

<b>Kyung Rim Choi v Han Ik Cho</b>
2014 NY Slip Op 33920(U)
July 21, 2014
Supreme Court, Nassau County
Docket Number: 600686-14
Judge: Timothy S. Driscoll
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ORIGINAL

**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**

**Justice Supreme Court**

-----X  
**KYUNG RIM CHOI, a shareholder of BWAY & 5<sup>th</sup>, INC.,  
suing in the right of BWAY & 5<sup>TH</sup>, INC.,**

**Plaintiff,**

**-against-**

**HAN IK CHO, STEVE S. KIM a/k/a SIN Y. KIM,  
and BWAY & 5<sup>TH</sup> INC.,**

**Defendants.**  
-----X

**TRIAL/IAS PART: 15  
NASSAU COUNTY**

**Index No. 600686-14  
Motion Seq. Nos. 2 & 3  
Submission Date: 6/13/14**

**Papers Read on these motions:**

**Notice of Motion, Affirmation in Support and Exhibits.....X  
Memorandum of Law in Support.....X  
Affirmation in Opposition and Exhibits.....X  
Reply Affirmation.....X**

**Notice of Motion, Affirmation in Support and Exhibits.....X  
Memorandum of Law in Support.....X  
Affirmation in Opposition.....X  
Reply Affirmation and Exhibit.....X**

This matter is before the court on the motions filed by Plaintiff Kyung Rim Choi, a shareholder of Bway & 5<sup>th</sup>, Inc., suing in the right of Bway & 5<sup>th</sup>, Inc., on April 14, 2014 and submitted on June 13, 2014. For the reasons set forth below, the Court 1) with respect to the motion directed to the counterclaim and affirmative defenses asserted by Defendant Han Ik Cho (“Cho”) (motion sequence number 2), grants Plaintiff’s motion to dismiss the counterclaim asserted by Cho but denies the motion to dismiss Cho’s affirmative defenses; and 2) with respect to the motion directed to the counterclaims and affirmative defenses asserted by Defendant S. Kim a/k/a Sin Y. Kim (“Kim”) (motion sequence number 3), deems the Verified Amended

Answer of Defendant Kim dated April 25, 2014 (Ex. D to Grossman Aff. in Opp.) the operative answer in this action, denies as moot Plaintiff's motion to dismiss Kim's counterclaims because Kim's Verified Amended Answer does not contain counterclaims, and denies Plaintiff's motion to dismiss the affirmative defenses asserted by Kim in his Verified Amended Answer.

### BACKGROUND

#### A. Relief Sought

Plaintiff Kyung Rim Choi ("Choi" or "Plaintiff"), a shareholder of Bway & 5<sup>th</sup>, Inc. ("Corporation"), suing in the right of Bway & 5<sup>th</sup>, Inc., moves for an Order, pursuant to CPLR §§ 3211(a)(3), (6) and (7), dismissing Defendant Han Ik Cho's ("Cho's") counterclaim on the grounds that the counterclaim may not be properly interposed in this action, the counterclaim fails to state a cause of action and Defendant Cho does not have the legal capacity to assert the counterclaim; and 2) pursuant to CPLR § 3211(b), dismissing Defendant Cho's Third Affirmative Defense, Fourth Affirmative Defense and (denominated) Seventh Affirmative Defense on the grounds that the defenses are not stated and have no merit.

Defendant Cho opposes the motion.

Plaintiff also moves for an Order 1) pursuant to CPLR §§ 3211(a)(3), (6) and (7), dismissing Defendant S. Kim a/k/a Sin Y. Kim's ("Kim's") First Counterclaim, Third Counterclaim and Fourth Counterclaim on the grounds that the counterclaims may not be properly interposed in this action, the counterclaims fail to state a cause of action and Defendant Kim does not have the legal capacity to assert them; and 2) pursuant to CPLR § 3211(b), dismissing Defendant Kim's First Affirmative Defense, Third Affirmative Defense and Fourth Affirmative Defense on the grounds that the defenses are not stated and have no merit.

Defendant Kim opposes the motion.

#### B. The Parties' History

The parties' history is outlined in detail in a prior decision ("Prior Decision") of the Court dated March 4, 2014 and the Court incorporates the Prior Decision by reference as if set forth in full herein. In the Prior Decision, the Court granted Plaintiff's prior motion for injunctive relief to the extent that the Court directed that the temporary restraining order ("TRO") issued by the Court on February 20, 2014 shall remain in effect pending further court order, on the condition that Plaintiff post a bond. Pursuant to the TRO, Defendants Cho, Kim and the Corporation are restrained from selling, disposing, transferring, assigning, alienating or distributing any property

or money of the Corporation, except in the ordinary course of business of the Corporation, and negotiations regarding a proposed sale of the business can continue.

As noted in the Prior Decision, Choi, Cho and Kim are the shareholders of the Corporation, each owning 1/3 of the issued and outstanding capital stock of the Corporation. The Corporation owns and operates a restaurant food business located at 39 West 32<sup>nd</sup> Street, New York, New York (“Premises”), doing business as Korea Spoon (“Restaurant”). The Corporation maintains a bank account (“Account”) that Cho and Kim controlled. Plaintiff alleges that Kim and Cho have failed to pay the Corporation’s landlord (“Landlord”) and vendors, have failed to pay sales tax to the State of New York, and have taken and diverted Corporation assets and money for their own benefit, and secreted money belonging to the Corporation in a safe deposit box .

Plaintiff seeks judgment granting the following relief: 1) money damages against Cho and Kim for the damages that the Corporation has sustained as a result of their conduct, 2) a direction that Kim and Cho be required to restore to the Corporation any monies wrongfully misappropriated by them, and that those monies be held in trust for the Corporation, 3) an order that Kim and Cho assign and transfer to the Corporation all of the Corporation’s assets that are in the possession of Kim and Cho, 4) an accounting to Plaintiff by Kim and Cho regarding monies related to the Premises that have been wrongfully diverted, and 5) an injunction restraining and enjoining Kim and Cho, during the pendency of this action and permanently, from disposing of any asset of the Corporation.

In his Verified Answer with Affirmative Defenses and Counterclaims (“Cho Answer”), Cho denies many of the allegations in the Complaint and asserts seven (7) affirmative defenses:<sup>1</sup> 1) Cho was not properly served with the Summons and Complaint; 2) Plaintiff fails to state a cause of action against Cho; 3) Plaintiff’s claims are barred by and/or Defendant’s defense is founded upon documentary evidence; 4) Plaintiff’s claims are barred, in whole or in part, by the doctrines of waiver, estoppel, laches and/or unclean hands; 5) if Plaintiff sustained any damages as alleged in the Complaint, they were the result of the culpable conduct of Plaintiff, or the result

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<sup>1</sup> Defendant Cho asserts a First, Second, Third and Fourth Affirmative Defense but apparently mislabels the remaining Affirmative Defenses so that the Affirmative Defenses designated the Seventh, Eighth and Ninth Affirmative Defenses are, in fact, the Fifth, Sixth and Seventh Affirmative Defenses.



of Plaintiff's negligence and, should it be found that Cho is liable to Plaintiff, then any damages should be apportioned between Plaintiff and Cho according to the degree of responsibility that each is found to have, and Plaintiff's recovery should be reduced by the proportion of culpability attributed to him; 6) Plaintiff's damages, if any, were caused solely by the separate, independent and/or negligent actions and/or inactions of third parties; and 7) Cho reserves the right to allege any and all additional defenses that may become known after discovery in this action.

Cho also asserts a counterclaim "(Cho Counterclaim)" based on the following allegations: 1) Plaintiff is asserting material factual statements that are false; 2) Plaintiff knew or should have known that the Summons and Complaint as asserted against Cho are baseless and without merit; 3) Plaintiff, with knowledge that he has no viable cause of action against Cho, filed the instant action for the sole purpose of harassing Cho and causing him hardship and expense; 4) Plaintiff has acted with malice and attempted to damage Cho's reputation and cause him financial hardship; 5) the allegations in the Complaint are false and were interposed solely to cause injury and expense to Cho; 6) by engaging in this conduct, Plaintiff has abused the process of law solely with the intent to maliciously cause injury to Defendants; 7) this abuse of process has injured and damaged Cho who will incur expenses in excess of \$30,000 in connection with this action; 8) Plaintiff's action or inaction caused the failure of the Restaurant and closure of the Premises; 9) Plaintiff breached the Shareholders Agreement by failing to contribute his proportionate share and by borrowing money from New Bank without Cho's consent; 10) Plaintiff caused New Bank to file a Security Agreement against the Premises without Cho's consent; and 11) Plaintiff failed to pay Cho in connection with a promissory note in the amount of \$900,000, dated July 10, 2008. In his Verified Answer with Counterclaims ("Kim Answer") (Ex. B to Latzman Aff. in Supp.), Kim denies many of the allegations in the Complaint and asserts five (5) affirmative defenses: 1) Plaintiff's damages, if any, are due to its own culpable conduct and are not related in any way to the conduct of Kim; 2) Plaintiff fails to state a cause of action against Kim upon which relief can be granted; 3) Plaintiff's claims are barred in whole or in part by the principles of laches, waiver, release and/or estoppel; 4) Plaintiff's damages, if any, were caused solely by the separate, negligent and/or independent actions of third parties; and 5) Kim reserves the right to allege additional defenses which may be discovered upon discovery in this action.

Kim also asserts counterclaims based on the following allegations: 1) Plaintiff, as an officer and director of the Corporation, had a fiduciary duty to the Corporation and its shareholders; 2) Plaintiff, through his inaction, caused the business failure of the Corporation; 3) Plaintiff breached a fiduciary duty to the Corporation by obtaining a Small Business Administration loan ("SBA Loan") in the amount of \$900,000 without the knowledge or consent of the other shareholders, officers and directors; 4) to obtain the SBA Loan, Plaintiff falsely represented that he and his wife were collectively the 100% owners of the Corporation; 5) as a result of the SBA Loan, which was secured by the Corporation's assets, the Restaurant could not be sold to preserve its value prior to closing; 6) Plaintiff has not, and will not, account for the proceeds of the SBA Loan in the amount of \$900,000 despite repeated demands by other shareholders, directors and officers; 7) under the terms of the Shareholders Agreement then in effect, loans to the Corporation required unanimous consent of the directors; and 8) Plaintiff did not request or obtain consent of the directors before taking out the SBA Loan.

In his initial answer, Kim asserts three ("3") counterclaims ("Kim Counterclaims"): 1) Plaintiff breached the Shareholders Agreement by wrongfully causing the Corporation to incur debt without the unanimous approval of the directors, as a result of which Kim has incurred damages in excess of \$900,000; 2) Plaintiff breached his fiduciary duty to the Corporation and its shareholders by wrongfully causing the Corporation's assets to be encumbered, as a result of which Kim has incurred damages in excess of \$900,000; and 3) by taking out the SBA Loan without accounting for the proceeds, Plaintiff has been unjustly enriched in the amount of \$900,000, as a result of which Kim has incurred damages in excess of \$900,000.

Counsel for Kim affirms that on or about April 25, 2014, subsequent to Plaintiff's filing of the instant motion, Kim timely filed and served a Verified Amended Answer ("Kim Amended Answer") (Ex. D to Grossman Aff. in Opp.). Thus, Kim submits, Plaintiff may withdraw his motion or have it deemed applied to the amended pleading. The Kim Amended Answer contains three (3) substantive affirmative defenses, and a fourth affirmative defense in which Kim reserves the right to allege additional defenses that may be identified upon discovery in this action. The Kim Amended Answer does not assert any counterclaims.

Kim submits that the First, Second and Third Affirmative Defenses in his Amended Answer adequately state a defense because they are supported by sufficient factual allegations.



Kim also contends that he has pleaded sufficient factual allegations to make out a prima facie case of individual estoppel against Choi, the representative shareholder. Kim argues that, because Choi is individually estopped from questioning the wrongs done to the Corporation, he is equally estopped from suing derivatively as a representative of the Corporation and, therefore, Kim's Third Affirmative Defense, asserted in his Amended Answer, of estoppel, acquiescence and/or ratification is properly interposed against Plaintiff in this action.

In reply, counsel for Plaintiff affirms that Plaintiff accepts service of the Kim Amended Answer. Plaintiff submits that the Court should dismiss Kim's Third Affirmative Defense as asserted in his Amended Answer because Kim's defense that Plaintiff's claims are barred by the principles of estoppel, acquiescence and/or ratification is not supported by factual allegations "stating with particularity which claims were acquiesced in or ratified by plaintiff and the nature of the purported acquiescence or ratification" (Latzman Reply Aff. at ¶ 7).

Paragraph 6 of the Complaint (Ex. A to Latzman Aff. in Supp.) alleges that "Plaintiff Choi and defendants Cho and Kim are the shareholders of the Corporation; each owning 66 2/3 shares of the Corporation representing 1/3 of the issued an[d] outstanding capital stock of the Corporation." Kim, in his Amended Answer, admits the allegation in paragraph 6 of the Complaint. Cho does not address paragraph 6 of the Complaint in his Answer and therefore, Plaintiff submits, admits that allegation by failing to deny it.

### C. The Parties' Positions

Plaintiff submits that the Court should dismiss the Counterclaim asserted by Defendant Cho, which seeks relief for corporate damage, because the claims must be brought derivatively on behalf of the Corporation. Plaintiff argues that an individual shareholder does not have the legal capacity to bring an action in his own name and on his own behalf for a wrong committed against the corporation and, therefore, the Court should dismiss the Counterclaim for failure to state a cause of action. Plaintiff makes reference to specific allegations in the Counterclaims, which include 1) Kim's allegation, in his Second Counterclaim in his initial answer, that "Plaintiff breached his fiduciary duty to the corporation and its shareholders by wrongfully causing the assets of the business to be encumbered" (Second Kim Counterclaim at ¶ 22); and 2) Cho's allegation that "plaintiff's action or inaction caused the business<sup>[1]</sup> failure and closure" (Cho Counterclaim at ¶ 18).

Plaintiff contends that any counterclaim asserted against a plaintiff must be pleaded

against him in the capacity in which the plaintiff brought the action, and that stockholders suing derivatively are not subject to counterclaims against them as individuals because they have no standing in the action apart from that which is derived as stockholders citing, *inter alia*, *Michelman-Cancelliere Iron Works, Inc. v. Kiska Construction Corporation-USA*, 18 A.D.3d 722 (2d Dept. 2005). Therefore, in light of the fact that Plaintiff has filed this action as a stockholder's derivative action in his representative capacity, the Counterclaim asserted against Plaintiff individually may not be pleaded in this stockholder derivative action.

Plaintiff also argues that the Court should dismiss Defendants' affirmative defenses as lacking merit because they are based on Plaintiff's individual conduct which is inapplicable to the instant derivative action. Plaintiff contends, further, that the Court should dismiss the affirmative defenses because they do not contain adequate particularity.

Cho opposes the motion, submitting that 1) the affirmative defenses adequately state a defense; 2) if the Court were to dismiss Cho's Counterclaim, Cho would be required to file another action against Plaintiff that would involve identical issues as the instant action; and 3) Plaintiff is incorrect in asserting that he has filed the instant action derivatively.

Kim submits that the Court should deny Plaintiff's motion to dismiss Kim's affirmative defenses, as asserted in his Amended Answer, because they are adequately stated and have merit. With respect to Kim's third affirmative defense in his Amended Answer, Kim submits that he has pleaded sufficient factual allegations to make out a prima facie case of individual estoppel against Choi.

#### RULING OF THE COURT

##### A. Affirmative Defenses

Pursuant to CPLR § 3211(b), a party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit. *Fireman's Fund Insurance Company v. Farrell*, 57 A.D.3d 721, 723 (2d Dept. 2008), quoting CPLR § 3211(b). In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference. *Fireman's Fund Insurance Company v. Farrell*, 57 A.D.3d at 723, citing *Warwick v. Cruz*, 270 A.D.2d 255 (2d Dept. 2000) and *Abney v. Lunsford*, 254 A.D.2d 318 (2d Dept. 1998). Moreover, if there is any doubt as to the availability of a defense, it should not be dismissed. *Fireman's Fund Insurance Company v. Farrell*, 57 A.D.3d at 723, citing *Becker v.*



*Elm A.C. Corp.*, 143 A.D.2d 965 (2d Dept. 1988).

#### B. Actions against Corporations

For a wrong against a corporation a shareholder has no individual cause of action, though he loses the value of his investment or incurs personal liability in an effort to maintain the solvency of the corporation. *Abrams v. Donati*, 66 N.Y.2d 951, 953 (1985). Exceptions to that rule have been recognized when the wrongdoer has breached a duty owed to the shareholder independent of any duty owing to the corporation wronged. *Id.* Allegations of mismanagement or diversion of assets by officers or directors to their own enrichment without more, however, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually. *Id.* The pertinent inquiry is determining whether an individual has standing to assert a claim is whether the thrust of the plaintiff's action is to vindicate his personal rights as an individual and not as a stockholder on behalf of the corporation. *Craven v. Rigas*, 85 A.D.3d 1524, 1527 (3d Dept. 2011), *lv. dismiss.*, 17 N.Y.3d 932 (2011), quoting *Albany-Plattsburgh United Corp. v. Bell*, 307 A.D.2d 416, 419 (3d Dept. 2003), *lv. dismiss. and den.*, 1 N.Y.3d 620 (2004) (internal quotation marks and citations omitted).

A claim and counterclaim must be by and against the same party in the same capacity. *Michelman-Cancelliere Iron Works, Inc. v. Kiska Construction Corp.-USA*, 18 A.D.3d 722, 723 (2d Dept. 2005), quoting *Ruzicka v. Rager*, 305 N.Y. 191, 198 (1953) and citing, *inter alia*, *Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 259-260 (1970).

#### C. Application of these Principles to the Instant Action

With respect to the motion directed to the counterclaim and affirmative defenses asserted by Defendant Cho, the Court grants Plaintiff's motion to dismiss the counterclaim asserted by Cho but denies the motion to dismiss Cho's affirmative defenses. The Court concludes that Cho's counterclaim is not viable because Plaintiff has sued in his derivative capacity and, therefore, may not be sued in his individual capacity. In consideration of the above principles regarding the viability of affirmative defenses, however, the Court denies Plaintiff's motion to dismiss the affirmative defenses as asserted in Cho's Answer and Kim's Amended Answer. The Court deems Kim's Amended Answer the operative answer in this action and denies, as moot, Plaintiff's motion to dismiss Kim's counterclaims because Kim's Amended Answer does not contain counterclaims.

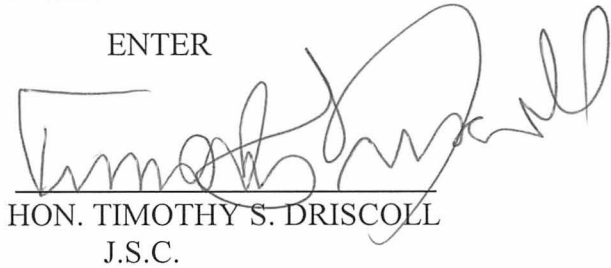
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Compliance Conference on July 23, 2014 at 9:30 a.m.

DATED: Mineola, NY  
July 21, 2014

ENTER



HON. TIMOTHY S. DRISCOLL  
J.S.C.

**ENTERED**

JUL 28 2014

NASSAU COUNTY  
COUNTY CLERK'S OFFICE