

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

PRESENT: O. PETER SHERWOOD
Justice

PART 61

LITTLE CHINATOWN ENTERPRISES, INC.

Plaintiff,

-against-

SHENG SU,

Defendant.

INDEX NO. 101501/2010

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

PAPERS NUMBERED

APR 14 2010

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion (sequence no. 001) is granted for the reasons set forth on the record on April 6, 2010. It is

ORDERED and ADJUDGED that defendant Sheng Su and his agents, including Xiaoyan Su are in CONTEMPT of COURT for violation of this court's order dated February 4, 2010 and it is further

ORDERED and ADJUDGED that Xiaoyan Su shall pay a fine in the amount of \$200.00 to the clerk of the court on or before April 9, 2010; and it is further

ORDERED that within five (5) days of receipt of an affirmation of plaintiff's counsel setting forth the time spent in connection with prosecution of this motion, defendant shall remit to plaintiff's counsel the sum of \$500 representing reimbursement of attorney fees for work performed with written proof of payment to be provided to the Clerk of Part 61 within 10 days thereafter; and it is further

ORDERED that Sheng Su, Xiaoyan Su, any undertenant(s) or subtenant(s), their agent(s), employees, and representatives, and all persons acting in concert or participating with them be enjoined from (1) engaging in selling or distributing counterfeit merchandise from any location within 247 Canal Street, New York, NY 10013 and specifically booth A-01 in 247 Canal Street, New York 10013 and (2) laying and/or displaying merchandise or goods that extends more than three (3) feet beyond the front of booth A-01.

Dated: April 6, 2010

O. P. Sherwood
O. PETER SHERWOOD, J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: CIVIL TERM: PART: 61
 -----X
 LITTLE CHINATOWN ENTERPRISES, INC.,

RECEIVED

APR 07 2010

PART 61

Plaintiffs,

INDEX NO.
 101501/10

-against-

SHENG SU,

Defendant.

-----X

60 Centre Street
 New York, New York 10007
 April 6, 2010

B E F O R E:

THE HONORABLE O. PETER SHERWOOD

J U S T I C E

A P P E A R A N C E S:

LAW OFFICES OF JOHN X. XIE, P.C.
 Attorneys for Plaintiff
 401 Broadway - Suite 1010
 New York, New York 10013
 BY: B. SHAMUS O'DONNILEY, ESQ.

FILED

APR 14 2010

NEW YORK
COUNTY CLERK'S OFFICE

ALSO PRESENT:

Xiaoyan Su

Ann Chi Ho, Official Mandarin Interpreter

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2 THE COURT: Mr. O'Donniley, will you let
3 me have a copy of the Order to Show Cause? For
4 some reason or another, I don't have it here.

5 (Brief pause.)

6 MR. O'DONNILEY: I believe this is a
7 complete copy, your Honor.

8 (Court handed document.)

9 THE COURT: I'll give it back.

10 So, we are now at the point where the
11 court will give its decision in connection with
12 motions that are before me.

13 Motion Number 1, which is brought on by
14 an Order to Show Cause, seeks a preliminary and
15 permanent injunction directing the defendants,
16 and anyone acting in accord with them,
17 including their subtenants, agents, employees
18 and representatives, from selling or causing to
19 be sold counterfeit merchandise from any
20 location within 247 Canal Street, Booth A-01.

21 The complaint alleges that the
22 defendant, which is Sheng Su, does not have a
23 sublease with Little Chinatown Enterprises and
24 that the defendant apparently had repeatedly
25 sold -- has repeatedly laid goods and
26 merchandise more than three feet into the

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2 public sidewalk in violation of the lease and
3 also has occupied and continues to sell
4 counterfeit goods from Booth A-01.

5 I take it, from my review of the
6 complaint, that the complaint is based on,
7 essentially, a breach of contract claim; is
8 that correct, Mr. O'Donniley?

9 MR. O'DONNILEY: No, your Honor. Their
10 relationship is, I believe, implied law at this
11 point because he refused to renew the sublease
12 and they would have what is termed a
13 month-to-month tenancy.

14 THE COURT: Your claims are that they
15 are violating the month-to-month tenancy? I am
16 trying to identify the legal Cause of Action.

17 MR. O'DONNILEY: The legal Cause of
18 Action would be that their actions, as the
19 month-to-month tenants, are damaging the
20 plaintiff in this case and the damages are
21 difficult to calculate, which is the typical --
22 one of the elements required for a preliminary
23 injunction. There are three elements --

24 THE COURT: I am trying to identify what
25 your Cause of Action is. I believe you have
26 one, but I would like to hear you articulate

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2 it.

3 MR. O'DONNILEY: Breach of contract,
4 your Honor. It would be tortious --

5 THE COURT: It seems to me that this is
6 essentially a contract claim. He is a holdover
7 tenant. He continues to be -- therefore, he is
8 a month to month tenant and he is in violation
9 of that month-to-month tenancy.

10 In addition to the motion, we have a
11 motion Number 2 by the defendant, seeking
12 dismissal of the complaint; the allegation
13 being that the defendant has not violated any
14 obligation that he has.

15 MR. O'DONNILEY: Your Honor, I have
16 never seen that motion. Are you sure that's
17 not my motion to dismiss? I made a motion to
18 dismiss their counterclaim.

19 THE COURT: I'm sorry, it is yours,
20 that's right. Your motion -- I guess it's your
21 motion to dismiss the counterclaim.

22 MR. O'DONNILEY: Yes, your Honor.

23 And I also pointed out, on April 1st,
24 that that claim is likely barred by collateral
25 estoppel res judicata --

26 THE COURT: Because of the civil court

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2 proceeding.

3 MR. O'DONNILEY: Yes. The judge in the
4 civil court proceeding --

5 THE COURT: Yes, I have that.

6 With respect to motion Number 1, which
7 is the Order to Show Cause, the court finds as
8 follows:

9 That plaintiff, Little Chinatown, Inc.,
10 holds a master lease with the China Buddhist
11 Association for the -- I guess that's the name
12 of it -- for the rental of premises, for
13 purposes of this case, located at 247 Canal
14 Street; that as of February 2005, the plaintiff
15 had sublet stall number A-01 to Sheng Su. That
16 was a one-year lease.

17 MR. XIAOYAN SU: I think the lease was
18 signed in 2006.

19 THE COURT: And that the leases were,
20 thereafter, renewed on an annual basis.

21 However, as of February of 2010 for
22 sure, and perhaps before that, the plaintiff
23 refused to renew the lease. It is alleged that
24 the lease was not renewed for a number of
25 reasons, including the assertion that booth
26 number A-1 was displaying merchandise on the

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2 sidewalk in violation of the lease; that
3 counterfeit goods were being sold from that
4 booth and that the subtenant, Sheng Su, was
5 subletting a portion of the booth without the
6 landlord's consent or approval and in violation
7 of the lease.

8 The court takes notice of a proceeding
9 in the civil court, an action to evict the
10 subtenant, Sheng Su, and the court notes that
11 there was a decision in that case rendered on
12 March 24th, 2010 which dismisses, apparently, a
13 counterclaim that was brought by the respondent
14 there. However, that case is not completely
15 disposed of and there is a further proceeding,
16 hearing, that is going to be held in that
17 court, dated for April 14th, 2010.

18 Coming back to the case that's before
19 me, as I said, the stall A-01 had been sublet
20 to Sheng Su. It appears that the store has
21 been operated by Mr. Su's father, who has
22 appeared before me in this case.

23 The plaintiff alleges that defendant is
24 in violation of the lease, and I reference the
25 three claims that were asserted before me,
26 which is the counterfeiting, placing of

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2 merchandise for sale more than three feet into
3 the street and subletting without the
4 landlord's consent.

5 Plaintiff here seeks a preliminary and
6 permanent injunction barring the sale of
7 counterfeit goods from that location.

8 The court, on February 4th, 2010,
9 granted a Temporary Restraining Order which
10 prohibited the defendant and anyone operating
11 in concert with them, including their agents,
12 from selling counterfeit merchandise from that
13 location.

14 It is alleged that subsequent to that
15 time, the New York City Police Department
16 arrested a person who was found selling
17 counterfeit goods from that stall. I will
18 return to that in a moment.

19 As I said earlier, the plaintiff here
20 has not renewed the lease and there is this
21 eviction proceeding, which is pending in the
22 civil court.

23 Now, I notice that since Sheng Su has
24 not, himself, appeared or participated in this
25 proceeding, however, he is represented here by
26 his dad and apparent agent, Xiaoyan Su.

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2 S U, X I A O Y A N.

3 It appears that the booth has been
4 subdivided by Xiaoyan in that he is retained
5 half of the space and has sublet the other
6 half, which itself had been further subdivided
7 into two halves; one half where perfume is
8 being sold and another where jewelry was being
9 sold.

10 It appears that it is from that location
11 where the jewelry was being sold that there was
12 evidence of sale of counterfeit goods.

13 As I mentioned, apparently there was an
14 arrest of a woman who was seen selling
15 counterfeit goods from that location.

16 Now, the defendant does not claim that
17 there was no counterfeit goods sold from that
18 location. He appears to argue that he had no
19 prior knowledge of the sale of counterfeit
20 goods and that when he was advised that
21 counterfeit goods could not be sold from that
22 location, he so informed his sublessee that
23 counterfeit goods could not be sold from that
24 location.

25 He also claims that counterfeit is
26 widely sold from various booths within that

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2 mart.

3 As I said, he claims that he had warned
4 his sublessee against the sale of counterfeit
5 goods and appears to claim that he has no
6 specific knowledge of sales of those goods
7 within booth number A-01.

8 Following the hearing in this court as
9 of Friday last week, in which the court
10 emphasized to Xiaoyan that there is an order
11 outstanding prohibiting the sale of counterfeit
12 goods, and admonishing him to make sure that
13 that did not continue, the court was advised
14 yesterday that the sublessee has been removed
15 from that location by Xiaoyan.

16 Now, the evidence shows that the
17 defendant sublet the stall in violation of the
18 lease. It also shows that a person, a woman,
19 described as an Asian, was arrested for selling
20 counterfeit from the west side of the stall.

21 I also found that the defendant was on
22 notice of the alleged sales and that the
23 defendant took inadequate measures in policing
24 the sublet space where illegal counterfeit
25 goods were sold.

26 This court signed an Order to Show Cause

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2 on February 4th, 2010; a copy of which was
3 provided to Xiaoyan and Xiaoyan has
4 acknowledged receipt of that order. However,
5 given the events of March 16th, 2010 when the
6 arrest was made, it appears that, and the
7 plaintiff has proved, that the sublessee,
8 including Xiaoyan, failed to take effective
9 steps to prevent the sale of counterfeit goods
10 from the booth A-01.

11 Under those circumstances, I find that
12 the defendant is in contempt of the court's
13 order dated February 4th, 2010 and that,
14 therefore, it is appropriate to grant the
15 relief being sought by the plaintiff.

16 Specifically, the court will fine you
17 for violation of its order and will enter a
18 permanent injunction barring the sale of
19 counterfeit merchandise from any location, from
20 any part of booth A-01 at 247 Canal Street.

21 The injunction extends to Sheng Su,
22 Xiaoyan Su, any undertenant or subtenant of the
23 booth at that location. It extends to the
24 defendant's agents, their employees, their
25 representatives and anyone who is acting in
26 concert with them.

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2 It also extends to prohibiting the
3 defendant from taking any action that would
4 allow any other party from engaging in the
5 conduct that is barred by my injunction; that
6 injunction being that one may not sell
7 counterfeit goods from that stall.

8 With respect to the monetary fine that
9 the Court is going to impose, I'd like to hear
10 from you, Mr. O'Donniley. I know that you have
11 asked for an award of attorney's fees. I have
12 no evidence with respect to what your fees may
13 have been or are. I am going to deny the
14 request for attorney's fees, but I am going to
15 impose a fine -- let me restate that.

16 I am going to impose a fine of \$200,
17 payable to the Clerk of the Court, as well as
18 an award of \$500 in attorney's fees that shall
19 be paid upon -- paid to counsel for the
20 plaintiff upon provision, by plaintiff's
21 counsel, of an affirmation setting forth the
22 time and fees that it has expended in
23 connection with this proceeding.

24 That is my order with respect to motion
25 Number 1.

26 With respect to motion Number 2, I

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2 believe, Mr. O'Donniley, you said that that
3 motion is now moot in light of the civil
4 court's decision; is that correct?

5 MR. O'DONNILEY: Yes, your Honor.

6 THE COURT: Accordingly, motion sequence
7 Number 2 is denied as moot.

8 We stand adjourned.

9 MR. O'DONNILEY: Your Honor, before we
10 adjourn, I would like to make an oral
11 application for leave of the court to submit an
12 additional Cause of Action.

13 We only learned that Mr. Xiaoyan Su was
14 a party to this proceeding and that there is an
15 additional cause of action that we have against
16 him and we would appreciate the opportunity to
17 serve those papers at a later point.

18 THE COURT: I think you're a bit late at
19 this point, Mr. O'Donniley, and that request
20 will be denied.

21 MR. O'DONNILEY: But, your Honor, we
22 only learned that --

23 THE COURT: Excuse me?

24 MR. O'DONNILEY: We only learned that he
25 was a part of this on April 1st when he
26 appeared and claimed that he was in this case.

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2 And in the interest of preserving judicial
3 resources, we can refile the other cause or
4 we --

5 THE COURT: Just remember that I have
6 held him in contempt. Contempt orders apply
7 not only to people who are individuals, who are
8 party to the case, but anyone else to whom that
9 injunction extends. In this case, it's clear
10 that the injunction in the stay that I gave
11 prohibiting the sale of counterfeit applies to
12 anyone anywhere in that stall. Xiaoyan
13 received my order and was subject to it and so
14 the fact that he is not formally named as a
15 defendant in this case does not exempt him from
16 being subject to my words and to be sanctioned.
17 And so, for that reason, I don't believe that
18 there is a need to go through that additional
19 step.

20 If you want to make such a motion, you
21 can do that, but, quite frankly, I do think
22 that your motion is a bit late.

23 MR. O'DONNILEY: Very well, your Honor.

24 Thank you.

25 THE COURT: What you ought to do is get
26 a copy of my decision and present it to me to

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be so ordered.

MR. O'DONNILEY: Yes.

XIAOYAN SU: Judge, when shall I pay the lawyer fee?

THE COURT: The payment should be made within seven days.

XIAOYAN SU: That includes the \$200 fine?

THE COURT: He needs to understand this: He needs to pay the -- the fine shall be paid by the end of the week, by Friday.

With respect to the attorney's fees, which is to be paid to the plaintiff's counsel, that amount shall be paid within five days of receipt of the affirmation, which I mentioned before.

So, Mr. O'Donniley, if you will get the affirmation out, provide it to Mr. Su, because he needs that before we can implement the payment of fees.

MR. O'DONNILEY: One other issue, your Honor. I'm not sure if this is in your file, but there was a motion filed that I spoke with you, with the previous attorney, on motion for contempt against Sheng Su, and the due date for

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2 that for submission was April 8th in the
3 submission part.

4 THE COURT: This is a motion that you
5 are making, an additional motion?

6 MR. O'DONNILEY: It was filed March
7 24th.

8 THE COURT: But you say its return date
9 is April 8th?

10 MR. O'DONNILEY: That's the submission
11 return date.

12 THE COURT: All right.

13 MR. O'DONNILEY: And Mr. Herzweig was
14 given a copy of that.

15 THE COURT: So what is it that you would
16 like the court to do? Given what I have done
17 today, what is it that you would like --

18 MR. O'DONNILEY: I just wanted to say
19 that. I didn't know if you were aware of this,
20 if you remembered --

21 THE COURT: There was a mention of it,
22 but it's not before me at the moment so there
23 is nothing for me to do.

24 MR. O'DONNILEY: Okay, yes, your Honor.

25 THE COURT: So, if you tell him, Ms. Ho,
26 within five days after he receives the

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2 affirmation from the lawyer, he has to pay him
3 the \$500.

4 THE INTERPRETER: Judge, one more
5 question.

6 XIAOYAN SU: Where shall I pay the fine?

7 THE COURT: To the clerk.

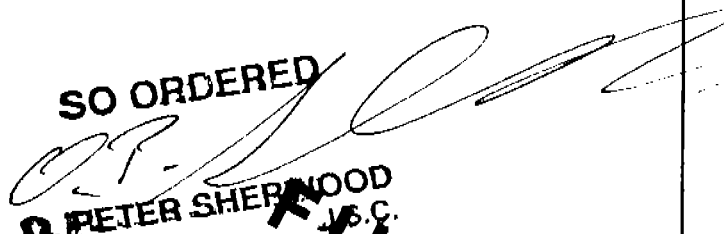
8 Thank you. The judge gave me such an
9 excellent interpreter.

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11 *****

12 CERTIFIED THAT THE FOREGOING IS A TRUE AND ACCURATE
13 TRANSCRIPT OF THE ORIGINAL STENOGRAPHIC MINUTES IN
14 THIS CASE.

15
16 

17 -----
18 ERIC ALLEN, RPR
19 SENIOR COURT REPORTER

20
21 SO ORDERED
22 
23 O. PETER SHERWOOD
24 J.C.
25 FILED
26 APR 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

Eric Allen, RPR
Official Court Reporter