To be Argued by:
CHRISTOPHER M. LYNCH
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Second Department

Docket No.: 2020-06947

NANCY SHUNKUEN NG, individually and derivatively on behalf of ASquared Group, Inc. as Successor in Interest to Kyoto Restaurant Inc. and Kyoto Dining Group Inc.,

Plaintiff-Respondent,

– against –

ASQUARED GROUP, INC. as Successor in Interest to Kyoto Restaurant Inc. and Kyoto Dining Group Inc., XYZ CORP. a fictitious corporation name intending same to be a successor in interest to ASquared Group, Inc. d/b/a Mira Sushi a/k/a Mira Sushi & Izakaya and ANDY LEE,

Defendants-Appellants.

BRIEF FOR PLAINTIFF-RESPONDENT

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This opposition brief is submitted on behalf of the Plaintiff-Respondent Nancy Shunkuen Ng, in reply to the Defendant-Appellants Asquared Group Inc., as successor in interest to Kyoto Restaurant, Inc., Kyoto Dining Group, Inc., and Andy Lee's appeal brief.

COUNTER-STATEMENT OF FACTS

The Plaintiff-Respondent, Nancy Shunkuen Ng ("Nancy"), brought the underlying action individually and derivatively on behalf of Asquared Group Inc. ("Asquared"), as successor in interest to Kyoto Restaurant, Inc. ("KRI") and Kyoto Dining Group, Inc. ("KDI"). Nancy asserted that Defendant-Appellant Andy Lee ("Lee") misappropriated the assets of both KRI and KDI, in which Nancy held a twenty-five (25%) percent interest. (R. 15).

On October 10, 2004, Lee and Eddie Choi ("Eddie"), the son of Nancy, entered into a business arrangement ("Kyoto Partnership") whereby Eddie held a twenty-five (25%) percent interest based upon his contribution of $67,500.00. (R. 45). Through this entity, the parties opened a Japanese restaurant located at 153-11 Union Turnpike, Flushing, New York ("Restaurant"). (R. 45). Thereafter, on or about February 19, 2009, the parties formed KDI for the purpose of operating a new restaurant located at 153-15 Union Turnpike, Flushing, New York ("New Restaurant") next door. (R. 54). Eddie held a twenty-five (25%) percent interest in KDI.

The Kyoto Partnership converted into KRI, which incorporated on January 7, 2010 and continued operation of the restaurant. (R. 54). As per the shareholder agreement dated April 21, 2010, Eddie was a twenty-five (25%) percent shareholder of KRI. (R. 54). Sometime in 2012, Eddie transferred his interest in KRI and KDI to his mother, Nancy, because he was traveling often due to his other business interests. (R. 21).

For years, the Plaintiff-Respondent was receiving shareholder statements and financial returns from the businesses; however, everything ceased being given to Nancy in January 2015. The Plaintiff-Respondent confronted Lee, the seventy-five (75%) percent shareholder, regarding this and his response was that he was being sued by employees. (R. 45). Later, when the Plaintiff-Respondent spoke with Lee again, his rationale for not providing returns or statements was that the restaurants were not making money. (R. 54).

Ultimately, the Plaintiff-Respondent and her son, Eddie, learned that Lee had formed a new corporation named Asquared in April 2013, and had been operating both restaurants under the Asquared corporation. (R. 55). Moreover, Nancy and Eddie learned that Lee had also dissolved KDI on January 15, 2014, and KRI on February 20, 2014, and transferred all of the assets of both KDI and KRI to Asquared and then to Stellar 153, Inc. ("Stellar"). Lee never notified Nancy of these decisions, nor did he provide her with any information related to the winding down of either

corporation. (R. 55). Lee also put forth this transfer in violation of the shareholder agreements requiring unanimous approval of all shareholders prior to the transfer. (R. 194-195).

Additionally, Lee breached his fiduciary duty owed to Nancy, as well as KDI and KRI. Lee admitted, at the inquest in the underlying proceeding, that he sold Asquared to his father's girlfriend for $300,000.00, of which $250,000.00 was an interest free promissory note. (R. 203).

Asquared, for all intents and purposes, is simply a continuation of the KDI and KRI corporations, the only difference being that Plaintiff-Respondent was frozen out of the operations. Furthermore, when the Plaintiff-Respondent requested to review the books and records of Asquared, KDI, and KRI, Lee refused to cooperate and gave no explanation or communication. (R. 29). It is important to note that all books and records pertaining to Asquared, and the restaurants are, and were, under the exclusive care and control of Lee. (R. 29).

The Defendant-Appellant failed to respond to the Plaintiff-Respondent's properly served Summons and Verified Complaint, and the lower court entered a default judgment against the Defendant-Appellant, ordering that an inquest be held on the issue of damages. (R. 14-16). The Plaintiff-Respondent requested certain statements and financial documents from the Defendant-Appellant in preparation for

the inquest, and Defendant-Appellant Lee again failed to provide the requested documents aside from selected billing statements. (R. 29).

INQUEST AND DECISION

At inquest, the Plaintiff-Respondent successfully established that the Defendant-Appellant transferred both restaurants to Stellar. (R. 139). Moreover, the lower court held that the Defendant-Appellant Lee breached his fiduciary duty to the Plaintiff-Respondent when he transferred the corporate interests to Asquared and then again to Stellar. (R. 26-27)

In its decision dated March 13, 2020, the lower court held that the Defendant-Appellee's actions "were undertaken as part of a scheme to freeze [Nancy] out of her ownership interest in both Kyoto and Kyoto Dining, without any compensation." (R. 17-41). The lower court also held that Nancy presented adequate proof that she was entitled to recover punitive damages in her individual capacity. (R. 32-33).

The lower court awarded Nancy $135,208.98 in compensatory damages; punitive damages in an amount of $700,000.00; legal fees in an amount of $42,345.00 and disbursements in an amount of $2,805.98; with a nine (9%) percent interest rate on the total judgment of $880,359.96 from the time the judgment is entered until it is paid by Defendant-Appellant Lee. (R. 39-41).

ARGUMENT

Though the Defendants defaulted, they did appear at the inquest on damages to present a defense. The Second Department has held that when reviewing a determination after a nonjury trial "this Court is as broad as that of the trial court, and a judgment may be rendered if warranted by the facts, bearing in mind that in a close case, the trial judge had the advantage of seeing the witnesses and hearing the testimony." Mears v. Long, 173 A.D.3d 734, 102 N.Y.S.3d 651, 2019 N.Y. Slip Op. 04376 (2d Dept. 2019).

Typically, upon review of a nonjury trial, due deference is given to the trial court's determination. Warm v. State of New York, 308 A.D.2d 534, 764 N.Y.S.2d 483, 2003 N.Y. Slip Op. 16794 (2d Dept 2003) ("While an appellate court's authority in reviewing a determination after a nonjury trial is as broad as that of the trial court, due deference is given to the trial court's. [] Such a determination should not be disturbed on appeal unless it is unsupported by legally sufficient evidence or could not have been reached by any fair interpretation of the evidence."); Mechwart v. Mechwart, 292 A.D.2d 354, 738 N.Y.S.2d 604 (Mem), 2002 N.Y. Slip Op. 01749 (2d Dept 2002).

Pursuant to NY CPLR § 5511, no appeal lies from a judgment or order entered upon the default of the aggrieved party. NY CPLR § 5511; Park Lane N. Owners,

Inc. v. Gengo, 151 A.D.3d 874, 875-6, 58 N.Y.S.3d 81, 2017 N.Y. Slip Op. 04853 (2d Dept. 2017).

As such, under those circumstances, the only appealable issue is an award of damages. However, when a lower court's determination regarding damages is supported by the record and warranted by the facts, the Second Department will not disturb that determination upon review. Kirchoff-Consigli Constr. Mgt., LLC v. Dharmakaya, Inc., 186 A.D.3d 585, 129 N.Y.S.3d 526, 2020 N.Y. Slip Op. 04468 (2d Dept. 2020) ("Here, contrary to the plaintiff's contentions, the Supreme Court's determinations regarding the plaintiff's damages and that the plaintiff was not a prevailing party for the purpose of an award of attorneys' fees pursuant to the parties' contract, were supported by the record and warranted by the facts. [] Therefore, those determinations will not be disturbed."); Mad Den, Inc. v. Vaccarino, 151 A.D.3d 712, 714, 56 N.Y.S.3d 522, 2017 N.Y. Slip Op. 04432 (2d Dept. 2017) ("Here, the Supreme Court's determination regarding D'Agostino's damages was supported by the record, warranted by the facts, and should not be disturbed.").

I. THE LOWER COURT'S DECISION AND AWARD OF DAMAGES ARE SUPPORTED BY THE RECORD AND WARRANTED BY THE FACTS

The Court of Appeals has held that the fundamental purpose of compensatory damages is to "have the wrongdoer 'make the victim whole.'" E.J. Brooks Co. v. Cambridge Sec. Seals, 31 N.Y.3d 441, 448-9, 105 N.E.3d 301, 80 N.Y.S.3d 162,

168 Lab. Cas. P 61,860, 2018 N.Y. Slip Op. 03171 (2018) (“‘Put another way, these measure fair and just compensation, commensurate with the loss or injury sustained from the wrongful act’ [] ‘The damages must be compensatory only’ and must result ‘directly from and as a natural consequence of the wrongful act’ [] ‘The goal is to restore the injured party, to the extent possible, to the position that would have been occupied had the wrong not occurred.’”). The damages “‘need not be immediate, but need to be so near to the cause only that they be reasonably traced to the event.’” Id. at 448-9. The Court of Appeals noted that “[t]he standard is not one of ‘mathematical certainty’ but only ‘reasonable certainty.’” Id. at 449.

In the instant case, the damages have been calculated to a reasonable certainty through the available evidence submitted and testimony of Nancy and Eddie. (R. 27-41). The calculations set forth at the lower court were sufficiently and reasonably based upon the financial information at hand, which constitutes reasonable certainty, and as such should be upheld.

The lower court, when calculating damages, utilized the revenue numbers available, along with the formula provided for in the shareholder agreement, in order to determine the monetary value of the Plaintiff-Respondent’s ownership stake with reasonable certainty:

> The credit card receipts for that time period totaled $1,888,009.12. When this amount is divided by 12, it comes out to be $157,334.09, which is the average monthly credit card sales for the 12-month period prior to

> the transfer to Stellar. Mr. Choi further testified that the average cash receipts for these two restaurants is approximately 20% of the credit card receipts, a percentage, this witness explained, that is accepted in the industry as a method for calculating cash transactions. Mr. Choi testified that the cash receipts for the two restaurants averaged $39,333.52 monthly or $472,002.28 annually. Thus, according to the plaintiff the combination of the credit card and cash receipts totals $196,667.62. When this figure is multiplied by the agreement formula of 2.75, "the price of the capital stock of each Shareholder or the value of the business of the Corporation to be sold" the sum is $540,835.95. Given that the plaintiff owned a 25% share in the two corporations, the value of her investment in the two business is $135,208.98.

(R. 28). Lee refused to furnish financial statements or comply with requests to examine the corporate bank accounts and expense records. (R. 29-30). As such, under the circumstances, the calculations provide reasonable certainty and represent a fair approximation to support compensatory damages. (R. 29-30).

II. THE PUNITIVE DAMAGES AWARD CONSTITUTES REASONABLE COMPENSATION UNDER THE CIRCUMSTANCES AND SHOULD BE AFFIRMED

The decision whether to award punitive damages should "reside in the sound discretion of the original trier of the facts." Fordham-Coleman v. Nat'l Fuel Gas Distribution Corp., 42 A.D.3d 106, 113-14, 834 N.Y.S.2d 422, 428-29 (4 Dept., 2007), quoting Nardelli v. Stamberg, 44 N.Y.2d 500, 502, 40 N.Y.S.2d 443, 377 N.E.2d 975 (1978).

Conduct justifying a award of punitive damages "need not be intentionally harmful but may consist of actions which constitute willful or wanton negligence or recklessness." Home Ins. Co. v. Am. Home Prod. Corp., 75 N.Y.2d 196, 204, 550 N.E.2d 930 (1990).

Such awards "are intended as punishment for gross misbehavior for the good of the public and have been referred to as a sort of hybrid between a display of ethical indignation and the imposition of a criminal fine…. Punitive damages are allowed on the ground of public policy and not because the plaintiff has suffered any monetary damages for which [s]he is entitled to reimbursement…. The damages may be considered expressive of the community attitude towards one who willfully and wantonly causes hurt or injury to another." Id. at 203.

Additionally, the Court of Appeals has held that "[p]unitive damages are intended not only to 'punish the tortfeasor' but also to 'deter future reprehensible conduct.'" Chauca v. Abraham, 30 N.Y.3d 325, 331, 89 N.E.3d 475, 67 N.Y.S.3d 85, 2017 Fair Empl. Prac. Cas. (BNA) 415,033, 101 Empl. Prac. Dec. P 45,933, 2017 N.Y. Slip Op. 08158 (2017) ("[The] punitive damages standard [is] 'essentially ... conduct having a high degree of moral culpability which manifests a conscious disregard of the rights of others or conduct so reckless as to amount to such disregard' [] "Punitive damages represent punishment for wrongful conduct that goes beyond mere negligence and are warranted only where aggravating factors

demonstrate an additional level of wrongful."). Generally, on appeal, the standard of review for a damages award is whether it deviates materially from what would be reasonable compensation. Estate of Loughlin v. State, 146 A.D.3d 863, 45 N.Y.S.3d 521, 2017 N.Y. Slip Op. 00290 (2d Dept. 2017).

At inquest, the Plaintiff-Respondent established with sufficient testimony, credibility, and proof that she was entitled to punitive damages based upon Lee's breach of fiduciary duty, independent of his duty to the company. (R. 32-33.) Additionally, the lower court found that the Defendant-Appellant purposefully attempted to freeze the Plaintiff-Appellant out of the business indicating "malice or evil motive sufficient to warrant an award of punitive damages." (R. 31-32). It has been long held that the Second Department has authority as broad as the lower court when reviewing a determination; however, the Second Department has also recognized the lower court's benefit and advantage of witnessing the testimony and credibility of witnesses as it pertains to making determinations.

These acts are willful, wanton, and demonstrate a high degree of moral culpability. The case law on this subject supports such a finding under virtually the same or similar facts as deemed admitted herein, (see, Stein v. McDowell, 74 AD3rd 1323 [2d Dep't 2010]; Giblin v. Murphy, 73 NY2d 769, 772 [1988]).

III. THE COMPENSATORY DAMAGES AWARD IS A FAIR APPROXIMATION OF THE LOSS SUSTAINED AND SHOULD BE AFFIRMED

In the instant case, regarding compensatory damages, determinations made at the inquest were based upon the proof and testimony of Nancy and Eddie, and the fact that Lee exclusively controlled the financial statements; additionally, the Defendant-Appellant refused to comply with requests to examine the corporate bank accounts and expense records. (R. 29.) Moreover, the lower court held that the Defendant's subsequent sale of Asquared to Stellar for "such a devalued price provided further proof of [Lee's] deceptiveness and deceit." (R. 33).

The lower court, citing to Wolf v. Rand, held that since a breach of fiduciary duty was proved by the Plaintiff-Respondent, the lower court was "accorded significant leeway in ascertaining a fair approximation of the loss as contrasted with the more precise, compensatory standard of a contract or tort case." Wolf v. Rand, 258 A.D.2d 401, 402-03 (1st Dept 1999). The lower court, quoting Wolf v. Rand, stated when a difficulty is encountered in calculating damages and that difficulty "is attributable to the defendant's misconduct, some uncertainty may be tolerated." Id. at 402-03.

In the Defendant-Appellant's appeal, he wrongfully states that the "Plaintiff failed to present any evidence of the value of her 25% interest as of the date of the transfers to Asquared." (Defendant-Appellant's Brief, p. 14). Meanwhile, the

Defendant-Appellant refused to cooperate with providing adequate disclosures of company records and financial statements as requested by the Plaintiff-Respondent. Additionally, the court held that the Plaintiff-Respondent carried her burden of proof regarding compensatory damages stating, "there was a causal connection between the defendant's conduct and her losses." (R. 30). The lower court went on to state that the amount proven by the Plaintiff-Respondent was "within reason and neither the result of speculation, conjecture, or imagination" and based upon the "evidence submitted at inquest." (R. 30).

Moreover, the lower court concluded that Lee "stole from the plaintiff by 'usurping her ownership interest' in two corporations." (R. 33). The lower court elaborated on the justification for the punitive damages stating that it not only allows Nancy and Eddie to recoup their investment but also deters the Defendant-Appellant from acting "deviously and wantonly dishonest regarding other business concerns." (R. 33). The court stated that this award serves to punish Lee for engaging in such financially harmful conduct. (R. 33).

IV. THE DEFENDANT-APPELLANT IS NOT ENTITLED TO VACATE THE DEFAULT JUDGMENT

"Absent a reasonable excuse for its default, we need not decide whether defendant demonstrated a potentially meritorious defense." Colony Ins. Co. v. Danica Group, LLC, 115 A.D.3d 453, 454, 984 N.Y.S.2d 2, 2014 N.Y. Slip Op.

01527 (1st Dept 2014); Buro Happold Consulting Engrs., P.C. v. RMJM, 107 A.D.3d 602, 968 N.Y.S.2d 61, 2013 N.Y. Slip Op. 04750 (1st Dept 2013) ("Because RMJM failed to proffer a reasonable excuse for its default, its motion to vacate the judgment must be denied, regardless of whether it demonstrated a potentially meritorious defense.").

In the instant case, there was no reasonable excuse for the Defendant-Appellant's default and for that reason any potential meritorious defense is irrelevant. The lower court properly granted a default judgment when the Defendant Lee failed to answer the complaint and did not demonstrate a reasonable excuse for his failure to respond. (R. 107). The lower court held that Defendant's counsel's statement regarding an action pending in federal court "which would affect settlement of the instant action" does not constitute a reasonable excuse for Defendant's failure to answer. (R. 107).

Moreover, the Second Department has held that when exercising discretion regarding what constitutes a reasonable excuse for a default judgment "'a pattern of willful default and neglect' should not be excused." Roussodimou v. Zafiriadis, 238 A.D.2d 568, 569, 657 N.Y.S.2d 66 (2d Dept. 1997). In the instant case, the Defendant-Appellant in its failure to answer the Plaintiff-Respondent's underlying complaint and requests for documentation, has exhibited a willful default, and has not demonstrated a reasonable excuse for the default; therefore, it should not even

be considered whether the Defendant-Appellant has a potentially meritorious defense.

The Defendant-Appellant's pattern of neglect in the underlying action should not be excused. Id. at 569; Santiago v. New York City Health & Hosps. Corp., 10 A.D.3d 393, 394, 780 N.Y.S.2d 764, 2004 N.Y. Slip Op. 06324 (2d Dept. 2004) ("Here, the defendant's failure to appear for the preliminary conference on January 2, 2003, and to comply with the preliminary conference order of the same date, and its failure to respond to the plaintiff's motion to strike its answer or to promptly move to vacate the order dated June 30, 2003, constituted "a pattern of willful default and neglect" which cannot be excused").

CONCLUSION

The Court should affirm the lower court's Decision and Order imposing reasonable compensatory and punitive damages in favor of the Plaintiff-Respondent based upon the financially harmful, deceptive, and devious behavior of the Defendant-Appellant; including Lee's misconduct, breach of fiduciary duty, and engaging in behavior that necessitated the Plaintiff-Respondent's retention of legal counsel to vindicate her ownership rights in the restaurants. The Defendant-Appellant purposefully deceived the Plaintiff-Respondent in an attempt to freeze the Plaintiff-Respondent out of her ownership interest in the two corporations to benefit

himself. The Plaintiff-Respondent successfully established that Lee's conduct was sufficiently malicious to support damages. The lower court properly determined that the damages award serves to punish Lee for his wantonly malicious behavior and acts as a deterrent from Lee engaging in any similar behavior in the future. As such, the Court should uphold the lower court's Decision and Order.

Dated: Hempstead, New York
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APPELLATE DIVISION – SECOND DEPARTMENT
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