of QiPai's investment to her own company, defendant Qifan; and (2) transferred \$100,000 to a checking account unaffiliated with either URGI or URG, and (3) used another \$20,000 to pay for personal expenses. (*Id.* at ¶ 31.) Within a month of Shen's investment, Li had transferred out \$460,000 of his original \$500,000 investment. (*Id.* at ¶ 30.)

Shen had already invested in URGI by the time Wang checked the company's listings with the SEC, yet Shen's name was not among the listed investors, despite both Li and Vega representing otherwise. (*Id.* at ¶ 49.) Additionally, the stock certificates issued to both Wang and Shen were never filed with the SEC. (*Id.* at ¶ 82.) When pressed about the missing funds, Li indicated to Wang that she was seeking to move to San Francisco, and in September 2018, Li transferred her condominium to her mother for no consideration, and has been attempting to sell Qifan. Last, Vega has been attempting to sell Shanghai, the only profitable restaurant owned by URGI.

On October 9, 2018, WZ USA and QiPai commenced this action alleging claims including fraudulent inducement, fraud, breach of the subscription agreement, breach of the shareholder operating agreement, an accounting, a declaration that the subscription agreement and operating agreement are null and void, and fraudulent conveyance. (NYSCEF Doc. No. 1 at ¶¶ 86-123, 124-144, 145-59.)

On October 17, 2018, WZ USA and QiPai filed this motion for a preliminary injunction to prevent any of the above named defendants from withdrawing or transferring any funds from their accounts, or from transferring any of their properties pending the resolution of this litigation. Plaintiffs also seek an order of attachment on the grounds that the defendants have attempted to sell at least one of the restaurants while also transferring funds to other companies. Plaintiffs posit that that the defendants

have already depleted plaintiffs' investments and any monies that remain will be transferred rendering the defendants judgment proof. Should the court grant an attachment, plaintiffs seek discovery with respect to any property or bank accounts in which the defendants have an interest.

URGI opposes, arguing that plaintiffs are not entitled to injunctive relief because plaintiffs fail to demonstrate irreparable harm. (NYSCEF Doc. No. 38 at 7.) In addition to the arguments advanced by URGI, Li and Qifan contend that this litigation should be stayed because the parties agreed to arbitrate. In reply, plaintiffs assert that Li and Qifan are not signatories to the Subscription Agreement, and therefore unable to compel arbitration. Plaintiffs argue that URGI, the only signatory to the Subscription Agreement, filed an Answer that did not raise jurisdictional defenses, therefore waiving the arbitration clause.

Discussion

Although Li and Qifan contend that this action should be stayed in favor of arbitration, assuming the arbitration clauses reach them, they have waived their opportunity to arbitrate by asserting cross-claims in their Answer without asserting their right to arbitrate. (*De Sapio v Kohlmeyer*, 35 NY2d 402, 405 [1974] [interposing a crossclaim is a sufficiently affirmative use of the judicial process so as to be inconsistent with a later motion to stay].) WZ USA and QiPai also waived their right to arbitration by commencing this action. (*Id.* ["[T]he party who commences an action may generally be assumed to have waived any right it may have had to submit the issues to arbitration.].) Indeed, none of the parties petitioned this court under CPLR 7502, and therefore, the requests for a preliminary injunction and attachment are governed by CPLR 6301 and 6201 respectively.

Under CPLR 6301, a party seeking a preliminary injunction must demonstrate the following three elements: (1) a likelihood of success on the merits, (2) the danger of irreparable harm in the absence of a preliminary injunction, and (3) a balance of the equities in the moving party's favor. (*Gliklad v Cherney*, 97 AD3d 401, 402 [2012].) Despite the seemingly insidious acts of the defendants, plaintiffs have not shown irreparable harm because "[d]amages compensable in money and capable of calculation, albeit with some difficulty, are not irreparable." (*SportsChannel America Associates v National Hockey League*, 186 AD2d 417, 418 [1st Dept 1992].) On the contrary, Plaintiffs have calculated, and are asking for, money damages. (NYSCEF Doc. No. 1 at 18-20.) This failure to demonstrate irreparable harm is fatal to the plaintiffs' request, and therefore, the preliminary injunction is denied.

CPLR 6201 (3) states in pertinent part that,

"an order of attachment may be granted ... where the plaintiff has demanded and would be entitled ... to a money judgment against one or more defendants, when: the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts."

Here, the record is riddled with the sort of "sinister maneuvers" and "fraudulent conduct" that have come to define the classic scenario in which an attachment is truly necessary. (*County Natwest Sec. Corp., USA v Jessup, Josephthal & Co.*, 180 AD2d 468, 469 [1st Dept 1992].) Accordingly, the court directs attachment of the assets of Li, Qifan, Vega, URGI, URG and Tao. (*Ford Motor Credit Co. v Hickey Ford Sales*, 62 NY2d 291, [1984] [noting the due process concerns implicated when a court attaches one defendants property for the misfeasance of another].)

Accordingly, it is

ORDERED that the motion of plaintiffs WZ USA LLC and QiPai Investment LLC

for a preliminary injunction is denied; and it is further

ORDERED that the plaintiff's motion for an order of attachment is granted; and it is further

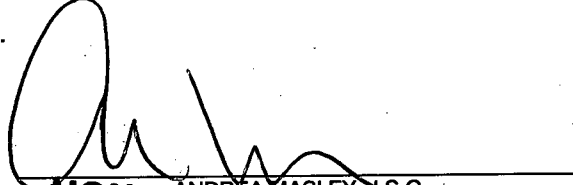
ORDERED that the amount to be secured by this order of attachment, inclusive of probable interest, costs and Sheriff's fees and expenses, shall be \$1,800,000; and it is further

ORDERED that the plaintiff's undertaking is fixed in the sum of \$100,000 conditioned that the plaintiff shall pay to the defendant an amount not exceeding \$95,000 for legal costs and damages, collectively, which may be sustained by reason of the attachment, and up to and not exceeding \$5,000 to the Sheriff for allowable fees, if the defendant recovers judgment or if it is decided that the plaintiff is not entitled to an attachment of the property of the defendant; and it is further

ORDERED that the Sheriff of the City of New York, or the Sheriff of any County of the State of New York, shall levy with in his jurisdiction, at any time before final judgment, upon such real and personal property in which defendants Qifan Li, Christian Vega, Zhenling Tao, United Restaurant Group International, Inc., United Restaurant Group, Inc., and Qifan LLC have an interest and upon such debts owing to the defendant as will satisfy \$1,800,000, the amount of plaintiff's demand, together with probable interest, costs, and the Sheriff's fees and expenses and that the Sheriff proceed herein in the manner and make his return within the time prescribed by law; and it is further

ORDERED that the parties are directed to appear for a discovery conference on August 8, 2019 at 11:30 AM in Part 48 at 60 Centre Street.

7/5/19
DATE


HON. ANDREA MASLEY, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	REFERENCE
		<input type="checkbox"/>	OTHER

APPLICATION:

CHECK IF APPROPRIATE: