

He Ping Shao v Cao Zhao Wei
2012 NY Slip Op 33878(U)
September 20, 2012
Supreme Court, Queens County
Docket Number: 18314/07
Judge: Marguerite A. Grays
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

ORIGINAL

Memorandum

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE MARGUERITE A. GRAYS**
Justice

IAS PART 4

-----x
HE PING SHAO, XIAO QUI HUANG, SHAO ZHERE
JIE, HUANG YOUNG XING, XIU YUN ZHU,

Index
No.: 18314/07

Plaintiff(s),

-against-

CAO ZHAO WEI, SHELLY CAO, CAO ZHAO WEI
a/k/a SHELLY CAO d/b/a WEIS REALTY CORP.,
CAO ZHAO WEI a/k/a SHELLY CAO d/b/a NYC
FUNDING CENTER, INC., WEI'S REALTY, PERFECT
FUNDING CORP., NYC FUNDING CENTER, INC.

Defendant(s).

-----x
Hon. Marguerite A. Grays

QUEENS COUNTY CLERK
FILED

2012 SEP 25 PM 2: 28

In this action, plaintiffs sued defendants for breach of contract , nonpayment of four promissory notes, and fraud. This action arose from defendants alleged breach of an agreement between the parties pursuant to which defendants agreed to purchase real estate investment property for plaintiffs and to form a real estate investment company to facilitate such investments. Plaintiffs tendered a total of \$1,590,344.40 to defendants in furtherance of the contract. Plaintiffs contend that defendants never formed the investment company or purchased any real estate, and refused to return plaintiffs' money. Plaintiffs further contend that defendant Shelly Cao converted the loan monies for her own personal use. The plaintiff's complaint asserts causes of action for breach of contract by the defendants, non-

payment of four promissory notes by defendants Cao, Wei's Realty Corp. and Perfect Funding Corp., and fraud as against all named defendants.

By Order of this Court dated November 3, 2011, defendants' answers were stricken for failure to comply with the Order of this Court dated October 24, 2011. The matter was set down for an inquest for a determination of damages.

An inquest was held in this matter on February 6, 7, 9, 15, 16, 17, 2012 and March 5, 2012. Plaintiffs Huang Young Xing, Sheirg Jie Shao, He Ping Shao and Xiu Yun Zhu testified. Defendant Shelly Cao, testified on her own behalf. Defendants Wei's Realty Corp., Perfect Funding Corp., and NYC Funding Center Inc. (collectively, "the corporate defendants") did not call any witnesses. At the conclusion of the inquest, the parties were directed to submit post-trial memoranda of law.

Now, after inquest, and upon consideration of the credible testimony and evidence adduced, the Court finds that plaintiffs failed to make a prima facie showing of entitlement to judgment on their claims sounding in breach of contract and non-payment on four promissory notes.

The instant action and a prior action entitled *He Ping Shao, et al. v. Cao Zhao Wei, et al.* (Queens County Supreme Court, Index Number 24001/05) ("2005 action"), involve identical parties and are based upon the same underlying facts. In the prior action, the plaintiff's asserted fourteen causes of action. By Order dated May 30, 2006, the plaintiffs were awarded summary judgment against defendants on four causes of action which sought to recover payment on the same four promissory notes that plaintiffs are suing on herein. By

Order dated February 23, 2009, issued in the instant action, this Court held that “to the extent that any of the plaintiffs’ present claims for breach of contract arising from loans allegedly made to the defendants are duplicative of their prior claims to recover payment on the four promissory notes, on which [plaintiffs] were awarded judgment in the prior action, the plaintiffs’ [sic] are precluded from re-asserting those four specific claims herein.”

Plaintiffs failed to establish entitlement to damages on their First through Ninth causes of action for breach of contract herein inasmuch as the record amply demonstrates that such claims are indeed duplicative of plaintiffs’ prior claims on the four promissory notes in the 2005 action. The record is replete with admissions by the plaintiffs (as well as stipulations by plaintiffs’ counsel) that the monies sought in the instant action based upon loans made by plaintiffs to the various defendants, are the same monies secured by the four promissory notes upon which plaintiffs were awarded judgments in the 2005 action.

Plaintiffs likewise failed to demonstrate entitlement to judgment as a matter of law on their Fourteenth cause of action for fraud. Plaintiffs simply failed to establish that defendants knowingly made false representations to plaintiffs for the purpose of inducing plaintiffs to loan defendants money (see generally, *Richmond Shop Smart, Inc., v Kenbor Development*, 32 AD3d 423 [2006], quoting *Camo Holding Co., v Smith Barney*, 88 NY2d 413), or that defendant Shelly Cao converted the monies loaned for her own personal use. Notwithstanding this failure, plaintiffs’ cause of action sounding in fraud would still fail inasmuch as the fraud claim is based on the same facts as the breach of contract claims, and it is well settled that a cause of action alleging fraud does not lie where the only fraud claim

relates to an alleged breach of contract (*WIT Holding Corp. v Klein*, 282 AD2d 527 [2001]

J.E. Morgan Knitting Mills v Reeves Bros., 243 AD2d 422 [1997]).

Accordingly, the plaintiff's action is hereby dismissed.

Date: **SEP 20 2012**



MARGUERITE A. GRAYS
J.S.C

2012 SEP 25 PM 2: 28

QUEENS COUNTY CLERK
FILED