

<b>Ng v Ng</b>
2022 NY Slip Op 31750(U)
May 27, 2022
Supreme Court, New York County
Docket Number: Index No. 651786/2022
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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RICHARD NG, GOLDEN FORTUNE IMPORT & EXPORT CORPORATION  Plaintiff,  - v -  FRANK SHYI FUH NG, TKS USA CORP,  Defendant.	<table border="0"> <tr> <td style="width: 150px;"><b>INDEX NO.</b></td> <td><u>651786/2022</u></td> </tr> <tr> <td><b>MOTION DATE</b></td> <td><u>05/02/2022, 05/02/2022</u></td> </tr> <tr> <td><b>MOTION SEQ. NO.</b></td> <td><u>003 004</u></td> </tr> </table> <p style="text-align: center;"><b>DECISION + ORDER ON MOTION</b></p>	<b>INDEX NO.</b>	<u>651786/2022</u>	<b>MOTION DATE</b>	<u>05/02/2022, 05/02/2022</u>	<b>MOTION SEQ. NO.</b>	<u>003 004</u>
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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 27, 28, 29, 30, 31, 32, 33, 41, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 76, 77, 78, 79, 80, 81  
 were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 34, 35, 36, 37, 38, 39, 40, 42, 68, 69, 70, 71, 72, 73, 74, 75, 82  
 were read on this motion to/for SEAL.

Upon the foregoing documents and for the reasons set forth on the record (5.27.2022), a limited preliminary injunction is granted (Mtn. Seq. No. 003) to the extent of enjoining the defendants from business solely as it relates to MX Mooncakes – Mei-Xin (**Mei-Xi**).

A party seeking a preliminary injunction must demonstrate (i) likelihood of success on the merits, (ii) threat of irreparable harm, and (iii) that the balance of the equities weighs in its favor (*Nobu Next Door, LLC v Fine Arts Housing, Inc.*, 4 NY39 839, 840 [2005]).

Briefly, this case involves the separation of a number of businesses previously owned by two brothers and former partners, Richard Ng and Frank Ng. Pursuant to a certain Dissolution

Agreement (the **Dissolution Agreement**; NYSCEF Doc. No. 29), dated November 4, 2019, by and between Richard Ng and Frank Ng, the brothers agreed to divide up the many businesses that they jointly owned. As relevant, pursuant to the Dissolution Agreement, the brothers agreed that Richard Ng would get, among other businesses they jointly owned, Golden Fortune Import and Export Corporation (**Golden Fortune**) and Frank Ng would pay \$1,200,000 in satisfaction of a loan that was made to him. As reflected in the Dissolution Agreement, this was to be a total separation of the various business -- where Golden Fortune was not even to be a creditor of Frank Ng following the separation. The Dissolution Agreement is not ambiguous. The defendants' submission to the contrary indicating that he was to retain rights to the good will are belied by the Dissolution Agreement itself and do not create an issue of fact to the contrary.

As indicated above, the Dissolution Agreement reflects a global business divorce between the two brothers. The express terms of the dissolution agreement indicate in the recitals that not only was Frank Ng's interest in the Schedule "B" Companies transferred but also "***all associated assets and liabilities***" and in the operative provisions of the agreement, at closing "Frank NG shall transfer to Richard NG and Richard NG shall take title from Frank NG ***the entire interest*** of Frank NG in the Schedule "B" Companies ***with all property rights owned by Frank Ng*** therein" (NYSCEF Doc. No. 29, ¶2 [emphasis added]). This includes Frank Ng's interest in Golden Fortune's good will. Frank Ng's attempt to dispute this and claim that it was merely a transfer of his stock or membership interests and that he somehow retained interests in the company's good will is belied by both the express language of the Dissolution Agreement and its intent as part of the complete business divorce that the Dissolution Agreement effectuated (*Mohawk Maintenance Co. v Kessler*, 52 NY2d 276, 284 [1981]).

The Dissolution Agreement does not however have a restriction on competition. In *Mohawk*, the Court discussed the differences between appropriate restriction as to a transfer of good will and a restrictive covenant as to competition:

We cannot embrace the proposition advanced by defendants, however, because, in our view, it fails to take into account the important distinction between the duty to refrain from soliciting former customers, which arises upon the sale of the "good will" of an established business, and separate duty to refrain from competing with the purchaser, which may only arise out of an express agreement such as that contained in defendant Kessler's employment contract. When a business is sold, the purchaser acquires no legal right to expect that the seller will refrain from engaging in a competing enterprise. Indeed, the seller remains free to pursue his own economic interests without restraint unless the purchaser has managed to extract from him an express promise to refrain from competing

(*Id.*, at 283).

In *Golden Fortune Import & Export Corporation v. Mei-Xin (Hong Kong) Limited*, Case No. 2:22-cv-01369-JXN-JPA (D.N.J. Apr. 4, 2022), the New Jersey District Court granted Golden Fortune a preliminary injunction enjoining Mei-Xin from terminating Golden Fortune's relationship with Mei-Xin as their exclusive distributor because their appeared to be a violation of the New Jersey Franchise Practices Act. As such, this relationship appears to be good will and Frank Ng having sold his rights to Good Fortune's good will can not now act in any a way to impair Good Fortune's good will. Therefore, Plaintiff sufficiently demonstrates a likelihood of success on the merits as it relates to solicitation of Mei-Xin because Frank Ng's conduct towards Mei-Xin directly violated the implied covenant inherent in the sale of his rights to Good Fortune (*Mohawk Maintenance Co.*, 52 NY2d at 286).

Frank Ng's campaign to solicit business from Mei-Xin constitutes irreparable harm (*FTI Consulting, Inc. v PricewaterhouseCoopers LLP*, 8 AD3d 145, 146 [1st Dept 2004]). Good Fortune has maintained an exclusive relationship with Mei-Xin for over 20 years which has been quite lucrative for Good Fortune. If Frank Ng's solicitations with Mei-Xin continue, he risks potentially compromising the exclusive relationship between Good Fortune and Mei-Xin and irreparably harm Good Fortune. This alleged harm can not be compensated by money damages alone.

The balance of the equities favors the granting of injunction because the injunction only grants the plaintiffs rights that they otherwise should have in the ordinary course under the Dissolution Agreement and enjoins the defendants from conduct that they inherently agreed not to engage in as part of the business divorce. Having owned 50% of Good Fortune previously, Frank Ng is well aware of the substantial critical value of this relationship to Good Fortune and has no legitimate expectation that he would be able to misappropriate this exclusive relationship to his new competing venture.

However, the motion must otherwise be denied without prejudice as to the other suppliers. The plaintiffs have simply not demonstrated on the record before the Court that they are entitled to injunctive relief as to other suppliers generally. Leave is granted to the plaintiffs to bring an order to show cause seeking additional equitable relief if appropriate as to the other suppliers and as to any customers of Golden Fortune.

In support of this injunction, the Plaintiffs shall post an undertaking in the sum of \$50,000 by the close of business on June 7, 2022 or the injunction shall be vacated.

The parties shall email Part 53 about whether their clients would be interested in attending ADR on or before June 10, 2022.

The sealing motion (Mtn. Seq. No. 004) is granted because the parties demonstrated good cause.

Accordingly, it is

ORDERED that the motion seeking a preliminary injunction is granted but solely to the extent of solicitation and the sales of products as it relates to the supplier MX Mooncakes – Mei-Xin, but otherwise denied with respect to the other suppliers; and it is further

ORDERED that the Defendants are enjoined from soliciting MX Mooncakes – Mei-Xin and selling its products; and it is further

ORDERED that the undertaking is fixed in the sum of \$50,000 to be posted on or before June 7, 2022 by the close of business or the injunction shall be vacated; and it is further

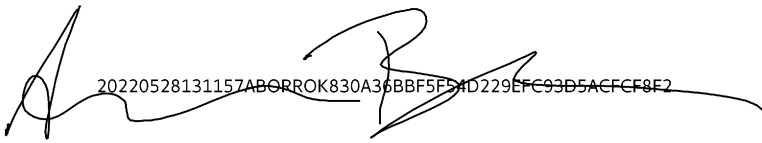
ORDERED that the Plaintiffs shall order a copy of the transcript (5.27.22) and upload it to NYSCEF; and it is further

ORDERED that the Clerk of the Court is directed to seal NYSCEF Doc. Nos. 11-13 & 30-32 in this action in its entirety upon service on him (60 Centre Street, Room 141B) of a copy of this order with notice of entry; and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that thereafter, or until further order of the court, the Clerk of the Court shall deny access to the file to anyone (other than the staff of the Clerk or the court) except for counsel of record for any party to this case and any party; and it is further

ORDERED that the parties shall appear for a preliminary conference on **June 10, 2022 at 12:00 PM.**

<p><u>5/27/2022</u> DATE</p>	 <p>20220528131157ABORROK830A36BBF5F54D229EFC93D5ACFCF8E2                  _____                  ANDREW BORROK, J.S.C.</p>																																
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