

**SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
SECOND JUDICIAL DEPARTMENT**

**Gary Liang, as assignee of Yeechiu Chung Liang, individually and as
a shareholder of EW Studio, Inc. v. Yi Jing Tan, et al.**

2017 NY Slip Op 08364 (App. Div. 2017) · No. 2016-02097; 2016-06192 · Decided November 29, 2017

SUMMARY

The Appellate Division, Second Department, dismissed the appeal from an order directing a hearing because no appeal lies as of right from such an order, and affirmed the denial of the defendants' request for costs and counsel fees. It reversed the order holding nonparty attorney Wei Ji in civil contempt, concluding that contempt was unavailable for nonpayment of counsel fees because execution could be awarded for collection of the sum.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	Randall T. Eng, P.J.; Reinaldo E. Rivera, J.; Sheri S. Roman, J.; Francesca E. Connolly, J.
JURISDICTION	New York
DECIDED	November 29, 2017
DOCKET	2016-02097; 2016-06192
DISPOSITION	other
PROCEDURAL POSTURE	Defendants appealed from an order denying their cross motion for costs and counsel fees and directing a hearing on contempt; nonparty attorney Wei Ji appealed from a subsequent order adjudging her in civil contempt and directing her to pay \$2,000 in counsel fees.
STANDARD OF REVIEW	Whether an appeal lies as of right from an order directing a hearing; review of the exercise of discretion concerning costs and counsel fees; and review for legal error in imposing civil contempt.
PRECEDENTIAL VALUE	published appellate opinion
PARTIES	Yi Jing Tan, et al., Wei Ji, nonparty-appellant v. Gary Liang, as assignee of Yeechiu Chung Liang, individually and as a shareholder of EW Studio, Inc.

TOPICS

contempt attorney fees appellate procedure civil procedure fiduciary duty

PRACTICE AREAS

civil procedure appellate procedure remedies commercial litigation corporate law

QUESTIONS PRESENTED

1. Whether an appeal lies as of right from an order directing a hearing to aid in the disposition of a motion.
2. Whether defendants established that plaintiff engaged in frivolous conduct warranting costs and counsel fees under 22 NYCRR 130-1.1.
3. Whether civil contempt was an available remedy for the attorney's nonpayment of counsel fees where execution could be awarded to collect the sum.

HOLDINGS

1. No appeal lies as of right from an order directing a hearing to aid in the disposition of a motion; the court declined to grant leave to appeal.
2. Defendants were not entitled to costs and counsel fees because they failed to establish that plaintiff engaged in frivolous conduct within the meaning of 22 NYCRR 130-1.1(c).
3. Civil contempt was unavailable because the counsel-fee obligation was a sum for which execution could be awarded.

KEY QUOTATIONS

“This is not a case where, by law, execution cannot be awarded. Therefore, the remedy of contempt is unavailable”

FACTUAL BACKGROUND

Plaintiff obtained an order awarding counsel fees against the defendants. Plaintiff then sought to hold defendants' attorney, nonparty Wei Ji, in civil contempt for failing to pay those fees. The Supreme Court directed a hearing, later held Ji in civil contempt, and ordered her to pay \$2,000 in counsel fees; the defendants separately sought costs and counsel fees based on alleged frivolous conduct by plaintiff.

PROCEDURAL HISTORY

In an action involving claims including conversion and breach of fiduciary duty, the Supreme Court, Queens County, denied defendants' request for costs and counsel fees under 22 NYCRR 130-1.1 and directed a hearing on plaintiff's contempt motion. After the hearing, the court granted the contempt motion against defendants' attorney and ordered her to pay \$2,000 in counsel fees. The Appellate Division dismissed the portion of the first appeal seeking review of the hearing order, affirmed the first order insofar as reviewed, and reversed the contempt order.

DISPOSITION

CASES CITED

- Serraro v. Staropoli, 94 AD3d 1083, 1084
- 4504 New Utrecht Ave. Corp. v. Pita Parlor, 143 AD2d 171
- Cantalupo Constr. Corp. v. 2319 Richmond Terrace Corp., 141 AD3d 626, 627-628
- Moore v. Davidson, 57 AD3d 862
- Agunloye Dev. Corp. v. Buckingham Owners, Inc., 132 AD3d 927, 928

OPINION

PER CURIAM.

Liang v Yi Jing Tan (2017 NY Slip Op 08364) Liang v Yi Jing Tan 2017 NY Slip Op 08364 Decided on November 29, 2017 Appellate Division, Second Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided on November 29, 2017 SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Second Judicial Department RANDALL T. ENG, P.J. REINALDO E. RIVERA SHERI S. ROMAN FRANCESCA E. CONNOLLY, JJ. 2016-02097 2016-06192 (Index No. 7424/08) [*1] Gary Liang, as assignee of Yeechiu Chung Liang, individually and as a shareholder of EW Studio, Inc., respondent, v Yi Jing Tan, et al., appellants.

(Appeal No. 1) Gary Liang, as assignee of Yeechiu Chung Liang, individually and as a shareholder of EW Studio, Inc., respondent, v Yi Jing Tan, et al., defendants; Wei Ji, nonparty-appellant. (Appeal No. 2) Wei Ji, New York, NY, for appellants in Appeal No. 1 and appellant pro se in Appeal No. 2. Wang Law Office, PLLC, Flushing, NY (Jean Wang of counsel), for respondent.

DECISION & ORDER In an action, inter alia, to recover damages for conversion and breach of fiduciary duty, (1) the defendants appeal from an order of the Supreme Court, Queens County (Grays, J.), dated December 23, 2015, which denied their cross motion pursuant to 22 NYCRR 130-1.1 for an award of costs and counsel fees against the plaintiff and directed a hearing on the plaintiff's motion to hold their attorney, nonparty Wei Ji, in civil contempt of court for her failure to pay counsel fees awarded to the plaintiff in an order of the same court dated August 12, 2014, and (2) nonparty Wei Ji appeals from an order of the same court dated April 25, 2016, which, after a hearing, in effect, granted the plaintiff's motion to hold her in civil contempt and directed her to pay counsel fees in the amount of \$2,000 as a result of her contempt.

ORDERED that the appeal from so much of the order dated December 23, 2015, as directing a hearing on the plaintiff's motion to hold the defendants' attorney in civil contempt is dismissed,

without costs or disbursements, as no appeal lies as of right from an order which directs a hearing to aid in the disposition of a motion (see *Serraro v Staropoli*, 94 AD3d 1083, 1084), and we decline to grant leave to appeal; and it is further, ORDERED that the order dated December 23, 2015, is affirmed insofar as reviewed, without costs or disbursements; and it is further, ORDERED that the order dated April 25, 2016, is reversed, on the law, without costs or disbursements, and the plaintiff's motion to hold the defendants' attorney in civil contempt is denied.

The Supreme Court erred in granting, after a hearing, the plaintiff's motion to hold the defendants' attorney in civil contempt based upon her failure to pay counsel fees awarded to the plaintiff in an order dated August 12, 2014. Judiciary Law § 753(A)(3) permits a court to punish a party for civil contempt "for the non-payment of a sum of money, ordered or adjudged by the court to be paid, in a case where by law execution can not be awarded for the collection of such sum."

This is not a case where, by law, execution cannot be awarded. Therefore, the remedy of contempt is unavailable (see *4504 New Utrecht Ave. Corp. v Pita Parlor*, 143 AD2d 171; see also *Cantalupo Constr. Corp. v 2319 Richmond Terrace Corp.*, 141 AD3d 626, 627-628; *Moore v Davidson*, 57 AD3d 862).

However, the Supreme Court providently exercised its discretion in denying the defendants' cross motion for an award of costs and counsel fees against the plaintiff, as the defendants failed to establish that the plaintiff engaged in frivolous conduct within the meaning of 22 NYCRR 130-1.1(c) (see *Agunloye Dev. Corp. v Buckingham Owners, Inc.*, 132 AD3d 927, 928).

In light of our determination, we need not address the parties' remaining contentions. ENG, P.J., RIVERA, ROMAN and CONNOLLY, JJ., concur. ENTER: Aprilanne Agostino Clerk of the Court