

**Jin Wu Yu v Hong Qin Jiang**

2019 NY Slip Op 32893(U)

August 20, 2019

Supreme Court, Queens County

Docket Number: 704356/2019

Judge: Chereé A. Buggs

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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**  
**Justice**

IAS PART 30

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JINWU YU and SH 168 LLC,

Index No.: 704356/2019

Plaintiffs,

Motion

Date: June 19, 2019

-against-

Motion Cal. No.: 54

HONG QIN JIANG,

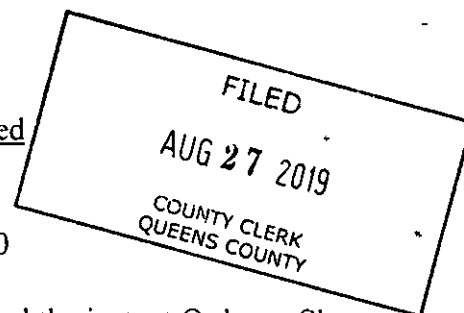
Motion Sequence No.: 1

Defendant.

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The following efile papers numbered 1-18, 44-50 submitted and considered on this Order to Show Cause by plaintiffs Jinwu Yu and SH 168 LLC seeking an Order enjoining and restraining defendant Hong Qin Jiang or any third party acting on her behalf or in concert with her during the pendency of this action, from acting on behalf of the plaintiff SH 168 LLC or interfering with its business; staying all summary proceedings and related relief.

	Papers <u>Numbered</u>
Order to Show Cause-Affidavits-Exhibits.....	EF 1-18
Affirmation in Opposition-Affidavits-Exhibits....	EF 44-50



Plaintiffs Jinwu Yu and SH 168 LLC (hereinafter "LLC") filed the instant Order to Show Cause seeking relief under Civil Practice Law and Rules (CPLR) §6301 seeking injunctive relief to enjoin and restraining defendant Hong Qin Jiang or any third party acting on her behalf or in concert with her during the pendency of this action, from acting on behalf of the LLC or interfering with its business; staying all summary proceedings between the LLC and respondents in multiple summary proceedings commenced in the New York City Civil Court, County of Queens; preventing defendant and any or her agents from collecting rent from the building known as 142-28/30 38 Avenue, Flushing, New York 11354 or disposing of real property, monies or financial instruments during the pendency of this action and related relief. Plaintiffs asserted that defendant has no authority to act on behalf of the LLC because she was not and is not a member, has no authority to commence legal proceedings or collect rent from any tenants, and that defendant's actions has damaged plaintiffs assets, tenants, goodwill and reputation. Defendant requests that the Court compel the defendant to account for the rents illegally taken by her and to turn them over to the plaintiffs.

Plaintiff Jinwu Yu attested in his affidavit annexed to the Order to Show Cause that in August 2016, on behalf of a legal entity known as Shirokia Development LLC (Debtor) the defendant filed a Chapter 11 Petition with the United States Bankruptcy Court for the Eastern District of New York. Pursuant to a Bankruptcy Court Order Confirming Debtor's First Amended Joint Chapter 11 Plan of Reorganization Pursuant to 11 U.S.C. Section 1129, the Debtor sold its property located at 142-28/32 38 Avenue, Flushing, New York 11354 (the "Premises") to the LLC for the sum of \$25,000,000.00 on August 22, 2017. A copy of the Bargain and Sale Deed with Covenant Against Grantor's Acts signed by the Defendant on behalf of the Debtor was annexed to the papers.

The premises consists of 23 residential apartments, 4 commercial community facility units and 47 parking spaces. It was approved as a condominium building in or about August 2007 as Shirokia Tower Condominium. Plaintiffs claimed that however, due to the defendant's repeated violation of the New York Executive Law §63(12), the Martin Act, New York General Business Law §352, New York Real Property Tax Law and New York City Administrative Codes, the Attorney General of the State of New York ("OAG") conducted at least two investigations and found the defendant in violations and revoked the approval of the condominium.

As part of the Debtor's bankruptcy plan, defendant personally and the Debtor entered into an Assurance of Discontinuance with the OAG on August 21, 2017, a copy of which was annexed to the papers. In such Assurance the OAG filed a Proof of Claim in the sum of \$910,750.00. To induce the OAG's consent to sell the Premises to plaintiff SH 168 LLC and to reduce its proof of claim, defendant represented to the OAG that "(i)n the course of settling OAG's claims through this Assurance, Respondent Jiang represented to the OAG that, other than the \$150,000.00 Escrow, she did not have sufficient assets to satisfy the OAG's claims", that "(r)espondent Jiang also represented to the OAG that she would not financially benefit from the sale of the 142-28 38<sup>th</sup> Avenue property or otherwise be provided with any proceeds or value now or in the future from any sale of the property"; and also that "OAG explicitly relied upon the representations by Respondent Jiang in paragraphs 43 and 44 above when it agreed to enter into this Assurance." Paragraphs 49 and 50 of the Assurance actually enjoin and restrain the defendant permanently from engaging in marketing, selling or offering for sale to the public any securities constituting participation interests or investments in real estate, including condominium or cooperative apartments which LLC is trying to reinstate the condominium approval. Thus, after the sale of the Premises to the LLC, defendant not only did not and does not have any interests in the LLC, it is also against her representations made to the OAG and the injunction enforced against her by the OAG.

On or about December 4, 2018, defendant acted as a member of the Debtor, Shirokia Development LLC and issued approximately seven (7) Ten (10) day Notice to Quit upon about 7 tenants in the Premises. Plaintiffs engaged counsel to correspond with defendant's counsel regarding same, providing a copy of the deed showing the sale, and defendant's counsel agreed to withdraw the notices. However, after withdrawing the notices, defendant again claimed to be a member of the LLC and commenced seven (7) summary proceedings in the New York City Civil Court County of Queens to evict about 7 tenants in the Premises. Copies of the Notice of Petition and Petition were

annexed to the papers. Plaintiffs argued that the defendant did not and does not have authority to act on behalf of the LLC she was and is not a member, or an officer. Thus these proceedings should be stayed pending this Court's determination as to whether she had any authority to act on behalf of the LLC. When the Debtor sold the Premises to the LLC it was solely owned by Mr. Zhi Rong Lin who signed certain documents relating to the sale including the RP-5217 NYC form, Affidavit of Compliance with Smoke Detector Requirement, NYC DEP Customer Registration Form for Water and Sewer Billing on behalf of the LLC as its member. When it purchased the subject premises it also took a mortgage and Mr. Lin signed the mortgage agreement on behalf of the LLC. Plaintiffs also annexed a copy of the Filing Receipt and Articles of Organization of the LLC, showing Mr. Lin as the Incorporator and Organizer, and a document issued by the Department of Treasury Internal Revenue Service showing Mr. Lin as the sole member. An Operating Agreement which was also attached showed Mr. Lin as the 100% owner as of June 29, 2017.

On or about October 24, 2018, Mr. Lin allegedly transferred all his membership interests to plaintiff Jinyu Wu and Mr. Aiguang Chen with 74% interest to Mr. Wu and 26% interest to Mr. Chen. A copy of a Membership Purchase Agreement of the LLC was annexed. Mr. Chen and Mr. Wu entered into a First Amended and Restated Operating Agreement of the LLC to reflect Mr. Lin is no longer a member and that it is owned by Mr. Wu and Mr. Chen with the aforementioned percentages. Defendant, although not a member of the LLC has been attempting to collect rent from some of the tenants and has collected some rent under false pretense and plaintiffs desire a Court Order that she cease from doing so and that she also be ordered to account for same and turn the monies over to the LLC. Plaintiffs claimed that defendant's sole intention is to steal monies from the tenants in the Premises, and this has led to confusing the tenants and subjected plaintiffs to irreparable harm to its goodwill and reputation, including causing it to become difficult to rent out apartments and other units. Based upon the documentary evidence submitted in support of the motion, plaintiffs claimed that they demonstrated a likelihood of success on the merits, irreparable injury if defendant is not restrained and the balance of equities tips in their favor (*see Doe v Axelrod*, 73 NY2d 748 [1988]).

In opposition, defendant claimed that the Order to Show Cause should be denied. She submitted her affidavit and the affidavit of Mr. Lin. Mr. Lin stated in his affidavit that he never transferred membership interest in the LLC to Mr. Wu or Mr. Chen, and that the documents submitted to the Court were fraudulent. Therefore, plaintiff Jinwu Yu lacks standing to prosecute the action on behalf of the LLC. Defendant claimed that when the property was purchased she contributed the sum of \$5,000,000.00 toward the sale proceed and paid all closing costs, and that no one other than defendant contributed any funds toward the closing costs or sale proceeds. Defendant contends that she is the true owner of the LLC, which is evidenced by the Certificate of Change of the LLC, a copy of which was annexed to the opposition papers which was subsequently filed, by which defendant was designated as the LLC's registered agent for the service of process. Moreover, contrary to plaintiffs' assertions, defendant is not precluded by the Assurance of Discontinuance, executed with the OAG on August 21, 2017 from having any membership interest in the LLC or any interest in the subject property. Paragraph 44 thereof contains a representation of defendant that she would not financially benefit from the sale of the property or otherwise be provided with any

proceeds or value now or in the future from the sale of the property. This was not a misrepresentation as defendant has not received any of the proceeds from the sale, thus she never benefitted financially therefrom. Paragraph 49 and 50 prohibit defendant from marketing, selling or offering for sale any securities constituting participation interests or investments in real estate, including but not limited to syndications and cooperative interest in realty. Defendant stated that she has not violated the prohibition. The LLC has not issued or sought to issue a new offering plan or to otherwise market the individual units at the property for sale, rather the units are being utilized as rental units.

Defendant further argued that in August 2018, a Resolution on Zhi Rong Lin's capacity with the LLC was executed by Mr. Lin and by Xi Liang Liu, defendant's estranged husband who is also the father of plaintiff Jinwu Yu. Through the resolution, Mr. Lin resigned from all positions with the LLC. However, there was no provision made therein as to the disposition of the membership interests; but it would appear that the intention was for the membership interests to be transferred to defendant as evidenced by an Operating Agreement of the LLC executed on August 7, 2018, a copy of which was annexed to the papers, which designated defendant as the sole member of the LLC. Therefore, the Order to Show Cause should be denied, because defendant has an interest in the LLC's property and plaintiff is attempting to gain control of the LLC's assets through fraudulent means, being used by his father as his proxy in a battle with defendant, his estranged wife to deprive her of her property.

### **Law and Application**

The law is well settled that to prevail on an application for a preliminary injunction, the moving party must demonstrate (1) a likelihood of ultimate success on the merits; (2) irreparable injury absent the granting of the preliminary injunction; and (3) that a balancing of equities favors the movant (*see Chase Home Finance v Cartelli*, 140 AD3d 911 [2d Dept 2016]). The determination of whether to issue a preliminary injunction is left to the discretion of the Court (*see Doe v Axelrod*, 73 NY2d 748 [1988]). Thus, it is up to the Court to preserve, if necessary, the status quo until the merits of the case is determined (*Hoppman v Riverview Equities*, 16 AD2d 631 [1<sup>st</sup> Dept 1962]). "The remedy is a drastic one, which should only be used sparingly." (*See Soundview Cinemas, Inc. v AC I Soundview, LLC*, 149 AD3d 1121 [2d Dept 2017]).

Defendant is in default having never submitted an answer to the plaintiffs' complaint. Until defendant files an answer or Mr. Lin takes affirmative steps to declare these documents which have been purportedly duly filed fraudulent, the court is constrained to accept their validity, and moreover, Mr. Lin acknowledges that the defendant is not a member of plaintiff SH 168 LLC. He stated that it was his intention to transfer all interest in the LLC and the interest in the property to the defendant and two other individuals, however, no formal transfer of the membership interest was executed, and Mr. Lin acknowledged that he executed a Resolution in August 2018, which defendant and Mr. Liu and defendant also executed. Defendant represented to the OAG that she would not financially benefit from the sale of the Premises "or otherwise be provided with any proceeds or value now or in the future from the sale of the property." The Court finds that plaintiffs have set forth grounds

for the requested relief. Therefore it is

**ORDERED**, plaintiffs' Order to Show Cause is granted; and it is further

**ORDERED**, defendant or any third party acting on defendant's behalf or in concert with her are enjoined and restrained during the pendency of this action from acting on behalf of the Plaintiff SH 168 LLC or to interfering with the business of SH 168 LLC in any manner; and it is further;

**ORDERED**, defendant or any third party acting on defendant's behalf or in concert with her are enjoined and restrained during the pendency of this action from collecting rent or additional rent payments from any tenants, occupants, lessees, licensees or anybody occupying any space or unit located at the building known as 142-28/30 38 Avenue, Flushing, New York 11354; and it is further

**ORDERED**, that all summary proceedings commenced by defendant in the name of SH 168 LLC in the New York City Civil Court County of Queens shall be stayed including LT-051243/19QU; LT-051244/19QU; LT-051245/19QU; LT-051246/19QU; LT-051247/19QU; LT-051248/19QU, said cases fully set forth in the Order to Show Cause, until further Order of the Court; and it is further


**ORDERED**, that defendant or any third party acting on defendant's behalf or in concert with her are enjoined and restrained during the pendency of this action from withdrawing, liquidating, selling, transferring, removing, borrowing against, disposing of, pledging or otherwise hypothecating or encumbering any monies, stocks, shares, bonds, financial instruments, or corporate assets of any nature, including but not limited to real estate, vehicles, equipment, inventory supplies, accounts receivables, customer lists, business checking accounts, business savings accounts/certificates of deposit and other financial instruments held in or by any bank, brokerage, financial advisor or similar financial institution, which items are the property of, under the control of or which are held by and/or for Plaintiff SH 168 LLC; and it is further

**ORDERED**, that defendant shall account for all rent or additional rent collected from any tenants, occupants, lessees, licensees or anybody occupying any space or unit located at the building and defendant is directed to turn over such receipts to the Plaintiff SH 168 LLC within twenty (20) days of the date of this Order; and it is further

**ORDERED**, that plaintiffs shall post a bond in an amount to be determined upon the filing and serving of a motion by plaintiff to fix the bond amount pursuant to CPLR §6312 (b) within fifteen (15) days of notice of entry of this decision. Defendants may submit their positions on the amount of the bond in the form of opposition or a cross motion. Alternatively, the parties may stipulate to the waiver of a bond or as to the amount and nature of the bond. The undertaking shall be in the form of surety, deposited with the Queens County Clerk or in a joint interest bearing escrow account.

This constitutes the decision and Order of the Court.

Dated: August 20, 2019

  
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**Hon. Chereé A. Buggs, JSC**

FILED  
AUG 27 2019  
COUNTY CLERK  
QUEENS COUNTY