Ji Juan Lin v Bo Jin Zhu
2019 NY Slip Op 34152(U)
January 14, 2019
Supreme Court, Queens County
Docket Number: 707231/18
Judge: Leonard Livote
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Short Form Order
NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable Leonard Livote — Commercial Division Part A
Acting Supreme Court Justice

x

Ji Juan Lin, and Chung Sum Cheng, individually and as Limited Partners and Shareholders and Creditors of 8220 Britton Ave Realty Corp., Plaintiffs

Index Number 707231/18

- against -

Motion Date 10/2/18

Bo Jin Zhu, Wen Ping Zhu, 8220 Britton Ave Realty Corp., LSL Realty Holding LLC, Xiumin Chen and Crown Mansion LLC, Defendants

Motion Seq. No.1

x

FILED
FEB 21 2019
COUNTY CLERK
QUEENS COUNTY

The following papers numbered EF18 to EF52 read on this motion by defendant LSL Realty Holding LLC ("LSL"), to dismiss the complaint pursuant to CPLR 3211[a][10](indispensable party) and, alternatively pursuant to CPLR 3211 [a][3](no legal capacity to sue); and cross motion by plaintiffs for a preliminary and permanent injunction enjoining LSL from transferring, dissipating, assigning, conveying, encumbering or otherwise disposing of the company property known as 43-01 to 43-09 National Street, in Corona, New York [Queens Block 1619, Lot 7], along with sanctions against LSL, costs and attorneys' fees for frivolous motion practice.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	EF18-EF39
Notice of Cross Motion - Affidavits - Exhibits.....	EF40-EF41
Answering Affidavits - Exhibits	EF42-EF45
Reply Affidavits	EF46-EF52

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

This action arises out of the alleged illegal conversion and transfer of corporate and partnership assets of 8220 Britton Avenue Realty Corp. to LSL. The complaint alleges that the sale was perpetuated through fraud, fraudulent inducement and conspiracy of defendants Bo Jin Zhu, Wen Ping Zhu and Xiumin Chen. Plaintiffs seek to set aside the April 24, 2018 sale of the premises known as 43-01, 03, 05, 07, and 09 National Street, in Queens, New York, Block 1619, Lot 7 ("Premises"), by defendant 8220 Britton Avenue Realty Corp., to LSL as a fraudulent conveyance; to recover damages for breach of a limited investment partnership agreement dated July 25, 2014; and for injunctive relief as against LSL. Defendant LSL moves to dismiss the complaint for failure to join 8220 Britton Ave Realty Corp. Limited Partnership ("Limited Partnership") and, in the alternative, to dismiss the complaint on the ground that plaintiffs lack standing as the limited partners of 8220 Britton.
Plaintiff opposes the motion and cross moves to enjoin LSL from transferring, dissipating, assigning, conveying, encumbering or otherwise disposing of the company property known as 43-01 to 43-09 National Street, along with sanctions against LSL and costs and attorneys' fees for frivolous motion practice.

Facts

On or about July 25, 2015, Ji Juan Lin and Chung Sum Cheng, as limited partners, entered into a Limited Investment Partnership Agreement (LIPA), with Ai Ying Zheng, as the third limited partner, and with defendants Bo Jin Zhu and Wen Ping Zhu as general partners. The LIPA created the limited partnership known as the 8220 Britton Ave Realty Corp. Limited Partnership. The purpose of the Limited Partnership was to invest in the development of 8220 Britton Ave Realty Corp., as contemplated by the company. General partners Bo Jin Zhu and Wen Ping Zhu were designated to represent the Limited Partnership in 8220 Britton Avenue Realty Corp., and to do "all that is necessary and required to achieve such purpose."

Pursuant to section 2.1 of the LIPA, the Limited Partners invested money in the Limited Partnership as follows: Ai Ying Zheng contributed $1,430,000; Ji Juan Lin contributed $1,000,000; and Chung Sum Cheng contributed $800,000. The monies were to be used by the general partners to pay debts and arrears of 8220 Britton Avenue Realty Corp. 8220 Britton simultaneously executed two promissory notes. One note is payable to Ji Juan Lin in the principal amount of $1,300,000 with a promise to repay the note in three monthly payments in the amount of $433,333.33 on August 1, 2016, September 1, 2016 and October 1, 2016. The second note is payable to Chung Sum Cheng in the principal amount of $1,040,000, with a promise to repay the note in three monthly installments on August 1, 2016, September 1, 2016 and October 1, 2016, in the amount of $346,666.66.

On September 19, 2017, an action was commenced in the Supreme Court, Queens County, entitled Ji Juan Lin and Chung Sum Cheng, et al., v Bo Jin Zhu, et al., Index No 713018/2017, against all defendants herein except LSL, for breach of the LIPA and for defaulting under the terms of the note payable to JI Juan Lin and Chung Sum Cheng. This action was discontinued on April 18, 2018, without prejudice. A notice of pendency was filed in connection with this prior action but was cancelled by plaintiffs on April 18, 2018.

On April 24, 2018, 8220 Britton conveyed the premises to LSL for $3,500,000. The deed was recorded against the premises on April 26, 2018. $1,605,195.74 of the sales proceeds were paid to satisfy an existing consolidated note and mortgage granted to Cathay Bank dated April 5, 2013, recorded against the premises on April 29, 2013. The Cathay Bank Mortgage was in foreclosure at the time of its payoff. After Cathay Bank received payment, it discontinued its foreclosure filed on March 14, 2014, in Supreme Court, Queens County, entitled Cathay Bank v 8220 Britton Ave Realty Corp., et al., Index No 704050/2018, on May 31, 2018. The notice of pendency was also canceled on May 31, 2018.

Shortly after the sale of the premises to LSL, plaintiffs commenced this action on May 8, 2018, by filing a summons, complaint and notice of pendency. In commencing the action, however, plaintiffs failed to name either the Limited Partnership or Ai Ying Zheng, as plaintiffs or even as nominal defendants. LSL moves to dismiss the action on the ground that plaintiffs failed to name either the Limited Partnership or Ai Ying Zheng as plaintiff or as even nominal defendants. LSL also moves, alternatively, to dismiss the complaint on the grounds that plaintiffs lack standing to commence this action. Plaintiffs oppose the motion and cross move for injunctive relief. LSL opposes the cross motion.

Discussion

A court may excuse the failure to join a necessary party and allow an action to proceed in the interest of justice upon consideration of five factors enumerated in CPLR 1001(b): (1) whether the petitioner has another remedy if the action is dismissed for nonjoinder, (2) the prejudice that may accrue from nonjoinder to the respondent or to the nonjoined party, (3) whether and by whom prejudice might have been avoided or may in the future be avoided, (4) the feasibility of a protective provision, and (5) whether an effective judgment may be rendered in the absence of the nonjoined party (*see Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Standards and Appeals*, 49 AD3d 749, 752 [2d Dept 2008]). A determination as to whether parties are so "indispensable" that in their absence a matter should not proceed is limited to those cases where the determination will adversely affect the rights of nonparties (see, 3 Weinstein–Korn–Miller, N.Y.Civ.Prac. § 1001.08). Here there can be no question that, in

the event that plaintiffs are successful . . ., the rights of the Limited Partnership and Ai Ying Zheng will be adversely affected. Upon consideration of the statutory factors that they are not only necessary parties under CPLR 1001(a), but they are also indispensable. Clearly, prejudice would accrue to these parties if this proceeding was permitted to go forward without them (see, CPLR 1001[b][2]) because it has not been demonstrated that their interests would be otherwise adequately protected (*see Matter of Mount Pleasant Cottage School Union Free School Dist. v. Sobol*, 163 AD2d 715, 716 [3d Dept 1990]; *cf., Matter of Awad v State Educ. Dept. of N.Y.*, 240 AD2d 923, 925 [3d Dept 1997]; *Arrigoni v Consolidated Rail Corp.*, 155 AD2d 357, 359 [1st Dept 1989], *appeal dismissed* 75 NY2d 1004, *lv. denied* 78 NY2d 851 [1991]). Considering the ease with which plaintiffs could have avoided this dilemma by simply joining them in the first instance (see, CPLR 1001[b][3]), this failure should not be excused in the interest of justice *(see Matter of Mount Pleasant Cottage School Union Free School Dist. v. Sobol, supra*, at 716–717; *cf., Matter of Greaney v Poston*, 50 AD2d 653 [3d Dept 1975]).

Accordingly, considering each of the five factors enumerated in CPLR 1001(b), and given the court's conclusion that the Limited Partnership and Ai Ying Zheng are indispensable parties (*see Matter of Red Hook/Gowanus Chamber of Commerce v. New York City Bd. of Stds. & Appeals*, 5 N.Y.3d 452, 459–460, 805 N.Y.S.2d 525, 839 N.E.2d 878), the motion to dismiss the proceeding is granted (see *Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Standards and Appeals*, 49 AD3d 749, 752-53 [2d Dept 2008]; *Matter of Cybul v Village of Scarsdale*, 17 AD3d 462, 463 [2d Dept 2005]; *Matter of East Bayside Homeowners Assn., Inc. v Chin*, 12 AD3d 370, 371 [2d Dept 2004]; *Matter of Fagelson v McGowan*, 301 AD2d 652 [2d Dept 2003]).

In light of the court's determination, LSL's remaining contention, in the alternative, has been rendered academic.

Cross motion

The cross motion for a preliminary and permanent injunction enjoining LSL from transferring, dissipating, assigning, conveying, encumbering or otherwise disposing of the Premises; and for sanctions against and costs from LSL, is denied as academic; and otherwise on the merits. "The purpose of a preliminary injunction is to preserve the status quo until a decision is reached on the merits" (*Icy Splash Food & Beverage, Inc. v Henckel*, 14 AD3d 595, 596 [2d Dept 2005]; *see S.J.J.K. Tennis, Inc. v Confer Bethpage, LLC*, 81 AD3d 629, 630 [2d Dept 2011]; *Ruiz v Meloney*, 26 AD3d 485, 486 [2d Dept 2006]). "To be entitled to a preliminary injunction, a movant must establish (1) a likelihood or probability of success on the merits, (2) irreparable injury absent granting the preliminary injunction, and (3) a balancing of the equities in the movant's favor" (*Rowland v Dushin*, 82 AD3d 738, 739 [2d Dept 2011]; *see Board of Mgrs. of Wharfside*

Condominium v Nehrich, 73 AD3d 822, 824 [2d Dept 2010]; *Yemini v Goldberg*, 60 AD3d 935, 936 [2d Dept 2009]). A movant must satisfy each requirement with "clear and convincing evidence" (*Apa Sec., Inc. v Apa*, 37 AD3d 502, 503 [2d Dept 2007]). "The decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court" (*Arcamone-Makinano v Britton Prop., Inc.*, 83 AD3d 623, 625 [2d Dept 2011]; *see Blinds & Carpet Gallery, Inc. v E.E.M. Realty, Inc.*, 82 AD3d 691, 692 [2d Dept 2011]; *Rowland v Dushin*, 82 AD3d at 739). Here, plaintiffs failed to demonstrate that they would suffer irreparable injury in the absence of a preliminary injunction (*see County of Suffolk v Givens*, 106 AD3d 943, 944 [2d Dept 2013]; *306 Rutledge, LLC v City of New York*, 90 AD3d 1026, 1028 [2d Dept 2011]; *Mar v Liquid Mgt. Partners, LLC*, 62 AD3d 762, 763 [2d Dept 2009]).

Furthermore, the record does not support plaintiffs' contention that the instant motion is "frivolous", as that word is defined in 22 NYCRR 130–1.1(c). In consequence, the branch of the cross motion that seeks the imposition of sanctions on defendant's counsel for frivolous conduct in civil litigation is properly denied (see *Yonkers Contr. Co., Inc. v Port Auth. Trans-Hudson Corp.*, 248 AD2d 463, 463 [2d Dept 1998], *affd*, 93 NY2d 375 [1999]; *Crandell v Schutz*, 188 AD2d 635, 635 [2d Dept 1992]).

Any other or further relief not specifically addressed herein is denied.

Conclusion

The motion to dismiss is granted. The cross motion for an injunction, and for costs and sanctions is denied.

Dated: January 14, 2019

A.J.S.C.

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