

Pehlivanian v Mingwang Lu
2020 NY Slip Op 30706(U)
March 2, 2020
Supreme Court, New York County
Docket Number: 656065/2017
Judge: Andrew Borrok
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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ARAM PEHLIVANIAN, ZIVAR INVESTMENTS LIMITED,
STANLEY HENRY, ROTH CONTRIBUTORY IRA,
STANLEY AND MARY HENRY, JOINT ACCOUNT, MARY
HENRY, SCHLESINGER FAMILY TRUST, HENRY FAMILY
TRUST, DARA HUBBARD, JAMES STEINER, NICHOLAS
PURO, SUSAN SHIRING DODGE 401(K) RETIREMENT
PLAN, MICHAEL C. DODGE CONTRIBUTORY IRA, OLEN
C. AND REBA F. JEFFRIES LIVING TRUST, BRIAN
ESWAY, PAUL SMITH, BARBARA GOLDSTEIN, LYNN &
ALAN AKAM JOINT ACCOUNT, PATRICIA ANDERSON,
MARY LOU BARR, CONSTANCE BRADLEY, AILEEN
CARRELL, NICOLE CHEN, JULIE DICKENSON, MYRON
FEIOCK, GC & KS ROBERTSON TRUST, FAITH GSTT
EXEMPT TRUST, MICAH LEE, JEFFREY AND SUZANNE
MARTIN JOINT ACCOUNT, JEFFREY MARTIN, SUZANNE
MARTIN, DAVID MARTY, JEAN MARTY, DAVID AND
JEAN MARTY JOINT ACCOUNT, RICHARD MCENTEE,
ANN MCENTEE, MARILYN MINCH, LEANA OSTERMAN,
TODD PETERSON, KIMBERLY POPPE, TIM AND
KIMBERLY POPPE JOINT ACCOUNT, THOMAS AND MARY
SELL JOINT ACCOUNT, DOUGLAS AND BETTINA
WILLIAMS JOINT ACCOUNT, TONY WYCHE, JASON
CYRULNIK, AMANDA CYRULNIK

Plaintiff,

- v -

MINGWANG LU, EDWARD MENG, YI LU, J.P. HUANG,
KWOK WONG, YUNLONG WANG, MAOTONG XU, CHINA
GERUI ADVANCED MATERIALS GROUP, LTD. (NOMINAL
DEFENDANT),

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 124, 125 were read on this motion to/for JUDGMENT - DEFAULT.

Upon the foregoing documents and for the reasons set forth below, the plaintiffs' renewed motion for default judgment against Mingwang Lu, Edward Meng, Yi Lu, J.P. Huang, Kwok

Keung Wong, Yunlong Wang, and Maotong Xu (**Defendants**) and for the appointment of a receiver is granted as unopposed.

The plaintiffs brought this shareholder derivative action on behalf of Nominal Defendant China Gerui Advanced Materials Group, Ltd. (the **Company**) alleging that the Defendants wrongfully converted hundreds of millions of dollars for their personal gain and rendered the Company's securities worthless. In their complaint, the plaintiffs allege that the Defendants orchestrated an elaborate fraudulent scheme to convert the Company's funds in three stages.

First, the Plaintiffs allege that the Defendants caused the Company to make an investment in excess of \$56 million to expand the Company's manufacturing capacity based on false projections of future domestic demand for steel, but rather than utilizing the capital to expand manufacturing capacity, they converted the money to their own custody, control, and ownership (Am. Compl., ¶¶ 91-97). Second, the Defendants caused the Company to invest \$43.6 million, ostensibly to acquire certain land use rights to 24.94 acres of land from the Zengzhou Company, in which defendant Mingwang Lu owned a 40% stake, but the land use rights were never actually transferred to the Company and the funds were instead diverted to the Defendants (*id.*, ¶¶ 99-104). Third, the Defendants caused the Company to use virtually of its unrestricted cash to purchase an antique Chinese porcelain collection for \$234 million and made false and misleading public disclosures relating to the acquisition, but in fact they never actually made the acquisition and instead looted the entirety of the company's cash reserves and converted the funds to their personal custody, control and ownership (*id.*, ¶¶ 131-143).

Beginning in 2014, the Company “went dark.” On April 30, 2015, without issuing a financial statement or press release, the Company filed a Form NT-20 with the SEC, indicating that its 2014 Annual Report would be filed late (*id.*, ¶ 144). In fact, it was never filed (*id.*, ¶ 146). As a result of the Company’s failure to remediate its disclosure deficiencies, NASDAQ staff issued a recommendation that the Company be suspended from NASDAQ and that its securities be delisted. On December 14, 2015, a Notice of Delisting was issued for the Company (*id.*, ¶ 150; NYSCEF Doc. No. 113). The Company’s stock now trades on the “over the counter” market. As of August 29, 2018, the Company’s stock was trading at \$0.0167 per share, a market capitalization of approximately \$75,364.00 (Am. Compl., ¶ 151). The Company appears to be out of business and the status of its assets is unknown (*id.*, ¶ 153). Its website has been taken down and its internet presence has been completely “scrubbed” from search engines.

The Plaintiffs served the Company with a Demand to Inspect, dated March 31, 2017, in order to assess and remediate the damages incurred by the Company’s shareholders as a result of the Defendants’ conduct. The Plaintiffs served the Demand to Inspect on the Company, its Chief Executive Officer, and other Officers at (1) the Company’s headquarters in the People’s Republic of China, (2) Mr. Mingwang Lu’s last known address, (3) the Company’s registered agent in the British Virgin Islands (where the Company was incorporated), and (4) the last known email addresses for Mr. Lu, the Company’s Chief Financial Officer, Edward Meng, the Company’s U.S.-based corporate Director, Harry Edelson, and the last known U.S.-based legal counsel representing the Company (Trinko Aff., Ex. 2; Am. Compl., ¶ 2). The Company and the Defendants failed to respond to the Demand to Inspect or provide access to any documents. Accordingly, the Plaintiffs commenced this action seeking, among other relief,

access to the Company's books and records, damages against the Defendants, and the appointment of a receiver to take control of the Company, marshal the Company's assets, and help enforce any judgment entered against it.

The Company and the Defendants failed to answer or otherwise appear. On March 27, 2018, the Plaintiffs moved for default judgment and for the appointment of a receiver (NYSCEF Doc. No. 4). The Plaintiffs subsequently withdrew the motion and moved for leave to file an amended complaint to address certain procedural issues (NYSCEF Doc. No. 46). The court granted the motion (NYSCEF Doc. No. 54), and the Plaintiffs filed an amended complaint on September 26, 2018 (NYSCEF Doc. No. 50). On October 17, 2018, the Plaintiffs moved for an order directing service of the amended complaint by alternative means pursuant to (NYSCEF Doc. No. 55). By decision and order, dated December 14, 2018, the court denied the motion for alternative service without prejudice based on a lack of sufficient evidence of the impracticability of service on the individual named Defendants in China (NYSCEF Doc. No. 71). The Plaintiffs subsequently brought a renewed motion for an order directing service of the amended complaint by alternative means (NYSCEF Doc. No. 75). The court determined that the Plaintiffs made a sufficient showing that service of process on the Individual Defendants in China was impracticable and that the difficulties that the Plaintiffs had encountered in their efforts to effectuate service would likely continue and, accordingly, by decision and order dated June 13, 2019, granted the motion (NYSCEF Doc. No. 91). Subsequently, the Plaintiffs' renewed their motion for default judgment and for the appointment of a receiver.

A party may move for default judgment pursuant to CPLR § 3215 “[w]hen a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed” (CPLR § 3215 [a]). A party in default is “deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them” (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]). A party moving for default judgment must file (i) proof of service of the summons and complaint, (ii) proof of the facts constituting the claim, and (iii) proof of the default and the amount due (CPLR § 3215 [f]). Even when a motion for default judgment is unopposed, the motion will only be granted if the movant has satisfied the requirements of CPLR § 3215 (*Crane, A.G. v 206 W. 41st St. Hotel Assoc., L.P.*, 87 AD3d 174, 180 [1st Dept 2011]).

Here, the Plaintiffs have filed proof of proper service of the Demand to Inspect and the summons and amended complaint by alternative service as directed by the court and proof that the Company and the Defendants have failed to answer or otherwise appear. The Plaintiffs have also filed proof of the claim in the form of affidavits and documentary evidence regarding the purported investment of \$56 million to increase manufacturing capacity, the \$43.6 million acquisition of land use rights, the \$234 million acquisition of the antique porcelain collection, and proof of the damages to the Company in the amount of \$333.6 million as a result of the foregoing breaches of fiduciary duty. Based on the foregoing, the Plaintiffs have established their entitlement to default judgment against the Defendants.

In addition, the Plaintiffs move for the appointment of a receiver. The issue of whether the appointment of a receiver is appropriate in a given case is a matter within the sound discretion of

the court (*64 B Venture v Am. Realty Co.*, 194 AD2d 504, 504 [1st Dept 1993]). In determining whether to appoint a receiver, courts consider “(1) alternative remedies available to the creditor . . . ; (2) the degree to which receivership will increase the likelihood of satisfaction . . . ; and (3) the risk of fraud or insolvency if a receiver is not appointed” (*Hotel 71 Mezz Lender LLC v Falor*, 14 NY3d 303, 317 [2010], quoting *United States v Zitron*, 1990 WL 13278, at *1 [SDNY 1990]). Here, the Plaintiffs have established that the only viable remedy available is a U.S.-appointed receiver with the authority to seize, control, and liquidate the Company’s assets, and there is simply no alternative means to enforce a U.S. judgment in China or to ensure its satisfaction. And, as to the second prong, the Plaintiffs have made a sufficient showing that the likelihood of satisfaction of the judgment would be increased by the appointment of a receiver. Without a receiver, the Defendants will likely continue to divert assets from the Company and even if assets could be located in China, they could not be seized without a U.S.-appointed receiver. Finally, the Plaintiffs have established that there is a strong likelihood that that the Defendants will render the Company insolvent by misappropriating and transferring assets out of the Company. Under these circumstances, the court concludes that the appointment of a receiver is warranted.

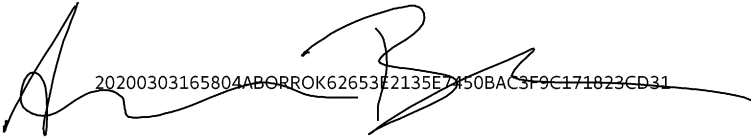
Accordingly, it is

ORDERED that the Plaintiffs’ motion for default judgment against the Defendants is granted pursuant to CPLR § 3215; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of the Plaintiffs and against the Defendants in the amount of \$333,600,000, together with interest at the rate of 9% per annum as follows: (i) pre-judgment interest on the first \$56,000,000 shall run from January 1, 2011; (ii) pre-judgment interest on the next \$43,600,000 shall run from June 1, 2011; and (iii) pre-judgment interest on the next \$234,000,000 shall run from July 1, 2020, plus costs and disbursements as taxed by the Clerk, and the Plaintiffs shall have execution thereof; and it is further

ORDERED that the Plaintiff's motion for the appointment of a receiver is granted pursuant to CPLR § 5228 (see separate order).

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3/2/2020
DATE

ANDREW BORROK, J.S.C.

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