

**47-53 Chrystie Holdings LLC v Thuan Tam Realty Corp.**

2018 NY Slip Op 32210(U)

September 7, 2018

Supreme Court, New York County

Docket Number: 651896/2015

Judge: Saliann Scarpulla

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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47-53 CHRYSTIE HOLDINGS LLC, THEODORE WELZ,  
Plaintiff,

INDEX NO. 651896/2015  
MOTION SEQ. NO. 007

- v -

**DECISION AND ORDER**

THUAN TAM REALTY CORP., WING YUI CHOI, RUDOLPH  
TRAN, DIANE CHOI, WILLIAM CHOI, CAM THI THAI, LISA  
QUACH FKA LISA FONG, CHUNG TEM CHOI, JONATHAN  
CHOI,  
Defendant.

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The following e-filed documents, listed by NYSCEF document number 135, 136, 137, 138, 139, 140,  
141, 142, 143, 144, 147, 148, 149, 150, 151, 152, 153, 154  
were read on this application to/for Attorney - Fees

HON. SALIANN SCARPULLA:

Defendant Rudolph Tran (“Tran”) moves pursuant BCL 724 (c) for an order compelling defendant Thuan Tam Realty Corp. (“Corporation”) to reimburse Tran for attorneys’ fees he has incurred in this action and for an advancement.

**Background**

This action arises from an unsuccessful attempt to sell the Corporation’s shares, and plaintiffs seek, *inter alia*, specific performance of an alleged contract of sale that would force the Corporation’s shareholders to sell their respective shares.

Tran is a shareholder of the Corporation, which owns property located at 47-53 Chrystie Street, New York, NY. Defendants Diane Choi, William Choi, Cam Thi Thai,

Lisa Quach, Chung Tem Choi, Jonathan Choi (collectively, "Choi Defendants") are also shareholders of the Corporation. Additionally, the Estate of Wing Yui Chan ("Estate")<sup>1</sup> and a shareholder not a party to this action are the remaining shareholders.

In 2016, Tran sought reimbursement from the Corporation's board of directors for his attorneys' fees related to this action, but the board denied his request. Then, in March 2017, Tran was elected as one of the Corporation's directors in addition to the existing directors Diane Choi and Cam Thi Thai. Tran attests that once he became a director, he again sought indemnification for his attorneys' fees, yet the Corporation continued to deny his request. Tran further attests that the Corporation has paid the legal fees for the Corporation's other directors and shareholders.

According to Diane Choi, the board of directors denied Tran's request and continues to deny his request because Tran supports the sale of the Corporation's shares in contravention to the Corporation's alleged interests. Diane Choi further attests that his conduct constitutes disloyalty.

Tran now seeks a court order for reimbursement of his attorneys' fees from when he became a director to present in addition to an advancement during the pendency of this action. The Corporation opposes, arguing that the Corporation's by-laws do not authorize indemnification of an officer or director, and that the complaint as asserted against Tran does not relate to his conduct as a director.

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<sup>1</sup> Although counsel for Tran also represents the Estate, Tran is the sole moving party because, according to the papers, Tran has paid the legal fees on behalf of both.

Tran's counsel submits an affidavit attesting that Tran has incurred fees in the amount of \$34,579.72 and includes corresponding invoices.

### Discussion

As an initial matter, it is undisputed that the Corporation's by-laws do not expressly authorize or prohibit indemnification of an officer or director. Even in the absence of an express authorization or prohibition, however, I may direct that such payment be made to the extent authorized by statutes. *See Tulino v Tulino*, 148 AD3d 755, 757 (2d Dep't 2017) ("Where a corporation does not provide for indemnification, indemnification may be obtained by court order").

The determinative issue then is whether the action against Tran is brought against him "by reason of the fact that he . . . was a director or officer of the corporation" as employed in BCL 722 (a). *See also Brittonia 54 Hotel Corp. v Freid*, 251 A.D.2d 49, 50 (1st Dep't 1998) ("Section 722 of the Business Corporation Law permits a corporation to indemnify a past or present officer for his reasonable litigation expenses when he is sued by reason of the fact that he was an officer, *i.e.*, for his actions taken as an officer.").

Review of the papers submitted demonstrate that this action was brought against Tran as a shareholder of the Corporation and not as a director. Tran, nevertheless, argues that he is entitled to an advancement during the pendency of this action, pursuant BCL 724 (c), because Diane Choi's affidavit, which attests that he is disloyal, raises genuine issues regarding his conduct as a director.

BCL 724 (c) provides that I may direct an advancement for directors and officers if I "find that that the defendant has by his pleadings or during the course of the litigation

raised genuine issues of fact or law.” Contrary to Tran’s position, however, BCL 724 (c) does not apply here because Tran is being sued as a shareholder and not a director. In the absence of an issue regarding the capacity in which Tran is being sued, Tran’s alleged disloyalty is irrelevant.

At bottom, this lawsuit is about forcing the Corporation’s shareholders to sell their respective shares, which includes Tran, and is unrelated to any action Tran has taken as a director. While I am sympathetic to Tran’s argument that he is being treated differently than the other shareholders, I have no authority to override the Corporation’s determination not to indemnify him. To the extent Tran has a claim as a shareholder for the Corporation’s decision in denying him attorneys’ fees, he may seek alternative relief on an applicable ground.

Accordingly, I deny Tran’s request for reimbursement of his attorneys’ fees and for an advancement.

In accordance with the foregoing, it is

ORDERED that defendant Rudolph Tran’s motion is denied.

This constitutes the decision and order of the court.

9/7/18  
DATE

*Saliann Scarpulla*  
SALIANN SCARPULLA J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER

REFERENCE