

Choi v Wu
2022 NY Slip Op 32842(U)
August 21, 2022
Supreme Court, New York County
Docket Number: Index No. 651716/2018
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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JOANNE CHOI, WILLIAM CHOI, KENNETH TAM, MZ
 GLOBAL, LLC, 8TH AVE ENT LLC, and COASTLINE
 HOLDING LLC,

Plaintiffs,

- v -

CARL WU AND RUDY J. WONG, AS ADMINISTRATORS
 OF THE ESTATE OF WELLMAN WU, DECEASED,
 DANIEL CAI, LOUIS LIN, THE BOARD OF THE POINT
 128, LLC AND, THE POINT 128, LLC, and EXECUTIVE
 OFFICE DE POINT, LLC,

Defendants.

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INDEX NO. 651716/2018
 MOTION DATE N/A
 MOTION SEQ. NO. 011

**SUPPLEMENTAL DECISION
 + ORDER ON MOTION**

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 011) 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 351, 352, 353, 354, 390, 393, 394, 395, 396, 397, 398, 399, 400 were read on this motion to/for MISCELLANEOUS.

In motion sequence number 011, plaintiffs Joanne Choi, William Choi, Kenneth Tam, MZ Global, LLC, and 8th Ave Ent LLC moved pursuant to CPLR 3126 for sanctions against defendants The Board of the Point 128, LLC (Board) and the Point 128, LLC (The Point) (collectively, defendants) for failure to comply with the court's January 15, 2020 conference order (Conference Order). In the Conference Order, the court ordered the Board and The Point to serve affidavit(s) of persons with knowledge setting forth all information regarding three QuickBook files on or before January 24, 2020. (NYSCEF 327, Conference Order at 1¹.)

¹ Pages cited refer to NYSCEF generated pagination.
 651716/2018 CHOI, JOANNE vs. WU, WELLMAN
 Motion No. 011

Motion sequence number 011 was denied on July 11, 2021 (July 2021 Decision and Order)² on the ground that plaintiffs did not show that the “conduct was willful or in bad faith” (NYSCEF Doc. No. [NYSCEF] 390, July 2021 Decision and Order [mot. seq. no. 009] at 6; see *Fish & Richardson, P.C. v Schindler*, 75 AD3d 219, 220 [1st Dept 2010] [internal quotation marks and citation omitted] [holding that sanctions under CPLR 3126 are proper when the moving party can establish that the “failure to comply was willful, contumacious or in bad faith.”].) The court permitted the Board and The Point

“one last chance to comply with the [Conference Order] and submit an affidavit from a person with knowledge regarding the missing information about the QuickBook files. If this directive cannot be complied with, the Point and the Board shall provide a Jackson affidavit detailing why they lack this knowledge and confirming that all information in their possession regarding the QuickBooks files has been produced or otherwise addressed. The Point and the Board will have twenty days from the date of this order to provide this information. If there is noncompliance with this order, plaintiffs will be awarded attorney’s fees for this motion.”

(*Id.* at 7.)

In response to the court’s directive, on August 2, 2021, defendants filed a letter, in lieu of an affidavit³, from Shu Page and an affidavit from defendant Louis Lin regarding the information related to the QuickBook files. (NYSCEF 393, Defendants’ Response.) Page’s letter, dated July 29, 2021, is addressed to Lin, who was a current board member for The Point. (*Id.*) Generally, Page’s letter identifies who created, inputted the data, and maintained the QuickBook files for the years 2010-2013, 2014-2015, 2016-2018, and from October 2019 thereafter. (*Id.* at 3.) Page states that her

² The relevant factual background is detailed in the court’s July 2021 Decision and Order.

³ Page stated that a letter was provided because Page was “still in Taiwan and cannot obtain an appointment to have an affidavit notarized before the deadline to provide the requested information.” (NYSCEF 393, Defendants’ Response at 3.)

knowledge is “based upon [her] previous employment with Broadtrade Group, Inc. (‘Broadtrade’) and EODP.” (*Id.*)

Lin’s further states that it is intended to provide additional information regarding the missing QuickBook files, for which he “consulted with Yen Chi Lee a/k/a Gladys Lee who used to work for Executive Office De Point, LLC (‘EODP’) which is the managing agent for The Point and Shu Page who used to work as the building manager for The Point through her employment with EODP.” (*Id.* at 5.) However, Lin’s affidavit reiterates many of the statements made in Page’s letter. (*Id.* at 5-7.) Lin attests that “[n]o other current board member of The Point, nor anyone else employed by EODP, The Point, or Broadtrade had any additional information that what is included in this affidavit with regard to the requested information relating to the three QuickBook files.” (*Id.* at 7.)

Plaintiffs argue that defendants’ submission violates the July 2021 Decision and Order because it lacks either an affidavit from a person with knowledge regarding the QuickBooks files or a *Jackson* affidavit. Therefore, based on this violation, plaintiffs contend they should be awarded attorneys’ fees for bringing this motion pursuant to the July 2021 Decision and Order. (*See generally* NYSCEF 394, Gabriel Levinson, Esq. [Levinson] aff.)

Page’s Unsworn Statements

Plaintiffs argue that Page’s unsworn letter violates the July 2021 Decision and Order because it is not an affidavit from a person with knowledge of the missing QuickBook files. (NYSCEF 394, Levinson aff. ¶ 8.) They also contend that the fact that Page is in Taiwan does not excuse noncompliance because defendants have had more

than a year and a half to obtain an affidavit from Ms. Page. (*Id.* ¶ 10; *see also id.* at ¶ 11 [explaining that defendants represented to plaintiffs that they would provide supplemental *Jackson* affidavits and an affidavit from Page in February 2020].)

The statements contained in Page's letter were apparently relied on by Lin in submitting, ostensibly, his *Jackson* affidavit with respect to the QuickBooks files. (See, e.g., NYSCEF 393, Defendants' Response at 6 ["I was informed by Ms. Page, that Alyssa Lin, who was employed by Global Vision, maintained the 2010-2013 QuickBooks file and was the only person to input data to that file."].) Thus, in the court's view, the main issue is not with Page's letter to Lin but with Lin's affidavit. Page does not characterize her "letter in lieu of an affidavit" as an affidavit, and plaintiffs' attack on the letter is misplaced as the court highlighted above. In any event, plaintiffs have failed to provide any law as to why Page's unsworn letter cannot be used and considered by Lin. The arguments made in support of the court rejecting Page's letter are conclusory.

Further, plaintiffs argue that defendants should not be permitted to "backdoor Ms. Page's unsworn statements through the affidavit of a third party with no knowledge," i.e., Lin's affidavit. (NYSCEF 394, Levinson aff. ¶ 9.) Again, plaintiffs have failed to present law to support a finding that Lin's affidavit insufficient to qualify as a *Jackson* affidavit based on his reliance on the letter.

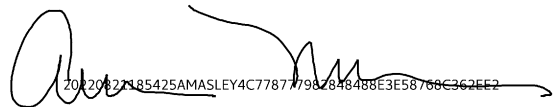
Page's Prior Sworn Testimony

Plaintiffs contend that Page's statements in her letter contradict her prior testimony, and she should be "precluded from now claiming in an unsworn letter that she prepared, and has knowledge about, those same books and records" based on her prior sworn testimony. (*Id.* ¶ 14.) Plaintiffs direct the court to Page's August 22, 2019

deposition to show the alleged inconsistencies. Plaintiffs’ counsel avers that, in 2019, when Page was asked a question about the March 27, 2018 QuickBooks, she replied “I don’t know. I don’t do books.” (NYSCEF 394, Levinson aff. ¶ 13.) However, plaintiffs do not include the August 22, 2019 deposition of Page despite plaintiffs’ purported reliance on the excerpts. Rather, plaintiffs’ counsel’s affirmation contains screenshots of Page’s purported deposition transcript. (*Id.*) The court will not solely rely on the screenshot excerpts provided by plaintiffs’ counsel and cannot make a determination as to the alleged inconsistencies of Page’s testimony.

Accordingly, it is

ORDERED that plaintiffs’ request for attorneys’ fees is denied.



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8/21/2022			ANDREA MASLEY, J.S.C.	
DATE				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE