

ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAMES P. DOLLARD IA Part 5
Justice

MAN CHOI CHIU, et al.	x	Index Number <u>21905</u> 2007
-against-		Motion Date <u>January 8,</u> 2008
WINSTON CHIU	x	Motion Cal. Number <u>8</u> Motion Seq. No. <u>4</u>

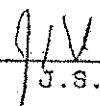
The following papers numbered 1 to 5 read on this motion by defendant Winston Chiu for an order dismissing the complaint asserted against him pursuant to CPLR 3211(a)(1), (2), (4), (5), and (7) and on this cross motion by plaintiff Man Choi Chiu for an order imposing sanctions on the defendant and his attorneys.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1
Notice of Cross Motion - Affidavits - Exhibits ...	2
Reply Affidavits	3
Other (Memoranda of Law)	4-5

Upon the foregoing papers it is ordered that:

Those branches of the motion which are for an order dismissing the first cause of action pursuant to CPLR 3211(a)(5) on the grounds of res judicata and collateral estoppel are granted as to that part of the first cause of action which seeks a judgment declaring "that Winston Chiu has, at best, a nominal financial interest or ownership interest in and to the LLC." Those branches of the motion which are for an order dismissing the first cause of action pursuant to CPLR 3211(a)(5) on the grounds of res judicata and collateral estoppel are otherwise denied. That branch of the motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the second cause of action as insufficiently stated is granted. The remaining branches of the motion are denied. The cross motion is denied. (See the accompanying memorandum.)

Dated: March 11, 2008


 J.S.C.
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MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 5

MAN CHOI CHIU, et al.

X

-against-

WINSTON CHIU

X

INDEX NO. 21905/07

MOTION SEQUENCE NO. 4

BY: DOLLARD, J.

DATED: MARCH 11, 2008

Defendant Winston Chiu (WC) has moved for an order dismissing the complaint asserted against him pursuant to CPLR 3211(a)(1), (2), (4), (5), and (7). Plaintiff Man Choi Chiu (MCC) has cross-moved for an order imposing sanctions upon the defendant and his attorneys.

MCC and WC are brothers and adverse parties in three related actions brought in the New York State Supreme Court, County of Queens: (1) Man Choi Chiu v Winston Chiu (Index No. 21170/02), commenced by the filing of a summons and a complaint on or about August 9, 2002, (2) Man Choi Chiu v Winston Chiu (Index No. 21905/2007), commenced by the filing of a summons and a complaint on or about August 31, 2007, and (3) Winston Chiu v Man Choi Chiu (Index No. 25275/07), commenced by the filing of a summons and a complaint on or about October 10, 2007.

42-52 Northern Blvd., LLC (the LLC) owns property located at 42-52 Northern Blvd., Queens, New York. In 2002, MCC and the LLC began the first action against WC and the trustees of his trust

seeking to set aside as fraudulent a transfer of the property from the LLC made by WC to his trust. The Honorable Laura Blackburne, after conducting a bench trial of the first action, cancelled the deed on the ground of fraud. However, at the trial, Justice Blackburne also granted a motion by the plaintiffs made after the close of evidence to amend the complaint to add a new cause of action for a judgment declaring that WC was only a "nominal member" of the LLC, who could be removed from membership. WC appealed. On March 13, 2007, the Appellate Division, Second Department, affirmed that part of Justice Blackburne's order and judgment (one paper) which set aside the transfer as fraudulent, but the appellate court modified the order and judgment by "(1) deleting the provisions thereof which determined that the defendant Winston Chiu 'was never a member of the [plaintiff 42-52 Northern Blvd.] LLC' and that the plaintiff Man Choi Chiu is the 'sole member' thereof, (2) deleting the provisions thereof which granted the plaintiffs' application to conform the pleadings to the proof by amending paragraphs 50 and 51 of the complaint and paragraph 2 of the ad damnum clause, and (3) deleting the provision thereof precluding the defendants from any financial involvement, participation, management, membership, rights, privileges, interest, or emoluments of membership in the plaintiff 42-52 Northern Blvd. LLC, and the premises known as 42-52 Northern Blvd." (Man Choi Chiu v Chiu, 38 AD3d 619, 620.) The

Appellate Division stated that "the trial court's determination that the defendant Winston Chiu 'was never a member of the [plaintiff 42-52 Northern Blvd.] LLC' was against the weight of the documentary and testimonial evidence relating to the original purchase and financing of the subject premises by the plaintiff 42-52 Northern Blvd., LLC (hereinafter the LLC), in September 1999." (Man Choi Chiu v Chiu, *supra*, 620.) The Appellate Division also stated "the trial court lacked a proper factual and legal basis to grant the plaintiffs' application, after the close of the evidence, to amend the complaint to include a new cause of action for a declaration that Winston Chiu was merely a 'nominal member' of the LLC, who could be expelled therefrom upon payment to him by the LLC of the value of the 4% capital account." (Man Choi Chiu v Chiu, *supra*, 620-621.)

About five months after the Appellate Division rendered its decision, MCC began this action alleging in substance that 42-52 Northern Blvd. was purchased in 1999 for \$5,450,000 with funds attributable to MCC except for a "contribution" by WC of \$193,854.51. WC allegedly made that "contribution" solely for the purpose of obtaining a tax benefit from the sale of another property that he and his wife owned. After title closed on 42-52 Northern Blvd., WC allegedly took back his "contribution." MCC's first cause of action seeks a judgment "(a) declaring that Winston Chiu has, at best, a nominal financial interest or

ownership interest in and to the LLC, (b) declaring the extent of Winston Chiu's financial or ownership interest, if any, in and to the LLC, and (c) directing Winston Chiu to account in connection with his alleged interest in and to the LLC." MCC's second cause of action seeks the expulsion of WC as a member of the company by reason of his fraudulent transfer of the property and/or his removal as an officer.

Those branches of the motion which are for an order dismissing the first cause of action pursuant to CPLR 3211(a)(5) on the grounds of res judicata and collateral estoppel are granted as to that part of the first cause of action which seeks a judgment declaring "that Winston Chiu has, at best, a nominal financial interest or ownership interest in and to the LLC." Those branches of the motion which are for an order dismissing the first cause of action pursuant to CPLR 3211(a)(5) on the grounds of res judicata and collateral estoppel are otherwise denied. "The doctrine of collateral estoppel, a narrower species of res judicata, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same***." (Ryan v New York Telephone Co., 62 NY2d 494, 500; Parker v Blauvelt Volunteer Fire Co., Inc., 93 NY2d 343; Altegra Credit Co. v Tin Chu, 29 AD3d 718; Sam v Metro-North Commuter Railroad, 287 AD2d 378.) It appears

from the opinion of Justice Blackburne that the issue of whether WC had an ownership interest in the LLC was relevant to the cause of action to set aside the transfer of the property for fraud. Her opinion states at page 4: "None of defendant's evidence nor Post-Trial Memorandum of Law disputed the fact the property of the LLC was transferred to the defendant's personal trust. However, defendant claims he had authority to do so because he was the sole owner of the LLC." In modifying Justice Blackburne's order and judgment, the Appellate Division stated: "the trial court's determination that the defendant Winston Chiu 'was never a member of the [plaintiff 42-52 Northern Blvd.] LLC' was against the weight of the documentary and testimonial evidence relating to the original purchase and financing of the subject premises by the plaintiff 42-52 Northern Blvd., LLC (hereinafter the LLC), in September 1999." (Man Choi Chiu v Chiu, supra, 620.) It may be seen that the Appellate Division decided the issue of whether WC had an ownership interest in the LLC in connection with reviewing the cause of action for fraud. (Although the appellate court decided this issue in favor of WC, the transfer was set aside as fraudulent on other grounds.) The Appellate Division also decided the issue of whether WC had an ownership interest in the LLC by holding that there was no factual basis to allow an amendment to the complaint to add a new cause of action for a judgment declaring that WC was merely a "nominal member" of the LLC. The

appellate court found that "the proposed amendment was unwarranted by the evidence***." (Man Choi Chiu v Chiu, *supra*, 621.) To the extent that the instant action seeks a judgment declaring that WC is merely a nominal member of the LLC, the action is barred by the doctrine of collateral estoppel. However, this court does not read the appellate decision as determining the precise extent of WC's interest in the LLC. There is no decretal paragraph in the appellate order declaring the precise extent of WC's interest in the company. While the appellate court relied on the LLC's tax returns for 1999 and 2000 to establish the membership of the company, this court does not read the decision as finding expressly or implicitly that the percentages of ownership stated in the returns (75% for MCC and 25% for WC) are conclusive. WC's own appellate attorney, Michael C. Marcus, Esq., read the decision in the same manner, stating in an affirmation dated May 8, 2007 submitted to the Appellate Division in opposition to a motion to clarify: "the precise amount of the parties' interest in the LLC has yet to be determined and must await further litigation." The doctrines of collateral estoppel and res judicata do not bar that part of the cause of action asserted here for a judgment declaring the precise interests of MCC and WC in their company.

That branch of the motion which is for an order pursuant to CPLR 3211(a)(1) dismissing the first cause of action is denied. Apparently, WC seeks to have the first cause of action dismissed

pursuant to CPLR 3211(a)(1) to the extent that it seeks a judgment declaring that he has less than a 25% ownership interest in the company. In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim***." (Fernandez v. Cigna Property and Casualty Insurance Company, 188 AD2d 700, 702; Vanderminde v Vanderminde, 226 AD2d 1037; Bronxville Knolls, Inc. v Webster Town Center Partnership, 221 AD2d 248.) In the case at bar, MCC has raised issues pertaining to the credibility of the tax returns prepared by the LLC which preclude the court from finding here that WC has at least a 25% interest in the company. In any event, WC is claiming that he has "at least" a 25% interest in the company, and the tax returns, even if credible, do not establish the precise amount of his interest.

That branch of the motion which is for an order dismissing the first cause of action pursuant to CPLR 3211(a)(4) on the ground of a prior pending action is denied. Contrary to the defendant's contention, the date of service does not determine whether an action was first commenced. CPLR 304 provides in relevant part that "[a]n action is commenced by filing a summons and complaint or summons with notice in accordance with rule twenty-one hundred two of this chapter." (See, Wilk v Genesee and Wyoming R. Co., 45 AD3d 1274.) MCC began this action (Index No.

21905/2007) by the filing of a summons and complaint on or about August 31, 2007, which was before WC began his action (Index No. 25275/07) by the filing of a summons and a complaint on or about October 10, 2007.

That branch of the motion which is for an order pursuant to CPLR 3211(a)(5) dismissing the first cause of action on Statute of Limitations grounds is denied. The defendant did not show that "the claim could have been made in a form other than an action for a declaratory judgment and the limitations period for an action in that form has already expired***." (See, Foley v Masiello, 38 AD3d 1201, 2202). Moreover, the defendant misreads the appellate opinion which found that the attempt to amend the complaint at the close of evidence was barred by laches, not that a cause of action to determine the respective interests of the parties was itself barred by laches. The case cited by the Appellate Division, Felix v Lettre (204 AD2d 679), concerned a motion to amend the complaint made at the trial which was found to be barred by laches.

That branch of the motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the second cause of action as insufficiently stated is granted. The second cause of action seeks the expulsion of WC as a member of the company by reason of his fraudulent transfer of the property and/or his removal as an officer. It is true that Limited Liability Company Law § 701

provides in relevant part: "Unless otherwise provided in the operating agreement, the death, retirement, resignation, expulsion, bankruptcy or dissolution of any member or the occurrence of any other event that terminates the continued membership of any member shall not cause the limited liability company to be dissolved***."

(The court's conclusions are not altered even if the version of Limited Liability Company Law § 701 in effect prior to the statutory amendment in 1999 is regarded as applicable.) However, the mere reference to the expulsion of a member in a statute pertaining to the continuing existence of a limited liability company does not amount to a statutory grant of power to the court to order the expulsion of a member. While the Limited Liability Company Law contains a provision for the withdrawal of a member (section 606) and a provision for the judicial dissolution of a limited liability company (section 702), the plaintiff did not correctly cite any statute or case authorizing the judicial expulsion of a member. The expulsion of a member can be provided for in the company's operating agreement (see, LLCL § 417), but the plaintiff has not shown that the parties entered into an operating agreement with such a clause. The plaintiff did not establish that he has an enforceable contractual basis for seeking the defendant's ouster. Finally, the complaint does not adequately allege that WC is an officer of the LLC, and, in the absence of an operating

