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Yuk Fung Ma v J.C. Sake Inc.
2011 NY Slip Op 50999(U)
Decided on June 3, 2011
Supreme Court, Kings County
Demarest, J.
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Supreme Court, Kings County

<p>Yuk Fung Ma, Petitioner,</p> <p>against</p> <p>J.C. Sake Inc., GEE WAI ("ALEX") CHAN, TAN THENG LIAU, WONG CHI KONG, TONY WAI, CHOON HEUNG CHEN and GEE ON ("ADAM") CHAN, Respondents.</p>
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Carolyn E. Demarest, J.

Following a framed-issue bench trial on plaintiff's allegations that he was forced by economic duress to sell his shares in defendant J. C. Sake, Inc. (Sake) to his fellow shareholders, the individual defendants named herein, for less than the value he believes was attributable to his interest, the court makes the following findings of fact and reaches the following conclusions of law.

FACTS

The essential facts are substantially undisputed. Plaintiff Yuk Fung Ma (Ma) entered into an agreement with defendant Gee Wai ("Alex") Chan (Alex) and his brother Gee On ("Adam") Chan (Adam) in or about late December of 2006 to open a restaurant in which plaintiff would be the cook and primary manager. Alex, who owned other restaurants, would come by to assist and advise. Adam was present at the opening of the restaurant, but otherwise did not appear, although, according to the pleadings, both Alex and Adam hold an ownership interest in the building at 2087 Coney Island Avenue in which the restaurant is located. Plaintiff (who is related to Alex's wife) would receive compensation for his daily labors at the rate of approximately \$3000 a month for six days a week, plus overtime, which was represented to be the market rate for "head cook". Initially, plaintiff was asked to invest \$100,000, but was permitted to contribute only \$46,414.50 in cash for what plaintiff

believed was a one-third ownership interest in the business.

Following formation of the corporate defendant, plaintiff, Alex and Adam opened a bank account at TD Bank and, after renovating the premises, opened the restaurant in May of 2007. Soon thereafter, Alex left the country and did not return until late in May 2008. In the interim, plaintiff, together with his wife and sister, managed the business. It is not disputed that the restaurant was not profitable for the first several months of operation and, according to plaintiff, he was unable to take a salary for the first ten months, although he was able to begin to recoup the loss beginning in 2008.

Upon Alex's return from China, in June 2008, he visited the restaurant and, according to his own testimony, found the situation not to his liking, including the presence of plaintiff's wife, [*2]child and sister on the premises and unsanitary conditions. Plaintiff testified that Alex demanded that he purchase supplies for the restaurant through a distributor owned by Alex, but that plaintiff declined because he wanted competitive prices. Plaintiff testified that Alex threatened to "kick [him] out" if he refused. Plaintiff testified that he responded "OK", that upon a calculation of what was owed to him, and payment thereof, he would get out. Together with plaintiff, on July 7, 2008, Adam calculated plaintiff's interest based upon the records and receipts, to which plaintiff also had full access, but plaintiff did not agree with defendants' offer of \$47,000 for his shares. Part of the reason for plaintiff's rejection of the numbers was apparently his contention that there were several other investors, the other defendants herein, of which plaintiff claims to have had no prior notice, whose interests were factored into the computation. Alex contended that he had supplied at least some of the names to plaintiff early on so that plaintiff was aware of the other investors. Plaintiff took the written calculation home to consult with his wife and an uncle.

The following day, July 8, 2008, Adam telephoned the plaintiff after 10 P.M. regarding the \$47,000 offer, which plaintiff again rejected as "incorrect". Plaintiff closed the restaurant and went home. When he arrived at the restaurant the next day, July 9, he found that the locks had been changed and he was unable to open. At approximately 11:30 P.M. that night, plaintiff received a call from his uncle directing him to call Adam. In a telephone conversation with Adam close to midnight, plaintiff complained of the store closing. Adam responded that the offer that had been \$47,000 was being reduced by \$12,000, to \$35,000, because of the closing and that, if plaintiff did not take it, the restaurant would continue to

be closed and plaintiff would get nothing. Plaintiff agreed to meet Adam at another restaurant owned by Adam located on Ocean Avenue, the next day at 11:00 A.M.

Adam and Alex described the negotiations with plaintiff somewhat differently, claiming that the arguments between Alex and plaintiff, which included plaintiff's sister and an incident in late June in which police were summoned to the restaurant, had created an irreconcilable rift that precluded a continuing business relationship. Both testified that the initial proposal was that either plaintiff could buy out the other shareholders or be bought out by them. The suggested price for the restaurant, the "total amount", was \$160,000, which had been discussed and agreed among all of the investing defendants. Alex testified that, in the beginning of July, plaintiff was told that he could have the "five shares" belonging to the defendant shareholders for \$113,000 (\$160,000 less the approximately \$47,000 invested by plaintiff), or could be bought out for \$47,000, but that plaintiff never responded. Thereafter, Alex left the negotiations to Adam.

Plaintiff denied that he had been given the alternative to purchase defendants' interest in the restaurant. Plaintiff stated that the \$160,000 value was not consistent with the numbers contained in Adam's original calculations which indicated \$230,000. It is not clear where this number came from, but it may have included the investments of the other shareholder defendants which were not known to plaintiff in advance of the falling out between himself and Alex.

When plaintiff met Adam on July 10, negotiations resumed, with plaintiff complaining that he was being "robbed" of his efforts in managing the restaurant through its early stages of loss to the point of profitability and having "a gun to [his] head", and Adam demanding that he accept the \$35,000 or face further closing and get "nothing". Ultimately, Adam paid plaintiff \$38,000 for his shares in Sake and a written agreement was prepared, in Chinese, by defendant [*3] Wong Chi Kong, who was also present, acknowledging plaintiff's sale of "all equity" in Sake and indicating he would have nothing further to do with the restaurant. The additional \$3,000 was based upon profits for the month of June which had been omitted from earlier calculations.

Plaintiff testified that he had accepted the \$38,000 in cash, at the urging of his uncle and upon consultation with his wife because, at the time, his wife was not employed, he was about to be unemployed, and he needed the money to support his family and feared that, if

he did not accept, he would get "nothing" based on defendants' threats to keep the restaurant closed.

DISCUSSION

Both of the above-captioned actions initiated by plaintiff Ma require a threshold determination regarding plaintiff's status as a shareholder of Sake. Defendants contend that the document executed by Ma on July 10, 2008, constitutes unequivocal and binding evidence that Ma sold his shares in Sake on that date for \$38,000 and that petitioner Ma had no standing as a shareholder to bring the petition for dissolution of Sake under Index no. 23704/08, filed August 13, 2008, or to prosecute those causes of action set forth in Index no. 28887/10 which are derivative in nature regarding alleged diversion of corporate assets to the private purpose of Alex in improving his building. Plaintiff contends that he executed the sale document and accepted \$38,000 under economic duress and that the sale should, therefore, be voided.

Economic duress requires proof by the party making such claim that he was compelled to agree to the terms of a contract "because of a wrongful threat by the other party which precluded the exercise of [his] free will" (*805 Third Ave Co. v M. W. Realty Assoc.*, 58 NY2d 447, 451 [1983]). "A valid claim of duress has two components, (1) threats of an unlawful act by one party which (2) compels performance by the other party of an act which it had a legal right to abstain from performing" (*Chase Manhattan Bank v State of New York*, 13 AD3d 873 [3d Dept 2004]). The undisputed evidence here is that defendants forced plaintiff to accede to a price for his interest in Sake against his own will by changing the locks on the restaurant and forcing plaintiff out of work. It was acknowledged that plaintiff was the authorized manager of the restaurant and that both plaintiff and his wife were employed there. Plaintiff testified to his economic distress at the prospect of being unemployed. Clearly defendants' actions were preemptive and were designed to coerce plaintiff to accept defendants' calculations as to the value of his interest despite his own reservations about their accuracy. Plaintiff took prompt action to repudiate the agreement in commencing suit.

However, it is apparent from the testimony of plaintiff that he had agreed to a severance of his business relationship with defendants in light of the extreme animosity between Alex and plaintiff and his family members and the various disputes concerning

business judgments. Initially offered basically the refund of his investment in exchange for his shares, plaintiff believed this sum did not represent a fair return, although he never made a counter-demand as he contended he did not have enough time to do so. The reduction of defendants' offer to \$35,000 was based on defendants' unilateral and unjustified closing of the restaurant. Plaintiff capitulated to defendants' threat to keep the restaurant closed indefinitely and to thus deprive plaintiff, not only of a fair return on his shares, but also of gainful employment and the means to support his [*4]family. Such coercion, though perhaps not *per se* illegal, is certainly unconscionable. The court finds defendants' actions constituted economic duress which precluded plaintiff's exercise of free will and compelled him to agree to a purchase price that was not consistent with the value of his shares. *See Art Stone Theatrical Corp. v Tech. Programming & Sys. Support of Long Is., Inc.*, 157 AD2d 689, 691 [2d Dept 1990].

Although plaintiff seeks to void the sale of his shares so as to restore himself to the status of a shareholder, the passage of nearly three years since the date of the transaction, during which period Alex has managed the restaurant, and more particularly, the undisputed fact that the parties had essentially agreed to a sale of plaintiff's interest in light of their irreconcilable differences regarding the operation of the restaurant, support the conclusion that the sale itself is not void, but that the appropriate equitable remedy here is the voidance of the price and an award of money damages based upon an assessment of the value of plaintiff's shares on July 8, 2008. *See Doyle v Allstate Ins. Co.*, 1 NY2d 439, 443 [1956]; *Ungewitter v Toch*, 31 AD2d 583 [3d Dept 1968].

CONCLUSION

Accordingly, in light of this court's finding of duress relating only to the price accepted for the shares transferred, for which money damages will provide adequate and appropriate compensation, the sale of shares is not voided and plaintiff, therefore, lacked standing on August 13, 2008 to bring the petition seeking dissolution of J. C. Sake, Inc. (Business Corporation Law §1104-a; *Artigas v Renewal Arts Realty Corp.*, 22 AD3d 327, 328 [1st Dept 2005]). Defendants' cross-motion to dismiss plaintiff's petition to dissolve the corporation under Index No. 23704/08 is granted and that proceeding is dismissed. CPLR 3211(a)(3), 3212(c).

Counsel and parties shall appear for conference in Commercial Part 1 on July 12, 2011

at 10:00 a.m. with respect to Index No. 28887/10.

The foregoing constitutes the decision and order of the court.

ENTER,

Carolyn E. Demarest

J. S. C.

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