| **Dian Kui Su v Sing Ming Chao** |
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| 2016 NY Slip Op 31734(U) |
| September 16, 2016 |
| Supreme Court, New York County |
| Docket Number: 601752/08 |
| Judge: Carol R. Edmead |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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DIAN KUI SU, QING MEI ZHAO and CHAO QIONG HU, ZAI SHENG and JUDY D.J. LIAO individually and suing derivatively on behalf of QUALITY LUMBER & BUILDING SUPPLIES, INC. and BRILLIANT PROSPECTS REALTY, INC.,

Plaintiffs,

-against-

SING MING CHAO, XIANG RU QUIAN, MARINDA WANG, ENG SOON ONG, HENG WEN LIU a/k/a CHEN YANG, AH WAH CHAI, individually as Shareholders and Acting Directors of QUALITY LUMBER & BUILDING SUPPLIES, INC., and/or BRILLIANT PROSPECTS REALTY, INC., KINGSLAND GROUP, LLC, LIANG-SHOU CHAN, HAYASHI 2 LLC, and MIAO LAND REALTY,

Defendants.

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**DECISION AND ORDER**

Index №.: 601752/08
Motion Seq. Nos.
001, 002, and 003

**CAROL R. EDMEAD, J.S.C.:**

In a case involving a complex set of business relationships that faltered, plaintiffs Dian Kui Su (Su), Qing Mei Zhao (Zhao), Chao Quiong Hu (Hu), Zai Sheng (Sheng), Judy D.J. Liao (Liao), Quality Lumber & Building Supplies, Inc. (Quality Lumber) and Brilliant Prospects Realty, Inc. (Brilliant Prospects) move for: (1) partial summary judgment on their first cause of action for breach of a fiduciary duty through usurpation of a business opportunity; (2) dismissal of defendants' affirmative defenses; and (3) leave to amend the complaint to add, as a plaintiff, Best Quality Lumber and Home Center, Inc. (Best Quality) (motion seq. No. 001). Defendants Sing Ming Chao (Chao), Xiang Ru Qian (Qian), Miranda Wang (Wang), Eng Soon Ong (Ong), Heng Wen Liu (Liu), Kingsland Group, LLC (Kingsland), Lian-Shou Chen (Chen), Hayahsi 2 LLC (Hayashi), and Miao Land Realty (Miao Land) move for summary judgment dismissing the

complaint (motion seq. No. 002). Finally, defendant Ah Wah Chai (Chai) also moves for summary judgment dismissing the complaint (motion seq. No. 003).

**BACKGROUND**

The history of this dispute begins with the history of Quality Lumber, a business that sold building supplies and was separately organized four times. In 1986, Quality Lumber and Home Center, Inc., or Quality Lumber 1, as plaintiffs refer to it, was incorporated (Zheng aff, ¶ 8). Quality Lumber 1, and its descendants, operated a showroom and warehouse located at 36-25 College Point Blvd. in Flushing (*id.*). In 1996, all of the assets and liabilities of Quality Lumber 1 were transferred to New Quality Lumber and Home Center, or Quality Lumber 2 (*id.*, ¶ 9). In 1998, the shareholders of Quality Lumber 2 decamped to another newly formed corporation, Best Quality Lumber and Home Center, Inc., or Quality Lumber 3, and Quality Lumber 3 continued the business and assumed all of the assets and liabilities of Quality Lumber 2 (*id.*, ¶¶ 10-11). Finally, in 2003, the shareholders of Quality Lumber 3 passed the assets and liabilities of Quality Lumber 3 to plaintiff Quality Lumber, while maintaining equal shares in both businesses (*id.*, ¶¶ 12-13). All of the individual plaintiffs and most of the individual defendants were shareholders in Quality Lumber, which was dissolved in 2007 (*id.* at 12). Plaintiffs Su, Hu, Zheng, and Liao, as well as defendants Chao, Qian, Wang, Chai, Liu and Ong were all shareholders in Brilliant Prospects and Quality Lumber 3 (*id.*, ¶ 24).

Prior to 1997, when Quality Lumber 2 was a viable entity, 29.9% of its shares were owned by China North Industries Corporation (Norinco) and its US subsidiary, NIC Internal Inc. (NIC). However, plaintiffs allege that, in 1996, Norinco was banned from doing business in the United States because of its involvement in smuggling 2,000 automatic weapons to drug dealers in Oakland, California (Second Amended Complaint, ¶ 85). Due to the ban, Norinco and NIC

had to divest their holdings in Quality Lumber 2 (*id.*, ¶ 86). Plaintiffs allege further that defendant Liu, who was NIC's representative to Quality Lumber, expressed interest in purchasing Norinco and NIC's shares, but that he was rebuffed by the other shareholders (*id.*, ¶ 86). Undeterred, plaintiffs allege that Liu purchased the shares under an alias, Chen Yang, and that defendants Chao, Quian and Wang were aware of the arrangement, but kept it hidden from the other shareholders (*id.*, ¶¶ 88-89).

The Quality Lumber entities leased the property in Flushing from nonparty Yonke Realty, Inc. (Yonke Realty). Plaintiff Brilliant Prospects was formed by the shareholders of Quality Lumber, and they each took shares in Brilliant Prospects equal to the shares they held in Quality Lumber (Zheng aff, ¶¶ 17-18). Defendants argue that the purpose of Brilliant Prospects was to be a single-entity holding company, while plaintiffs argue that its purpose was to be a general real estate holding company. In any event, Brilliant Prospects bought the property at 36-25 College Point Blvd. from Yonke, in March 2000, and leased it back to its twin entity, Quality Lumber 3 (*id.*, ¶ 21). Brilliant Prospects was dissolved by the New York Department of State in 2010 (*id.*, ¶ 22).

In May 2002, Quality Lumber leased another lot, located at 133-25 36th Road, from Yonke Auto Body Works, Inc. (Yonke Auto), this one located next to the one purchased by Brilliant Prospects. According to plaintiffs, that property, as well as a contiguous one located at 133-33 36th Road, and two other lots without their own addresses, became available for sale in October 2002 (the Sale Property). Both plaintiffs and defendants agree that plaintiff Zheng and defendant Wang met, on two occasions, with John Yonke (Yonke) of Yonke Realty and Yonke Auto to discuss purchasing the Sale Property, but plaintiffs allege that the meetings took place in December 2002, while defendants maintain that it took place in 2000.

Plaintiffs allege that Quality Lumber 3 was offered the Sale Property for $4 million in October 2002 and $4.5 million in November 2002, and that, after a shareholder meeting held on December 4, 2002, Quality Lumber 3/Brilliant Prospects agreed to counteroffer $3.75 million (Second Amended Complaint, ¶¶ 66). Plaintiffs also claim that, at the shareholder meeting in December 2002, the shareholders of Quality Lumber 3 agreed that, if Quality Lumber 3 and Brilliant Prospects would not purchase the Sale Property, then none of the shareholders would otherwise purchase the property or have an interest in purchasing the property, and that all shareholders agreed to keep information related to the possible transaction confidential (*id.*, ¶ 68).

However, Yonke rejected the Quality Lumber 3/Brilliant Prospects counteroffer and subsequently accepted a $4.3 million offer from defendant Kingsland (*id.*, ¶ 70). Defendants Chao, Qian, Wang, Chai, Liu and Ong were all shareholders in Quality Lumber 3/Brilliant Prospects, as well as members of Kingsland (*id.*, ¶ 71). Additionally, defendants Hayashi and Miao Land were members of Kingsland (*id.*).

By January 2004, Quality Lumber 3 had become plaintiff Quality Lumber. Foiled in its attempt to buy the combined property, Quality Lumber entered into a lease with Kingsland for a portion of the Sale Property, a warehouse located at 133-25 36th Street (*id.*, ¶ 75). According to plaintiffs, Kingsland sought to terminate the lease in November 2006 (*id.*, ¶ 78). Quality Lumber dissolved the following year.

In June 2008, plaintiffs initiated this action. In their second amended complaint, plaintiffs allege three causes of action. The first cause of action is for breach of fiduciary duty against Chao, Qian, Wang, Ong, Liu and Chai. The second cause of action is for fraud against Chao, Qian, Wang, Ong, Liu and Chai for their alleged representation that they would not,

outside of Quality Lumber/Brilliant Prospects, obtain any interest in the Sale Property. The third cause of action is for fraud in the inducement against Kingsland and Lian-Shou Chan (Chan) for allegedly representing to plaintiffs that Chao, Quian, Wang, Ong, Liu, and Chai had no relationship with Kingsland.

## ANALYSIS

### I. Plaintiffs' Motion for Summary Judgment and to Amend the Complaint

#### A. Breach of Fiduciary Duty

Plaintiffs seek partial summary judgment against Chao, Qian, Wang, Ong, Liu and Chai for breach of fiduciary duty through usurpation of a business opportunity.

Summary judgment must be granted if the proponent makes 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, and the opponent fails to rebut that showing (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, *regardless of the sufficiency of the opposing papers* (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

"The corporate opportunity doctrine provides that a corporate fiduciary may not, without consent, divert and exploit for his own benefit any opportunity that should be deemed an asset of the corporation" (*Commodities Research Unit [Holdings] v Chemical Week Assoc.*, 174 AD2d 476, 477 [1st Dept 1991]). The First Department has held that, where a business opportunity presents itself, it does not matter if "the corporation was financially unable or for other reasons unwilling" to seize it; that is "no excuse for an officer undertaking it individually," as the

corporation is "entitled to the officer's undivided loyalty" (*Owen v Hamilton*, 44 AD3d 452, 454 [1st Dept 2007] [internal quotation marks and citation omitted]).

The first question is whether Chao, Qian, Wang, Ong, Liu and Chai should be considered corporate fiduciaries, such that they are subject to the requirements of this doctrine. Plaintiffs contend that they should, since they are majority shareholders in a closely held corporation. The First Department has held that "in a close corporation, the relationship between the shareholders vis-a-vis each other is akin to that between partners" (*Matter of T. J. Ronan Paint Corp.*, 98 AD2d 413, 421 [1st Dept 1984]). Thus, the same "high degree of fidelity and good faith" that is required among partners is "likewise applicable to shareholders in a close corporation" (*id.*; *see also Matter of Rodman,* 116 AD3d 422, 423 [1st Dept 2014] [holding that a shareholder in a closely held corporation is a fiduciary]; *Brunetti v Musallam*, 11 AD3d 280, 281 [1st Dept 2004]). "This strict standard of good faith imposed upon a fiduciary may not be so easily circumvented" (*Brunetti*, 11 AD3d at 281 [internal quotation marks and citation omitted]).

Here, Chao, Qian, Wang, Ong, Liu and Chai are corporate fiduciaries, as they are shareholders in a closely held corporation. Moreover, they are majority shareholders in a closely held corporation, and therefore owed a fiduciary duty to the individual plaintiffs, who were minority shareholders (*Gjuraj v Uplift El. Corp.*, 110 AD3d 540, 541 [1st Dept 2013] [holding that the majority shareholder of a closely held corporation "had a fiduciary duty to plaintiff, a minority shareholder"]). Thus it is clear that Chao, Qian, Wang, Ong, Liu and Chai should be considered corporate fiduciaries.

The next question is whether the property that was offered to Quality Lumber, but which was eventually bought by Kingsland, represented a corporate opportunity. The First Department has described the parameters of this inquiry:

> "Various tests have been utilized to determine whether a venture should be considered a 'corporate opportunity.' One such method, and the one frequently employed in this jurisdiction, is whether the corporation has an 'interest' or 'tangible expectancy' in the opportunity. An 'interest' or 'tangible expectancy' has been explained as something much less tenable than ownership, but, on the other hand, more certain than a desire or a hope . . . . [Interest or tangible expectancy] clearly expresses the judgment that the corporate opportunity doctrine should not be used to bar corporate directors from purchasing any property which might be useful to the corporation, but only to prevent their acquisition of property which the corporation needs or is seeking, or which they are otherwise under a duty to the corporation to acquire for it"

(*Alexander & Alexander of N.Y. v Fritzen*, 147 AD2d 241, 247-248 [1st Dept 1989] [internal quotation marks and citation omitted]).

Plaintiffs argue that the Sale Property represented a corporate opportunity, as they sought to purchase it, leased a large portion of it in May 2002, and had a history of buying property from Yonke. Additionally, plaintiffs argue that Quality Lumber needed the property, as, subsequent to Kingsland's purchase of the property, they leased a large portion of it for warehouse space in January 2004.

Defendants argue that the Sale Property did not represent a corporate opportunity to Quality Lumber or Brilliant Prospects, as they had no tangible expectancy in the opportunity. Central to this argument is defendants' assertion that the shareholders of both entities made no more inquiries or offers on the property after November 28, 2000. In support, defendants submit the deposition transcript of Wang, at which she testified that the meetings she attended with Zheng and Yonke took place in October and November of 2000, rather than 2002 (Wang tr at 234-235). Moreover, defendants submit Chao's affidavit in which Chao also states that the meetings took place on October 31,

2000 and November 28, 2000 rather than October 31, 2002 and November 28, 2002 (Chao aff, ¶ 3).[1]

Here, there is clearly an issue of fact as to whether the meetings between Yonke, Zheng and Wang about Quality Lumber's interest in the combined property took place several months or several years before Kingsland ultimate purchase of the property. Plaintiffs argue that this contested fact is not material to the question of whether the Sale Property was a corporate opportunity for Quality Lumber and Brilliant Prospects. Specifically, plaintiffs argue that the passage of time does not absolve Chao, Qian, Wang, Ong, Liu and Chai of their obligation not to filch a corporate opportunity.

But the focus of the inquiry should be on whether the Sale Property would constitute a corporate opportunity two years after Quality Lumber showed any interest in the property. Plaintiffs cite to *Maritime Fish Prods. v World-Wide Fish Prods.* (100 AD2d 81 [1st Dept 1984]), which involved a claim of employee disloyalty. In *Maritime Fish*, an employee of a company that sold fish started his own fish-selling business on company time and diverted clients from his employer (*id.* at 88-89). In that context, the First Department held that "he would not be free to take the business for himself or direct it to a competitor for his profit without express consent and approval of his employer" even if a client had first offered its business to his competing business.

*Maritime Fish* is inapplicable here, as the corporate opportunity there -- a client that wished to buy fish -- was clear. Here, it is less so. The Sale Property would constitute a corporate opportunity if Quality Lumber was actively seeking to buy it, but if it made no overtures or offers for over two years, it would be difficult to determine, as a

[1] The court takes judicial notice of the fact that November 28, 2002 was Thanksgiving.

matter of law, that there was a tangible expectancy in the property. As a result, the court is unable to determine as a matter of law whether the Sale Property constituted a corporate opportunity.

That is, the issue of fact as to whether the meetings where representatives of Quality Lumber and Brilliant Prospects expressed interest in the Sale Property took place in 2000 or 2002 is a material one that precludes summary judgment for plaintiffs on the issue of whether Chao, Qian, Wang, Ong, Liu and Chai are liable for usurping a corporate opportunity. Accordingly, the branch of plaintiff's motion seeking summary judgment as to liability on this claim must be denied.

**B. Defendants Affirmative Defenses**

Defendants' answers list various affirmative defenses, including lack of standing, unclean hands, waiver/estoppel, laches, ratification, acquiescence, unjust enrichment, statute of limitations and failure to mitigate damages. Plaintiffs, in their moving papers, address each affirmative defense and their arguments for why it should be dismissed. Defendants do not address plaintiffs' arguments and, as such, have abandoned their affirmative defenses (*see Perez v Folio House, Inc.*, 123 AD3d 519, 520 [1st Dept 2014] [failure to address claims indicates an intention to abandon them]). However, as discussed below, defendants are entitled to dismissal on other grounds.

**C. Application to Amend**

Similarly, defendants do not make any arguments specific to plaintiffs' motion to amend. "It is well established that leave to amend a pleading is freely given absent prejudice or surprise resulting directly from the delay (*Anoun v City of New York*, 85 AD3d 694, 694 [1st Dept 2011] [internal quotation marks and citation omitted]). Here, as defendants fail to show how adding

Quality Lumber 3 as a plaintiff would prejudice or surprise them, the branch of plaintiff's motion to add Quality Lumber 3 as a plaintiff must be granted. However, since plaintiff does not attach a proposed amended third complaint, this branch of the motion effectively seeks an amendment of the caption rather than the complaint. To that extent, this branch of the motion would be granted if it were not moot because defendants are entitled to dismissal of the second amended complaint.

**II. Chao, Qian, Wang, Ong, Liu, Kingsland, Chen, Hayashi, and Miao Land's Motion for Summary Judgment**

**A. Breach of Fiduciary Duties**

Initially, defendants argue that plaintiffs' second amended complaint must be dismissed because they confuse claims they bring as individuals with those they assert derivatively as shareholders on behalf of the corporation. Defendants rely on *Abrams v Donati* (66 NY2d 951, 953 [1985]), which held that a "[a] complaint the allegations of which confuse a shareholder's derivative and individual rights will . . . be dismissed."

Plaintiffs argue in opposition that the claims are not confused, as both the corporate and individual plaintiffs have viable claims against defendants. In support, plaintiffs cite to *Hammer v Werner* (239 App Div 38, 44 [2d Dept 1933]), which held that:

> "The fact that a particular act of directors may constitute a wrong to the corporation which may be righted ordinarily on behalf of the corporation does not bar a stockholder from having redress if that act effects a separate and distinct wrong to him independently of the wrong to the corporation. Redress of this latter wrong is available to him personally despite the right of a present stockholder to redress the wrong in a derivative action so far as it relates to the corporation."

In *Yudell v Gilbert* (99 AD3d 108, 110 [1st Dept 2012]), the First Department considered the question of "the difference between direct and derivative claims." The

Court acknowledged that "New York has lacked a clear approach for determining this difference. Instead, our jurisprudence consists of case by case analyses, that are sometimes difficult to apply to new fact patterns" (*id.*). In order to remedy this problem and provide a "clear and simple framework," *Yudell* adopted a test developed by the Supreme Court of Delaware in *Tooley v Donaldson, Lufkin & Jerette, Inc.* (845 A2d 1031 [Del 2004]). The *Tooley* test provides that, when determining whether a claim is direct or derivative

> "[a] court should look to the nature of the wrong and to whom the relief should go. The stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing injury to the corporation."

(*Yudell*, 99 AD3d at 114 [internal quotation marks and citation omitted]).

The Court of Appeals held in *Abrams* that diversion of corporate assets is a wrong to the corporation (66 NY2d at 953). Plaintiffs fail to articulate any direct injury outside of the injury to the corporation and concede that "the relief and damages are singular, and it is not significant" whether that relief is granted to the corporate entities or the individuals. In these circumstances, it is clear, under the *Tooley* test, that the diversion of corporate assets is a derivative claim that plaintiffs confuse with duplicative direct claims.

Under *Abrams*, the court must dismiss the entire second amended complaint because of this confusion. *Abrams* is clear: "[a] complaint the allegations of which confuse a shareholder's derivative and individual rights will . . . be dismissed" (66 NY2d at 953). Thus, the court must dismiss the second amended complaint.

Though it is dismissing the second amended complaint, the court, for the sake of clarity and completeness, will analyze whether defendants would have been entitled, on substantive grounds, to dismissal of plaintiffs' claims for fraud and fraud in the inducement.

**B. Fraud**

The second amended complaint brings a claim for fraud against Chao, Quian, Wang, Ong and Liu based on their alleged promise that they would not obtain any interest in Sale Property outside of Quality Lumber/Brilliant Prospects. Plaintiffs allege that these promises were made at the alleged shareholder meeting in December 2002.

"The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance . . . and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). Here defendants argue simply that plaintiffs offer no evidence that the shareholder meeting in 2002 took place at all. However, plaintiffs proffer Zheng's affidavit, in which he states that the shareholder meeting took place on December 4, 2002 (Zheng aff, ¶ 67). Thus, as there is a question of fact as to whether the meeting took place, defendants fail to make a prima facie showing entitling them to judgment on this cause of action. If they had not been entitled to dismissal of the complaint as a whole, this branch of defendants' motion would have been denied.

**C. Fraud in the Inducement**

Plaintiffs allege that defendants Kingsland and Chen are liable for fraud in the inducement because Kingsland and Lian-Shou Chan (Chan) represented to plaintiffs that Chao, Quian, Wang, Ong, Liu, and Chai had no relationship with Kingsland.

A viable claim for fraudulent inducement requires a showing "that there was a false representation, made for the purpose of inducing another to act on it, and that the party to whom the representation was made justifiably relied on it and was damaged" (*Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498 [1st Dept 2011]). Defendants argue briefly that "[T]here is no evidence, however, that any such meeting took place," without specifying any particular meeting. Clearly, this would not have been enough to make a prima facie showing of entitlement to summary judgment had defendants not been entitled to dismissal on other grounds.

**III. Chai's Motion For Summary Judgment**

While Chai filed a separate motion, he simply joined the motion of the other defendants. For the reasons articulated above, Chai is also entitled to dismissal of plaintiffs' second amended complaint.

**CONCLUSION**

Accordingly, it is

ORDERED that defendants' motions for summary judgment dismissing the second amended complaint (motion Seq. Nos. 002 and 003) are granted. And it is further

ORDERED that the Clerk of the Court shall enter Judgment accordingly. And it is further

ORDERED that plaintiffs' motion (motion seq. No. 001) is denied as moot. And it is further

ORDERED that counsel for defendants shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for plaintiffs.

Dated: 9.16.16

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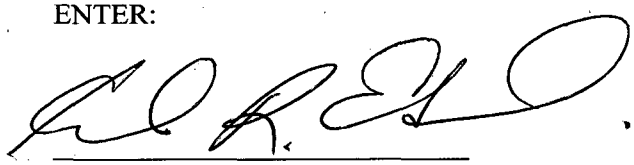

Hon. CAROL R. EDMEAD, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.