

**Beijing Zhong Xian Wei Ye Stainless Decoration Ctr.
v Wengui Guo**

2020 NY Slip Op 31413(U)

May 7, 2020

Supreme Court, New York County

Docket Number: 653176/2017

Judge: Nancy M. Bannon

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.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

-----X

INDEX NO. 653176/2017

BEIJING ZHONG XIAN WEI YE STAINLESS DECORATION CENTER, BEIJING BI HAI GE LIN YUAN LIN LU HUA, LTD, SHI JIA ZHUANG ZHEN YUAN JIAN ZHU AN ZHUANG GONG CHENG LTD BEIJING FIRST BRANCH, BEIJING CHENG JIAN WU JIAN SHE GROUP, LTD, HONG QI QU JIAN SHE GROUP, LTD, NAN TONG SI JIAN GROUP, LTD, HE BEI YUE HUA ZHUANG SHI GONG CHENG LTD, BEIJING FU LE HONG MA JIAN ZHU ZHUANG SHI GONG CHENG, LTD, and JIANG SU PROVINCE JIAN GONG GROUP, LTD, BEIJING BRANCH

MOTION DATE 05/23/2018

MOTION SEQ. NO. 001

Plaintiffs,

- v -

**DECISION AND ORDER
ON MOTION**

WENGUI GUO a/k/a HAOYUN GUO a/k/a MILES KWOK a/k/a KWOK HO WAN a/k/a KWOK HO a/k/a GWO WEN GUI a/k/a WAN GUE HAOYUN a/k/a HAOYUN GUO, BEIJING ZENITH HOLDINGS CO., LTD a/k/a BEIJING ZHENG QUAN HOLDINGS CO., LTD., BEIJING PANGU INVESTMENT CO., LTD a/k/a BEIJING PANGU INVESTMENT INC., GENEVER HOLDINGS, LLC, and GOLDEN SPRING (NEW YORK) LTD.,

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 64

were read on this motion to/for DISMISSAL.

In this fraudulent conveyance action, the defendants move to dismiss the complaint in its entirety for failure to state a cause of action (CPLR 3211[a][7]) and for lack of personal jurisdiction over the corporate defendants Beijing Zenith Holdings Co., Ltd., a/k/a Beijing Zheng Quan Holdings Co., Ltd. (Zenith), and Beijing Pangu Investment Co., Ltd., a/k/a Beijing Pangu Investment, Inc. (Pangu). (CPLR 3211[a][8]). The plaintiffs oppose the motion and cross-move pursuant to CPLR 5303 to recognize and enforce a series of foreign judgments purportedly rendered in the People’s Republic of China. The branch of defendants’ motion is granted to the extent that the complaint is dismissed pursuant to CPLR 3211(a)(7), and the plaintiff’s cross-motion is denied.

The complaint alleges that all nine plaintiffs are Chinese corporations whose principal place of business is in Beijing, China. Defendants Zenith and Pangu are two Chinese real estate development companies purportedly owned by Guo, which are alleged to have never conducted any business in New York. Four of the nine plaintiffs claimed to have obtained judgments against Zenith and Pangu in the courts of the People's Republic China in 2016 for breaching certain construction contracts. The other five plaintiffs do not allege they obtained judgments against Guo but instead allege that they are owed money for services they performed for Zenith and Pangu under Chinese contracts for services performed for either Zenith or Pangu in China. In a complaint filled with bare-bones allegations purporting to allege fraudulent transfers, plaintiffs allege that defendants Zenith and Pangu sought to evade their debts to the plaintiff when Guo, the alleged owner of Zenith and Pangu, purportedly transferred all of the assets of Zenith and Pangu to himself or to companies that he owns in the United States, namely defendants Genever Holdings, LLC and Golden Spring LLC. The complaint, however, does not specify any specific conveyances or the dates of such conveyances.

The complaint interposes 17 causes of action. The first 11 causes of action are styled as ones for fraudulent conveyance and are directed at all of the defendants. The 12th cause of action, also entitled "fraudulent conveyance," is directed solely at Guo. The 13th cause of action is for unjust enrichment against all of the defendants. The 14th cause of action is for breach of the implied covenant and duty of good faith and fair dealing under the Chinese contracts that Zenith and Pangu allegedly breached. The 15th cause of action seeks to permanently enjoin Guo and all entities he controls from transferring or selling any of his assets until Zenith and Pangu pay their alleged debts to the plaintiffs. The 16th cause of action seeks an award of attorneys' fees under Debtor Creditor Law § 276-a. The 17th cause of action is for punitive damages.

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-152 (2002). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference" (*id.* at 152: see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013]; Simkin v Blank, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v

Martinez, 84 NY2d 83 (1994); Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267 (1st Dept. 2004); CPLR 3026. "The motion must be denied if from the pleading's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." 511 W. 232nd Owners Corp. v Jennifer Realty Co., *supra*, at 152 (internal quotation marks omitted); see Leon v Martinez, *supra*; Guggenheimer v Ginzburg, 43 NY2d 268 (1977). To survive a motion to dismiss, a pleading must allege more than a conclusory recitation of the elements of a cause of action. See Maas v Cornell Univ., 94 NY2d 87 (1999). Factual allegations that are vague or consist of bare legal conclusions are not entitled to the benefit of favorable inferences. See Mamoon v Dot Net, Inc., 135 AD3d 650 (1st Dept. 2016); Delran v Prada USA Corp., 23 AD3d 308 (1st Dept. 2005). "Liberal construction of pleadings cannot be used as a substitute for matters of substance nor may conclusory statements of law be utilized to supply material facts by inference. See Didier v McFadden Pubs., 299 NY 49 (1949). CPLR 3013 requires that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences or series of transactions or occurrences, intended to be proved and the material elements of each cause of action."

In the first 12 causes of action, styled as claims for fraudulent conveyance, the plaintiffs simply parrot the statutory elements for DCL §§ 273, 273-a, 274, 275, and 276 and plead in conclusory fashion that, upon information and belief, at some unspecified time, Guo conveyed unspecified funds and assets of defendants Zenith and Pangu from China to Guo in New York without fair consideration. Such vague and conclusory allegations do not satisfy the pleading standards of CPLR 3013, (see Jaliman v D.H. Blair & Co., 105 AD3d 646 [1st Dept. 2013]; C&K Realty v ISFC Fabrics Corp., 66 AD2d 697 [1st Dept. 1978]; Riback v. Margulis, 43 AD3d 1023 [2nd Dept. 2007]), nor the heightened pleading standard of CPLR 3016(b) for claims under DCL § 276 that must allege actual intent to defraud. See RTN Networks LLC v Telco Grp., Inc., 126 AD3d 477 (1st Dept. 2015). Thus, the defendants' motion to dismiss the first through 12th causes of action for fraudulent conveyance is granted.

As to the 13th cause of action for unjust enrichment, that "is not a catchall cause of action to be used when others fail." Corsello v Verizon N.Y, Inc., 18 NY3d 777, 790 (2012). "An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim." *Id.* Here, the 13th cause of action for unjust enrichment relies upon the same allegations as tort claims that the plaintiff unsuccessfully fails to plead in the first through 12th

causes of action for fraudulent conveyance. Thus, the plaintiff's cause of action for unjust enrichment is dismissed.

As correctly argued by the defendants, the 14th cause of action for breach of the implied duty of good faith and fair dealing is also subject to dismissal pursuant to CPLR 3211(a)(7). This claim is premised upon the existence of a contract, and there is no breach of contract claim asserted in this action. The plaintiffs concede in their opposition papers that this cause of action is not premised on a contract breach but is an alternative legal theory for holding the defendants liable for the fraudulent conveyances alleged in the first 12 causes of action, which the court has already dismissed. Additionally, the defendants correctly argue that CPLR 3016(e) requires that where a cause of action or defense is based upon the law of a foreign country or its political subdivision, "the substance of the foreign law relied upon shall be stated." The contracts in which the duty of good faith and fair dealing were purportedly breach were Chinese contracts, subject to Chinese law, which the plaintiffs allege that intend to seek redress for breach in Chinese court. Nothing in the complaint alleges that under Chinese law, contracts are governed by a duty of good faith or fair dealing.

Even assuming that there were a viable claim for breach of the duty of good faith and fair dealing, the plaintiffs do not allege that Guo is a party to any of those contracts in his individual capacity. As such, the implied duty of good faith and fair dealing does not extend to him in his individual capacity. See Johnson v Law Office of Kenneth B. Schwartz, 145 AD3d 608 (1st Dept. 2016). Plaintiffs allege that the court should pierce the corporate veil of Zenith and Pangu and impose liability against Guo individually under these contracts. However, the plaintiffs alleges only, in conclusory fashion, that Guo exercised complete domination and control over Zenith and Pangu and used such domination to commit a fraud or wrong against the plaintiffs. That is, the plaintiffs merely recite the elements necessary to pierce the corporate veil without asserting factual allegations to support the claim. See Johnson v Law Office of Kenneth B. Schwartz, supra; East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc., 66 AD3d 122 (2nd Dept. 2009), aff'd 16 NY3d 775 (2011). This is insufficient.

The 15th, 16th and 17th causes of action seeking a permanent injunction, attorneys fees and punitive damages are also dismissed pursuant to CPLR 3211(a)(7). The 15th cause of action seeks to permanently enjoin Guo and all entities he controls from transferring or selling any of his assets is dismissed. However, "[i]njunctive relief is simply not available when the

plaintiff does not have any remaining substantive cause of action against those defendants.” Weinreb v 37 Apts. Corp., 97 AD3d 54, 58-59 (1st Dept. 2012). Since the court has dismissed all causes of action in the complaint, no injunctive relief can be granted Id. Likewise, as the plaintiffs’ allegations with respect to DCL 276, the 16th cause of action for attorneys’ fees under DC 276-a is dismissed. As to the 17th cause of action for punitive damages, New York does not recognize a separate cause of action for punitive damages, and in any event, there are no remaining causes of action on which to award punitive damages. See Rocanova v Equitable Life Assur. Soc’y, 83 NY2d 603 (1994); see also Rivera v City of New York, 40 AD3d 334 (1st Dept. 2007).

As dismissal of the entire complaint pursuant to CPLR 3211(a)(7) is warranted, the court does not reach the defendants’ motion for dismissal on the alternative ground of lack of personal jurisdiction under CPLR 3211(a)(8).

Finally, the plaintiffs’ cross-motion to recognize and enforce their foreign judgments purportedly rendered in the People’s Republic of China must be denied as procedurally improper inasmuch as they did not bring “an action on the judgment, a motion for summary judgment in lieu of complaint, or in a pending action by counterclaim, cross-claim or affirmative defense.” CPLR 5303. Rather, the plaintiff seeks recognition of the judgments by cross-motion, which is not permissible under CPLR 5303.

Accordingly, it is hereby


ORDERED that the defendants’ motion is granted to the extent that the complaint is dismissed in its entirety pursuant to CPLR 3211(a)(7); and it is further,

ORDERED that the plaintiffs’ cross-motion is denied, and it is further

ORDERED that Clerk shall enter judgment dismissing the complaint.

This constitutes the Decision and Order of the court.

5/7/2020
DATE



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

NANCY M. BANNON, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>
<input checked="" type="checkbox"/>

CASE DISPOSED

GRANTED

<input type="checkbox"/>

DENIED

<input type="checkbox"/>
<input type="checkbox"/>

NON-FINAL DISPOSITION

GRANTED IN PART

<input type="checkbox"/>

OTHER