

Yin Shin Leung Charitable Found. v Seng
2022 NY Slip Op 32130(U)
July 6, 2022
Supreme Court, New York County
Docket Number: Index No. 654290/2013
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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<p>YIN SHIN LEUNG CHARITABLE FOUNDATION, DAVID SENG, JAMES SENG, and JOSEPH SENG</p> <p style="text-align: center;">Petitioners,</p> <p>For an Order Dissolving Cathay Properties Corporation Pursuant to N.Y. Bus. Corp. Law § 1104-A.</p> <p style="text-align: center;">- v -</p> <p>MARIA SENG, PETER SENG, and WILLIAM SENG,</p> <p style="text-align: center;">Respondents.</p>	<p>INDEX NO. <u>654290/2013</u></p> <p>MOTION DATE _____</p> <p>MOTION SEQ. NO. <u>009</u></p> <p style="text-align: center;">DECISION + ORDER ON MOTION</p>
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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 009) 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 365, 373, 374, 375, 379, 380, 381, 382, 383, 386, 387, 388, 389, 390, 391, 392, 393, 394, 396

were read on this motion to/for DISMISSAL.

In motion sequence number 009, respondents Maria Seng (Maria), Peter Seng (Peter), and William Seng (William), move, pursuant to CPLR 3212, for summary judgment dismissing petitioners Yin Shin Leung Charitable Foundation (YSL), David Seng (David), James Seng (James), and Joseph Seng's (Joseph) remaining claim for breach of fiduciary duty premised on a \$210,000 loan Cathay Properties Corp. (CPC) made to Cathay Import & Export, Ltd. (CIE). (*See Matter of Yin Shin Leung Charitable Foundation v Seng*, 177 AD3d 463 [1st Dept 2019].) Further, respondents oppose petitioners' request for dissolution of CPC pursuant to BCL § 1104-a.

Background

The parties and the Seng Family business history was discussed in detail in the court's decision on motion sequence numbers 006 and 007. (NYSCEF Doc. No.

[NYSCEF], 314 Decision and Order [Motion Seq 006]; NYSCEF 315, Decision and Order [Motion Seq 007]; see also *Yin Shin Leung Charitable Found. v Seng*, 2019 NY Slip Op 30051[U] [Sup Ct, NY County 2019].) The remaining issue stems from a 2008 short-term interest-bearing loan made by nonparty Seng & Sons Trust (Seng Trust) to CIE to pay the State of New Jersey income tax for a sale of a warehouse sold by CIE. (NYSCEF 343, Minutes of Seng Trust Meeting at 1.) CIE needed the loan because it did not have adequate reserves to pay the required state tax. (NYSCEF 339, William Seng Aff ¶¶ 11-12.) At the December 19, 2018, meeting of the trustees for the Seng Trust, William, Peter, Maria, and Henry voted to approve a \$210,000 payment (the Loan) by CPC from a special bank account maintained on behalf of Seng Trust to CIE to pay the New Jersey income tax due. (NYSCEF 343, Minutes of Seng Trust Meeting at 1.) David and James voted against the payment. (*Id.*) However, the Special Account allegedly did not have funds available to fund the Loan, so CPC loaned \$210,000 to Seng Trust to be repaid within a year at an interest rate of 4% per annum. (NYSCEF 339, William Seng Aff, ¶ 16.) On July 3, 2009, CIE merged into Seng Trust. (*Id.* ¶ 20.) On December 18, 2009, Seng Trust paid CPC \$216,489.86 to fulfil the Loan obligation with interest. (*Id.*) Petitioners allege respondents breached their fiduciary duty by misusing CPC's corporate assets by making loans from CPC without disinterested approval by the board. (NYSCEF 1, Verified Petition, ¶ 31.)

Procedural History

On January 3, 2019, this court granted respondents' motions for summary judgment and ordered the dismissal of petitioners' claims in their entirety. (NYSCEF 314 Decision and Order [Motion Seq 006]; NYSCEF 315, Decision and Order [Motion

Seq 007]; see also *Yin Shin Leung Charitable Found. v Seng*, 2019 NY Slip Op 30051[U] [Sup Ct, NY County 2019].) Petitioners appealed to the First Department. On November 14, 2019, the First Department modified this court's order, "on the law, to deny the motion as to so much of the cause of action for breach of fiduciary duty as is premised on a \$210,000 loan made to Cathay Import & Export, Ltd., and otherwise affirmed, without costs." (*Matter of Yin Shin Leung Charitable Found.*, 177 AD3d at 463.) The First Department determined that respondents, as a matter of law, are not entitled to the protections of the business judgment rule to shield their conduct associated with the Loan transaction. (*Id.* at 465.) Further, the First Department found the respondents failed to meet their burden to prove the transaction was fair, as the respondents controlled the entities on both sides. (*Id.*)

On December 18, 2019, respondents filed a Notice of Motion for Reargument before the Appellate Division, First Department. (NYSCEF 380, Respondents Reargument.) However, the First Department denied the motion on February 25, 2020. (NYSCEF 382, First Department Reargument Decision and Order.)

Discussion

A party moving for summary judgment under CPLR 3212 "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 Hosp.*, 68 NY2d 320, 324 [1986].) The "facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted].) Once the moving party has met this prima facie burden, the burden shifts to the non-moving party to furnish evidentiary

proof in admissible form sufficient to raise a material issue of fact. (*Alvarez*, 68 NY2d at 324). The moving party's "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." (*Id.*) "Successive motions for summary judgment should not be entertained without a showing of newly discovered evidence or other sufficient justification." (*Jones ex rel. Cline v 636 Holding Corp.*, 73 AD3d 409 [1st Dept 2010] [citations omitted].) However, if the court can dispose the case, then a successive summary judgment motion should be considered. (*Varsity Tr., Inc. v Bd. of Educ. of City of New York*, 300 AD2d 38, 39 [1st Dept 2002] [citations omitted].)

Loan

Petitioners argue respondents' summary judgment motion is impermissible as a successive motion. However, if the motion is considered, petitioners assert that whether the consideration provided for the Loan was corporate waste is a disputed question of fact. Respondents contend their summary judgment motion should be entertained because it will conserve judicial resources and conclude the case, as respondents maintain there are no issues of fact regarding the Loan.

This motion is an improper successive motion. Respondents have not provided new facts to warrant consideration of this motion or resolve all issues of fact. Whether the transaction was fair is an issue of fact not resolvable on this motion. Respondents present nothing new to meet their burden. Further, this motion is redundant of respondents' Motion for Reargument before the First Department, in which respondents asserted that no issue of fact exists as to the Loan. Again, that motion was denied.

The motion for summary judgment on the breach of fiduciary duty claim as it relates to the Loan is denied. A trial will proceed on this issue.

Dissolution

Respondents contend that, even if the Loan transaction was unfair, dissolution of CPC would be unjustified. Petitioners moved for the dissolution of CPC pursuant to BCL § 1104-a (2). (NYSCEF 1, Verified Complaint, ¶¶ 31, 79-81.) BCL § 1104-a (2) states:

(a) The holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation, other than a corporation registered as an investment company under an act of congress entitled "Investment Company Act of 1940", no shares of which are listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national or an affiliated securities association, entitled to vote in an election of directors may present a petition of dissolution on one or more of the following grounds:

(2) The property or assets of the corporation are being looted, wasted, or diverted for non-corporate purposes by its directors, officers or those in control of the corporation. (Business Corporation Law § 1104-a (2).)

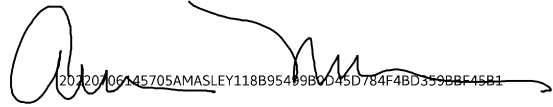
As issues of fact surround the fairness of the Loan transaction, whether the corporate assets were wasted, and in turn, whether dissolution is justified, cannot be determined on this motion.

Accordingly, it is

ORDERED that respondents' motion for summary judgment is denied; and it is further

ORDERED that as to the remaining causes of action before this court, the parties shall have until August 8, 2022 to file motions in limine or they are deemed waived (no cross motions); and it is further

ORDERED that the parties shall update the court by email by August 9, 2022 as to whether they have filed motions in limine or to schedule a pre-trial conference.



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7/6/2022
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: