

Choicer v Shuk Yin Choi
2020 NY Slip Op 35226(U)
July 5, 2020
Supreme Court, Kings County
Docket Number: Index No. 515918/2022
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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HENRY CHOICER, individually and derivatively
on behalf of 8501 21 AVE LLC, as its managing
member,

Plaintiffs, Decision and order

- against -

Index No. 515918/2022

SHUK YIN CHOI, individually and as
Trustee of the SHUK YIN CHOI LIVING TRUST,
8501 21 AVE OWNER, LLC, CHI WAI LAM and
VINCENT S. WONG, ESQ.,

Defendants, July 5, 2022

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff Henry Choicer has moved seeking to restrain defendant Shuk Yin Choi from selling or otherwise encumbering property located at 8501 21st Avenue. The defendant opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

The parties in this case were once related, the defendant is the widow of the plaintiff's brother. According to the Amended Complaint, on July 30, 1985 the plaintiff and the defendant took title as tenants in common to property located at 8501 21st Avenue. On November 22, 2019 the plaintiff transferred her share of the property to the defendant trust. The defendant on behalf of the trust and the plaintiff then created First LLC and adopted an operating agreement to govern the LLC which provides that the plaintiff and defendant are each fifty percent owners of the LLC.

Subsequently, the ownership of the property was transferred to the LLC. On March 15, 2022 the defendant executed a deed transferring First LLC's interest to the trust. Thereafter, the property was transferred to another entity called Second LLC. The plaintiff has initiated the instant lawsuit and has asserted causes of action seeking a determination First LLC is the owner of the property, that the defendants be restrained from transferring the property in any manner, the imposition of a constructive trust, breach of contract and other claims. The plaintiff now moves seeking an injunction restraining the defendant from further transferring the property until this lawsuit is resolved.

Conclusions of Law

In relevant part, CPLR §6301 allows the court to issue a preliminary injunction "in any action...where the plaintiff has demanded and would be entitled to a judgment restraining defendant from the commission or the continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff" (id).

It is well established that "the party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of the injunction and a balance of the equities in its favor" (Nobu Next Door, LLC v. Fine Arts Housing, Inc., 4 NY3d 839, 800 NYS2d 48

[2005], see also, Alexandru v. Pappas, 68 AD3d 690, 890 NYS2d 593 [2d Dept., 2009]). The Second Department has noted that "the remedy of granting a preliminary injunction is a drastic one which should be used sparingly" (Town of Smithtown v. Carlson, 204 AD2d 537, 614 NYS2d 18 [2d Dept., 1994]). Thus, the Second Department has been clear that the party seeking the drastic remedy of a preliminary injunction has the burden of proving each of the above noted elements "by clear and convincing evidence" (Liotta v. Mattone, 71 AD3d 741, 900 NYS2d 62 [2d Dept., 2010]).

Considering the first prong, establishing a likelihood of success on the merits, the plaintiff must prima facie establish a reasonable probability of success (Barbes Restaurant Inc., v. Seuzer 218 LLC, 140 AD3d 430, 33 NYS3d 43 [2d Dept., 2016]). In this case the basis for the injunction is the fact the defendant sold her share of the corporation without the plaintiff's consent. Article 7.2 of the operating agreement presented by the plaintiff provides that "a Member may not transfer any Membership Interests, whether now owned or later acquired, unless Members holding all of the Percentage Interests not subject to transfer consent to such transfer" (id). Thus, according to the plaintiff, the defendant had no authority to transfer any of her shares of ownership without the consent of the plaintiff. The defendant argues the operating agreement is a forgery and was never signed by the defendant. Indeed, the defendant has

presented an affidavit from an expert, Robert Baier who opined, to a reasonable degree of professional certainty, that the defendant did not sign the operating agreement. Moreover, in another lawsuit where the defendant sued the plaintiff, the complaint there alleges that "on or around and thereafter September 15, 2020, Plaintiffs and Defendant entered into an agreement to invest in, open, and operate the LLC" (see, Complaint, ¶ 5 in Shuk Yin Choi, individually and as a member/owner of 8501 21 Ave LLC suing in the right 8501 21 Ave LLC, v. Henry Choicer a/k/a/ Kin Chung Choi). Further, in that case the defendant here (plaintiff in the other case) submitted an operating agreement and Article 7.2 of that agreement states that "a Member may transfer Membership Interests to any other Person without the consent of any other Member" (*id*). Clearly, there are questions of fact which operating agreement was signed by the parties. It is possible, although unlikely, that the parties signed both agreements containing contradictory terms. In any event there are questions whether the defendant in this case had the right to transfer her shares without the consent of the plaintiff. Thus, while it is true that a preliminary injunction may be granted where some facts are in dispute and it is still apparent the moving party has a likelihood of success on the merits, (see, Borenstein v. Rochel Properties, 176 AD2d 171, 574 NYS2d 192 [1st Dept., 1991]) some evidence of likelihood of


success must be presented. Therefore, when "key facts" are in dispute and the moving party cannot satisfy the necessary elements then an injunction must be denied (Digestive Liver Disease P.C. v. Patel, 18 AD3d 423, 793 NYS2d 773 [2d Dept., 2005]).

In this case, the entire basis for the injunction, namely, whether the defendant had the right to transfer her interest in the corporation and the property is disputed. Of course, the continuation of discovery and a trial, if necessary, will determine whether the plaintiff will be able to prove the claims alleged and prevail on the allegations of breaches of contract on the part of the defendant. However, at this juncture, the plaintiff has only raised contested and disputed claims of improper behavior. Consequently, an injunction cannot be granted where the crux of the basis for such injunction is in dispute. Therefore, the motion seeking an injunction is denied.

So ordered.

ENTER:

DATED: July 5, 2020
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC