

Choicer v Shuk Yin Choi
2022 NY Slip Op 33494(U)
October 6, 2022
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, October 6, 2022

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff Henry Choicer has moved pursuant to CPLR §2221 seeking to reargue a decision and order dated July 5, 2022 which denied his motion for a preliminary injunction. 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.

As recorded in the prior order, 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 his share of the property to the defendant trust. The defendant on behalf of the trust and the plaintiff then created First 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 initiated the instant lawsuit and

sought an injunction restraining the defendant from further transferring the property until this lawsuit is resolved. The court denied the request finding the plaintiff failed to demonstrate a likelihood of success on the merits because there were two operating agreements presented signed by the parties. One operating agreement permitted the defendant to sell her share without the consent of any other members and the other only permitted the defendant the right to sell her share upon consent of the remaining members. The court concluded since the entire crux of the issue was disputed there could be no likelihood of success on the merits.

Upon reargument the plaintiff asserts that even if two contradictory operating agreements have been presented the injunction is still available because the defendant never relied upon the existence of the agreement which states she does not need any consent. Thus, without any governing operating agreement at all the Limited Liability Corporation Law controls and that pursuant to various provisions of the LLC defendant Lam never acquired full rights to the property and consequently an injunction may follow. Further, the plaintiff argues that the plaintiff asserts that no LLC ever existed and if true then Lam has been defrauded further necessitating an injunction. The motion seeking reargument is denied by all the defendants.

Conclusions of Law

A motion to reargue must be based upon the fact the court overlooked or misapprehended fact or law or for some other reason mistakenly arrived at in its earlier decision (Deutsche Bank National Trust Co., v. Russo, 170 AD3d 952, 96 NYS2d 617 [2d Dept., 2019]).

It is true that the plaintiff also argues there has never been a meeting of the minds between the parties and no corporation exists at all. However, that argument merely raises more questions of fact demonstrating that the plaintiff cannot possibly present a likelihood of success on the merits. Thus, there are two operating agreements presented as noted which contradict each other in the one area of concern in this case, namely whether the defendant was permitted to transfer her shares of the corporation without the plaintiff's consent. If no corporation existed at all the plaintiff argues that Lam has been defrauded. Of course, presenting arguments on behalf of another does not mean the plaintiff has demonstrated a likelihood of success on the merits. This is particularly true in this case where Lam has not taken any steps to argue they have been "defrauded" and on the contrary fully oppose this motion to reargue and the previous motion seeking the injunction. Thus, the only basis upon which the plaintiff seeks to present any likelihood of success on the merits is the fact "Ms. Choi

defrauded Lam's LLC into paying \$800,000.00 for membership in a non-existent LLC" (Memorandum of Law in Support, page 10 [NYSCEF Doc #131]). However, that argument is undermined by Lam's opposition to the motion and hence a rejection of any such fraud. Thus, there is still no likelihood of success on the merits the plaintiff will prevail in this action.

Moreover, even assuming the defendant's operating agreement governs any inconsistency between Article 7.2 and Article 2.3(b) does not demonstrate a likelihood of success on the merits. Article 7.2 as noted states that "a Member may transfer Membership Interests to any other Person without the consent of any other Member" and that "a Person that acquires Membership Interests in accordance with this Section 7.2 will be admitted as a Member of the Company only after the requirements of Section 2.3(b) are complied with in full" (id., NYSCEF Doc #94]). However, Article 2.3(b) states that "with the exception of a transfer of interest governed by Article 7 of this Agreement, before a Person may be admitted as a Member of the Company, that Person must sign and deliver to the Company the documents and instruments, in the form and containing the information required by the Company, that the Members deem necessary or desirable. Membership Interests of new Members will be allocated according to the terms of this Agreement" (id). Thus, article 7 requires satisfaction in compliance with Article 2.3 and Article

2.3 exempts transfers pursuant to Article 7. While that inconsistency, if the document is proven to be authentic, requires analysis it has no bearing on the plaintiff's request for an injunction. Indeed, that inconsistency is merely further evidence of the many questions of fact which surround the relationship between parties, making an injunction impossible.

Therefore, based on the foregoing, the motion seeking reargument is denied.

So ordered.

ENTER:

DATED: October 6, 2022
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC