

Matter of Tak Yuen Cheung

2007 NY Slip Op 30669(U)

March 1, 2007

Supreme Court, New York County

Docket Number: 0112773/2005

Judge: Nicholas Figueroa

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. NICHOLAS FIGUEROA
Justice

PART 46

In the Matter of the Application of
TAK YUEN CHEUNG,

For Dissolution of the HO FOONG SHIU
REALTY CORP.

INDEX NO. 112773/05
MOTION DATE _____
MOTION SEQ. NO. 4
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No


UPON the foregoing papers, It is ordered that this motion

See Decision and Judgment attached.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be given. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: March 1, 2007



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

In the Matter of the Application of
TAK YUEN CHEUNG,

Index No. 112773/05

Petitioner,

For the Dissolution of the HO FOONG SHIU
REALTY CORP.,

**DECISION AND
JUDGMENT**

Respondent,

Pursuant to Section 1104/1104(a) of the BCL, and
IRENE LAI,

Respondent.

Nicholas Figueroa, J.:

Petitioner, a fifty percent shareholder in respondent corporation, seeks to dissolve a closely held corporation pursuant to BCL §1104-a. He alleges that because the other fifty percent shareholder, respondent Lai, has engaged in oppressive conduct, dissolution of the corporation is required.

Petitioner alleges that he became a shareholder in 1989. He invested \$50,000 in cash and received a certificate for one share. He alleges that the corporation's major asset is a building at 56 Avenue C, in Manhattan that the corporation purchased in 1988, and a house in New Jersey. Petitioner alleges that this building contains eight residential rental apartments and two retail stores, and that the corporation has been receiving rental income from the property.

Petitioner concedes that although he invested \$10,000 in a New Jersey property, he transferred his interest in it to Lai, without consideration, by a September 18, 1987 deed.

Petitioner alleges that he has never received an accounting of the corporation's income and expenses. However, nothing in his papers indicates that he has ever demanded an accounting. He further alleges that Lai controls all of the corporate books and records, collects all of the rents, and pays all of the corporation's bills.

Petitioner contends that "For all intents and purposes, respondent Lai is in 'control' of the corporation." He asserts that "I believe respondent Lai does not consider me a 50% shareholder in the corporation." He states that she never provided him with a Schedule K-1 for income tax purposes and has identified herself on income tax returns as owning one hundred percent of the corporation's stock.

Additionally, according to petitioner, Lai is in complete control of the corporate bank account, at United Orient Bank, but that he does not know the amount of money in that account. Nor does he know the current fair market value of the building at 56 Avenue C.

In her affidavit in opposition, Lai agrees that this building is the corporation's sole asset. She states that she and petitioner each contributed \$20,000 towards the building's \$238,000 purchase price.

Lai asserts that the building operated profitably from 1988 to 1993; however, she used approximately \$20,000 of her own funds for the building's operation and maintenance during that period.

In 1993, Lai alleges that petitioner hired a contractor to do work on the building's gas lines. Petitioner supervised the work. During the work, someone removed the gas meter, without Consolidated Edison's knowledge; however, the building continued to receive gas from Consolidated Edison.

Consolidated Edison discovered the meter's removal in 1994 and threatened to discontinue gas service to the building, unless substantial arrears were paid. A discontinuance would have meant loss of utility service to the building's residents.

The matter was settled in 1995. The corporation agreed to pay Consolidated Edison \$71,946.54. The payment left the corporation insolvent.

Lai alleges that, "At the time of the Con Ed crisis, petitioner agreed to relinquish his interest in the corporation. Con Ed was repaid largely through my personal funds or loans that I secured by accepting personal liability." She alleges that petitioner did not make a contribution towards the settlement.

Lai states that she became "upset by this turn of events; during one of our conversations in this period (in or about 1994), insisted that petitioner would have to get out of [the corporation]." According to Lai, "Petitioner agreed not to participate in the corporation any further." After this alleged agreement, petitioner "showed no interest" in the corporation or its building.

Lai had no contact with petitioner from 1994 to 2004. During that period, he made no demands for information "or anything else in connection with [the corporation]." However, in 2004, petitioner's attorney contacted Lai and demanded an inspection of the corporate books and records. Lai alleges that she complied with the demand.

According to Lai, the corporation's building has been generating "some positive income." However, she has not drawn a salary for her building management services; rather, she has "reinvested substantially all of the income from 56 Avenue C back into the building..."

Lai concedes that she identified herself as the corporation's sole shareholder; however, she alleges that she did this with petitioner's "...full knowledge, acquiescence and encouragement..." According to Lai, petitioner is an experienced real estate investor and acknowledges that the

corporation would operate as an S-Corporation; moreover, he was aware that shareholders in such corporations are required to reflect any income or loss on his or her tax returns.

Respondent contends, based on the facts recited in Lai's affidavit, that because petitioner abandoned all participation in the corporation for ten years, during which time he did not demand access to the corporate books and records, he is not entitled to dissolve the corporation, as he was not oppressed, within the meaning of BCL §1104-a.

The court conducted a hearing at which both sides were given the opportunity to give testimony and submit documents. The court is satisfied, based on the hearing and the documents submitted with the application to dissolve the corporation, that petitioner is not entitled to a judgment of dissolution, as he has failed to prove he was an oppressed shareholder.

The facts demonstrate that petitioner failed to have any contact with the corporation for a ten-year period, between 1994 and 2004. During this period, the corporation was forced to spend \$71,946.54 to satisfy a Consolidated Edison arrearage that resulted, as demonstrated by the hearing testimony, from petitioner's failure to supervise maintenance work at the corporation's building, is sole asset.

Petitioner's sole contact with the corporation since 1994, was his 2004 demand to inspect the corporation's books and records. Respondent Lai complied with that demand and furnished the corporate books and records to petitioner in that year.

Petitioner has never demanded an accounting, a shareholders meeting or board of directors meeting.

Petitioner has not proven that the corporation's operations have been impaired.

The facts demonstrate that the corporation has not substantially defeated any of petitioner's reasonable expectations that were reasonable under the circumstances and were central to his

decision to join the venture (*Matter of Brickman v. Brickman Estate at the Point, Inc.*, 253 AD2d 812, citing *Matter of Keys & Beatley [Gardstein]*, 64 NY2d 63, 73).

Although petitioner had access to the corporate books and records, he has not demonstrated that there were corporate profits he was deprived of in any form, by way of dividends or other distribution. Moreover, by his long absence from participation in the corporations affairs, following an incident caused a significant financial loss to the corporation, he has demonstrated that he had not expectation of receiving any benefits from the corporation.

Accordingly, it is

ADJUDGED that the petition is denied and the proceeding dismissed

This constitutes the decision and judgment of the court.

Dated: March 1, 2007

ENTER

J.S.C.

UNFILED JUDGMENT

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