

Peng Sheng Huang v Air China Ltd.

2020 NY Slip Op 30893(U)

February 25, 2020

Supreme Court, Queens County

Docket Number: 706696/2017

Judge: Joseph Risi

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

[*1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE, JOSEPH RISI, A.J.S.C. IA Part 3

-----X
PENG SHENG HUANG,

Index No.: 706696/2017

Plaintiff,

DECISION/ORDER

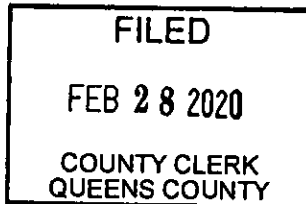
-against-

AIR CHINA LIMITED, XUE WENG YU, and HUI YU, Mot. Seq. No.: 2
YU,

Defendants.

-----X

The following papers EF numbered below read on this motion by defendants Hui Yu and Xue Weng Yu for summary judgment dismissing the complaint against them and on this cross-motion by plaintiff Peng Sheng Huang for an order permitting him to serve an amended complaint.



Papers
Numbered

Notice of Motion - Affidavits - Exhibits	EF115-134
Notice of Cross-Motion - Affidavits - Exhibits	EF 159-201
Answering Affidavits - Exhibits	EF 203-204, 206
Reply Affidavits	EF 136, 207
Memoranda of Law.....	EF 118, 202, 205

Upon the foregoing papers, it is ordered that the motion and cross motion are consolidated for determination as follows:

I. The Allegations of Plaintiff Peng Sheng Huang

Plaintiff Peng Sheng Huang alleges the following:

In November 2010, Defendant Hui Yu (“Hui Yu”) and Plaintiff Peng Sheng Huang (“Huang”) created the entity, LB Oceanside Corp. (“LB Oceanside”), for the

[*2]

purpose of entering into a contract with Defendant Air China Limited¹ (“Air China”) to manage property located at 485 West Broadway, Long Beach, New York that would be used as a dormitory for Defendant Air China’s air crews.

Plaintiff and Defendant Hui Yu organized LB Oceanside as equal shareholders wherein they would divide the company’s revenue equally. They also agreed not to engage in any other business or conduct that might potentially harm LB Oceanside. Defendant Hui Yu testified uncontested during his deposition that their agreement was never put into writing. Defendant Hui Yu further testified that his father, Co-Defendant Xue Weng Yu, was the *de facto* owner of LB Oceanside wherein he only “represented [Defendant Hui Yu’s] interests” and had no other role within the corporation.

Defendant Air China ultimately selected LB Oceanside to manage its dormitory. Defendant Hui Yu was the only party from LB Oceanside to sign the agreement along with Zhou Yue Long (“Mr. Zhou”), an official at Defendant Air China’s New York office in December 2010. Plaintiff claims that Mr. Zhou was aware of the business relationship between plaintiff and Defendant Hui Yu and their roles within LB Oceanside. LB Oceanside and Defendant Air China entered into a second agreement to continuously manage the dormitory at the end of the first contract dated April 2013.

In 2014, Defendant Air China appointed Congtao Li (“Mr. Li”) to be its onsite representative at LB Oceanside. However, plaintiff alleges that once there, Mr. Li disregarded food quality standards while he directed and ordered food for meal preparation at the dormitory. Plaintiff also claims that Mr. Li sexually harassed Huan Wang (“Ms. Wang”), one of LB Oceanside’s female employees that worked at the front desk.

Since plaintiff and Defendant Hui Yu were unable to stop the alleged harassment themselves, they reported the misconduct to Mr. Li’s supervisor, Mr. Zhou, but the allegations were not resolved even after a meeting with all parties involved. Thereafter, in August 2015, plaintiff shared pictures of dead lobsters that Mr. Li had purchased on a WeChat account, a messaging application. Mr. Zhou testified during his examination before trial that when he saw the pictures, he sent a letter to LB Oceanside stating in relevant part: “On August 17, one of the shareholders of your company, Huang Pengsheng [plaintiff], published a message in his Moments alleging that there was a food safety issue at the Long Beach Flight Unit.” Plaintiff asserts that this statement made by Mr. Zhou indicates his knowledge of the business relationship between plaintiff and Defendant Hui Yu.

¹ Pursuant to Decision and Order dated December 17, 2019, this Court granted defendant Air China summary judgment dismissing the complaint against it.

[*3]

Mr. Zhou went on to recommend that LB Oceanside suspend plaintiff's involvement in managing Defendant Air China's flight unit. LB Oceanside agreed and plaintiff was temporarily suspended at work although he continued to receive the same amount of compensation as an equal shareholder in LB Oceanside.

In September 2015, while on a trip in China, plaintiff reported the problems at the dormitory to Defendant Air China's disciplinary committee at its headquarters in Beijing. He submitted a complaint letter to the committee which started an investigation. Upon learning of plaintiff's complaint, Mr. Zhou interviewed Ms. Wang about her allegations of sexual harassment. Thereafter, Defendant Air China suggested to Defendant Hui Yu that Ms. Wang be replaced by a male employee.

Defendant Air China terminated the management contract with LB Oceanside in or about December 2016 and subsequently entered into another contract with LB Oceanfront Corp., owned solely by Defendant Hui Yu. Plaintiff alleges that this new corporation employed most of the same personnel as LB Oceanside and as such, Mr. Zhou and Defendant Hui Yu conspired to exclude plaintiff from contracting with Defendant Air China. Plaintiff claims that Defendant Hui Yu breached their oral agreement that he and plaintiff would jointly own the company that would manage the dormitory and that, Mr. Zhou, acting as an agent for Defendant Air China, induced that breach and therefore, tortuously interfered with their oral contract.

II. Discussion

A. The Plaintiff's Cross-Motion to Amend the Complaint

The plaintiff proposes to amend his complaint for the purpose of adding a cause of action for breach of fiduciary duty against the defendants. "The shareholders of a close corporation owe each other a duty to act in good faith." (*Matter of Cassata v. Brewster-Allen-Wichert, Inc.*, 248 AD2d 710,711 [2nd Dept 1998]; *Unitel Telecard Distribution Corp. v. Nunez*, 90 AD3d 568, 569 [1st Dept 2011]) ["defendant and the individual plaintiffs, as shareholders in a close corporation, owe fiduciary duties to one another"]; see, *In re Estate of Rodman*, 116 AD3d 422 [1st Dept 2014]).

If there has been a long delay in moving for permission to amend, the party seeking the amendment must offer a reasonable excuse for the delay. (*Tinch-McNeill v. Alcohol & Drug Dependency Servs., Inc.*, 96 AD3d 1407 [4th Dept 2012]). The plaintiff does not have a valid excuse for making the instant cross-motion after the close of discovery and only in response to the defendants' motion for summary judgment. The plaintiff's proposed new theory of liability should have been known to him even before the conclusion of discovery. The plaintiff alleges that the breach of fiduciary duty occurred when the defendants repudiated his shareholder agreement with them and covertly organized a new company to manage the Air China facility. These allegations are basically the same that he made in his original complaint in asserting a cause of action for

[*4]

breach of contract. “Lateness in making a motion to amend, coupled with the absence of a satisfactory excuse for the delay and prejudice to the opposing party, justifies denial of such a motion.” (*Thibeault v. Palma*, 266 AD2d 616, 617 [3rd Dept 1999]; *Senior Care Servs., Inc. v. New York State Dep’t of Health*, 46 AD3d 962[3rd Dept 2007]). Moreover, “[a] plaintiff cannot, for the first time in opposition to a motion for summary judgment, raise a new or materially different theory of recovery against a party from those pleaded in the complaint and the bill of particulars” (*Palka v. Vill. of Ossining*, 120 AD3d 641, 643 [2nd Dept 2014]).

Accordingly, the cross-motion seeking to amend the complaint is denied.

B. The Defendants’ Motion for Summary Judgment

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]). The defendants successfully carried this burden. “The essential elements of a cause of action to recover damages for breach of contract are (1) the existence of a contract, (2) the plaintiff’s performance pursuant to the contract, (3) the defendant’s breach of its contractual obligations, and (4) damages resulting from the breach.” (*Starker v. Trump Vill. Section 4, Inc.*, 162 AD3d 946 [2nd Dept 2018]; *All Seasons Fuels, Inc. v. Morgan Fuel & Heating Co.*, 156 AD3d 591[2nd Dept 2017]). In the case at bar, the defendants successfully made a prima facie showing that they did not breach the oral agreement with plaintiff Huang.

LB Oceanside’s property management agreement with Air China was terminable by at will the latter. The defendants produced evidence showing that Air China terminated the property management agreement with LB Oceanside because of (1) the plaintiff’s illegal activity of selling merchandise to Air China’s employees for a profit without having the proper city licenses to do so and without collecting the sales taxes due on these transactions and (2) the plaintiff’s sales activity in violation of Air China’s own rules and policies. There is also evidence in the record of the plaintiff’s abrasive relationship with Air China officials. Once Air China terminated the property management agreement with LB Oceanside, no clause in the alleged oral agreement between the parties prohibited the defendants from forming a new company to manage the airline facility. In his response to Interrogatory No. 7 and in his deposition testimony, the plaintiff did not allege that any provision of the oral agreement forbade the defendants from forming a new company to manage the Air China facility in the future.

Moreover, the plaintiff did not allege that the parties had any definite termination date for the oral agreement in mind. “Where ‘it appears that no termination date was within the contemplation of the parties, or that their intention with respect thereto cannot be ascertained, the contract will be held to be terminable within a reasonable time or

[*5]


revocable at will, dependent upon the circumstances.'” (*Mitler v. Friedeberg*, 32 Misc.2d 78, 85,[Sup. Ct. 1961], quoting *Warner-Lambert Pharmaceutical Company v. John J. Reynolds, Inc., D.C.*, 178 Fsupp. 655, 661 [SDNY 1959]; 22 N.Y. Jur. 2d Contracts § 274 [“Where it appears that no termination date was within the contemplation of the parties, or that their intention with respect thereto cannot be ascertained, the contract will be held to be terminable within a reasonable time, or revocable at will, dependent upon the circumstances.”]). Once Air China terminated the management agreement with LB Oceanside, the defendants could revoke their oral agreement with the plaintiff at will.

In opposition, the plaintiff failed to produce sufficient evidence showing that there is a triable issue of fact. (*See, Alvarez v. Prospect Hospital, supra.*) The defendants did not breach the oral agreement to manage the property jointly because Air China effectively put an end to the agreement by its own action in terminating the at will contract with LB Oceanside. The plaintiff produced no evidence showing that the parties’ oral agreement to manage the Air China facility had a definite termination date, and the plaintiff produced no evidence which contradicted defendant Hui Yu’s deposition testimony that the oral agreement contained no restrictive covenants.

Accordingly, Defendants Hui Yu and Zue Weng Yu’s motion for summary judgment is granted and the complaint is dismissed in its entirety.

This is the decision and order of the Court.

Dated: February 25, 2020

2/25/2020 
Hon. Joseph Rasi, J.S.C.

