

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

YAN DENG, *derivatively on behalf of nominal
defendant iFresh, Inc.*

Plaintiff,

-v-

PING ZHOU, AMY XUE, DENGRONG ZHOU,
KAIRUI TONG, HAO HUANG, HUBEI
RONGENTANG WINE CO., LTD, HUBEI
RONGENTANG HERBAL WINE CO., LTD.
FEI ZHANG, MENG LIU, and JIUXIANG BLUE
SKY TECHNOLOGY (BEIJING) CO., LTD.,

Defendants.

Index No. 712408/2022
(Livote, J.S.C.)

NOTICE OF ENTRY

PLEASE TAKE NOTICE of the attached Short Form Order of the Court (Livote, J.S.C.)
dated June 29, 2023, and entered in the Office of the Queens County Clerk on July 5, 2023.

Dated: July 5, 20223

CARTER LEDYARD & MILBURN LLP

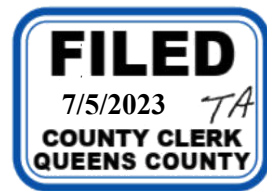
By: /s/ Alexander G. Malyshev
Alexander G. Malyshev
28 Liberty Street, 41st Floor
New York, NY 10005
Tel. 212.732.3200
Fax. 212.732.3232
Attorneys for Defendant Dengrong Zhou

To: All Counsel of Record by NYSCEF Filing

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Leonard Livote IA Part 33
Justice



YAN DENG, derivatively on behalf of
nominal defendant iFresh, Inc.,
Plaintiff

Index No. 712408/22

- against -

Motion Date 10/18/22

Dengrong Zeng, et al
Plaintiff

Motion Seq. No. 3

x

The following numbered papers read on this motion by the defendant Dengrong Zhou to dismiss the complaint insofar as asserted against him pursuant to CPLR 3211(a), and the cross motion by the plaintiff for leave to file a second amended complaint.

Papers
Numbered

- Notice of Motion - Affidavits - Exhibits..... EF 71-84
- Notice of Cross Motion - Affidavits - Exhibits... EF 94-99
- Answering Affidavits - Exhibits..... EF 100-106
- Reply Affidavits..... EF 108-109

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Factual background

The plaintiff, a shareholder of iFresh, Inc. (iFresh), commenced this derivative action on behalf of iFresh in June 2022, based on allegations that the defendants engaged in a series of fraudulent stock transactions in an effort to prevent nonparty Long Deng, iFresh's founder and former majority shareholder, from controlling iFresh's corporate affairs. The first amended complaint alleges the following: In 2020, iFresh issued a substantial number of new shares of stock to various individual defendants in exchange for 100% controlling interest in several companies, the defendants Hubei Rongentang Wine Co., LTD and Hubei Rongentang Herbal Wine Co., LTD (collectively RET Wine Company), and the defendant Jiuxiang Blue Sky Technology (Beijing) Co., LTD (Jiuxiang). However, the RET Wine Company and Jiuxiang transactions were based on numerous fraudulent misrepresentations concerning the financial affairs and assets held by these

companies. Several of iFresh's officers and directors were aware of these misrepresentations but breached their fiduciary duties to iFresh by allowing these transactions to proceed. Based on these breaches, the first amended complaint also asserts a cause of action for aiding and abetting breach of fiduciary duty against the defendant Dengrong Zhou (the defendant), who is also a shareholder of iFresh.

Prior motion practice

Shortly after commencing this action, the plaintiff submitted an order to show cause seeking a preliminary injunction and declaratory relief (Sequence #1). In his motion, the plaintiff argued that after Deng effectively relinquished a majority share of iFresh stock through the RET Wine Company and Jiuxiang stock transactions, the new majority of shareholders executed a written consent on January 12, 2021 which removed Deng from his position as CEO of iFresh and a member of its board of directors (the written consent). The plaintiff characterized the RET Wine Company and Jiuxiang transactions and the written consent as a "Trojan Horse" scheme by the defendant to gain majority control of iFresh, and thus, sought, among other things a declaration voiding the written consent.

In an order dated February 24, 2023, this Court denied the plaintiff's motion on Sequence #1. In discussing the plaintiff's submissions, this Court took note of the following:

In support of this order to show cause, the plaintiff relies on, among other things, an April 6, 2022 memorandum opinion from the Court of Chancery of Delaware (see *Zhou v Deng*, 2022 WL 1024809, 2022 Del Ch LEXIS 79 [Del Ch Ct, Apr. 6, 2022, C.A. No. 2021-0026-JRS], *affd* 2022 WL 16832660, 2022 Del LEXIS 340 [Del Sup Ct, Nov. 9, 2022, No. 152, 2022]). In that proceeding (the Delaware proceeding), the defendant sought, among other things, a declaration that Deng was validly removed from iFresh's board of directors by a written consent executed by a majority of iFresh's shareholders (NY St Cts Elec Filing [NYSCEF] Doc No. 111 at 3).

This Court also reviewed a number of subsequent orders issued during the pendency of the Delaware proceeding (see *Zhou v Deng*, 2022 WL 4367379 [Del Ch Ct, Sept. 20, 2022, C.A. No. 2021-0026-JRS]; *Zhou v Deng*, 2022 WL 2803876, 2022 Del Ch LEXIS 112 [Del Ch Ct, July 15, 2022, C.A. No. 2021-0026-JRS]; *Zhou v Deng*, 2022 WL 1617218, 2022 Del Ch LEXIS 112 [Del Ch Ct, May 23, 2022, C.A. No. 2021-0026-JRS]), and made the following observations:

The April 6, 2022 memorandum opinion exhaustively details the controversy between Deng and the defendant, as well as the claims asserted by both parties in the Delaware proceeding. As is relevant to this motion, the defendant sought a declaration that the written consent validly removed [Deng] from iFresh's board of directors, and Deng asserted counterclaims seeking a declaration that the written consent was invalid because [the defendant] and his allies obtained their iFresh shares through fraud, aiding and abetting breaches of fiduciary duty and breach of contract. Following a trial, the Court of Chancery of Delaware determined, inter alia, that the written consent was valid and effective and that Deng was validly removed as a director of iFresh. This being the case, the Court of Chancery of Delaware dismissed Deng's counterclaims with prejudice (NY St Cts Elec Filing [NYSCEF] Doc No. 111 at 3 [internal citations and quotation marks omitted]).

Upon review of the prior orders in the Delaware proceeding, this Court found that the plaintiff's order to show cause in this action was effectively an attempt to invalidate the written consent. However, because the validity of the written consent was already presented, litigated, and decided upon in the Delaware proceeding, and the determination regarding the validity of the written consent was essential to the prior judgment in the Delaware proceeding, this Court determined that, when applying Delaware law, the doctrine of collateral estoppel precluded the plaintiff from relitigating the validity of the written consent in this action (see *id.* at 4-5).

The defendant's motion to dismiss

While the plaintiff's order to show cause was still pending, the defendant submitted the instant motion to dismiss the complaint insofar as asserted against him. In many respects, the defendant's arguments in support of his motion are identical to the arguments he raised in opposition to the plaintiff's order to show cause. To this end, the defendant asserts, among other things, that the plaintiff's claim for aiding abetting breach of fiduciary duty is barred by *res judicata*. The defendant contends that this cause of action was also asserted against him in the Delaware proceeding, that it was based on identical facts and issues that are in controversy here, and that Deng had a full and fair opportunity to litigate these issues during the pendency of the Delaware proceeding. The defendant further argues that Deng and the plaintiff are in privity with one another because they are siblings, and thus, their interest in the outcomes of this action

and the Delaware proceeding are identical. Lastly, the defendant points out that, because the Court of Chancery of Delaware (the Delaware court) handed down a judgment disposing of Deng's claims against the defendant after a two-day bench trial, the Delaware proceeding reached a final adjudication.

In opposition to the defendant's arguments concerning preclusion, the plaintiff contends that the circumstances here are insufficient to satisfy any of the elements of *res judicata*. First, the plaintiff argues that the Delaware court lacked personal jurisdiction over the plaintiff as well as subject matter jurisdiction over the claim against the defendant. Second, the plaintiff asserts that the aiding and abetting breach of fiduciary duty claim asserted against the defendant was a collateral issue in the Delaware proceeding, and thus, it was not essential to the prior judgment. Third, the plaintiff maintains that his familial relationship with Deng is insufficient to establish privity between them. Finally, the plaintiff contends that the Delaware court never reached a final determination on the merits of the aiding and abetting claim because the Delaware court determined that this claim was waived.

As this Court noted in its February 22, 2023 decision, Delaware's preclusion doctrine must be utilized here because the prior orders were issued by Delaware courts (see *Matter of Luna v Dobson*, 97 NY2d 178, 183 [2000]). "A fundamental precept that is common to the doctrines of both *res judicata* and collateral estoppel is that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies'" (*Hercules Inc. v AUI Ins. Co.*, 783 A2d 1275, 1278 [Del Sup Ct 2000], quoting *Montana v United States*, 440 US 147, 153 [1979]). *Res judicata* will bar a claim where the following five-part test is satisfied: (1) the original court had jurisdiction over the subject matter and the parties; (2) the parties to the original action were the same as those parties, or in privity, in the case at bar; (3) the causes of action or the issues decided in the prior action were the same as those presented in the case at bar; (4) the issues in the prior action must have been decided adversely to the party against whom preclusion is sought; and (5) the decree in the prior action was a final decree (see *Dover Historical Socy., Inc. v City of Dover Planning Commn.*, 902 A2d 1084, 1092 [Del Sup Ct 2006]).

Privity between Deng and the plaintiff

As an initial matter, the Court notes that, for the purpose of the claim asserted against the defendant here, the plaintiff and Deng are in privity with one another. Although the parties emphasize the familial relationship between Deng and the plaintiff, the Court finds that their status as privies is derived from their capacity as fellow shareholders of iFresh and the nature of the plaintiff's claim. In a derivative action such as this one, a plaintiff "only has standing to seek to bring an action by and in the right of the corporation and never has an individual cause of action" (*California State Teachers' Retirement Sys. v Alvarez*, 179 A3d 824, 847 [Del Sup Ct 2018]; see *Schoon v Smith*, 953 A2d 196, 202 [Del Sup Ct 2008] ["The stockholder does not bring (a derivative action) because his rights have been directly violated, or because the cause of action is his"]). Thus, where multiple derivative actions are filed, the plaintiffs in these actions share a common interest in seeking to prosecute claims on behalf of the corporation - the real party in interest to the derivative actions (see *California State Teachers' Retirement Sys.*, 179 A3d at 847). It follows, therefore, that "differing groups of stockholders who seek to control the corporation's cause of action share the same interest and therefore are in privity" (*id.*).

In the Delaware proceeding, Deng's counterclaim for aiding and abetting breach of fiduciary duty asserted against the defendant was predicated on certain alleged breaches of fiduciary duties which were owed to iFresh (see *Zhou*, 2022 WL 1024809 at *6, 2022 Del Ch LEXIS 79 at *11). Here, the claim for aiding and abetting breach of fiduciary duty asserted against the defendant is grounded in the same purported breaches of the same fiduciary duties. Thus, both this action and the Delaware proceeding involve different shareholders seeking to assert iFresh's aiding and abetting claim against the defendant (see *California State Teachers' Retirement Sys.*, 179 A3d at 847). The plaintiff and Deng, therefore, are parties in privity for the purpose of preclusion.

The Delaware court's jurisdiction over the parties and claims

Similarly, the plaintiff's argument that the Delaware court lacked personal jurisdiction over him is without merit. Although the plaintiff relies on *Genger v TR Invs., LLC* (26 A3d 180 [Del Sup Ct 2011]) in support of this argument, his reliance on this case is misplaced. As opposed to the claim asserted against the defendant here, *Genger* did not involve derivative rights asserted on behalf of a corporation. To the contrary, the personal jurisdiction issue in *Genger* was based on stockholders' individual property rights in the voting shares of the corporation (see *Genger*, 26 A3d at 201 ["An adjudication of who has the right to vote disputed corporate shares for Section 225 purposes cannot constitute a binding

adjudication of who beneficially owns those shares, because a Section 225 action is by its nature an *in rem*, not a plenary, proceeding. Only in a plenary proceeding before a court that has in personam jurisdiction over the litigants may the court adjudicate the litigants' property interest in disputed corporate shares."]).

Moreover, contrary to the plaintiff's additional contention, the Delaware court had subject matter jurisdiction over the claim against the defendant. As stated by the Delaware court:

The purpose of Section 225 is to provide a quick method for review of the corporate election process to prevent a Delaware corporation from being immobilized by controversies about whether a given officer or director is properly holding office. Because a Section 225 proceeding is summary in nature, and narrow in purpose, the scope of the proceeding is limited to determining those issues that pertain to the validity of actions to elect or remove a director or officer. In other words, for a claim to be adjudicated in a 225 proceeding, the adjudication must be necessary to help the court decide the proper composition of the corporation's board or management team (*Zhou*, 2022 WL 1024809 at *3, 2022 Del Ch LEXIS 79 at *7 [internal quotation marks and footnotes omitted]).

In the Delaware proceeding, the defendant sought to validate the written consent, which, among other things, removed Deng from his position as a director of iFresh. Yet Deng raised the instant aiding and abetting argument in an attempt to invalidate the written consent. Because the analysis of this contention was necessary to help the Delaware court determine the proper composition of iFresh's board of directors, the Delaware court had subject matter jurisdiction over this claim.

Identity of the issues in a final decree

For the reasons previously discussed, this Court further finds that the claims asserted against the defendant in this action and the Delaware proceeding are identical. The claims seek identical relief, have the same operative facts, and are premised on the same alleged actions of specific officers and directors of iFresh. What is more, the judgment in the Delaware proceeding was a final decree. The Delaware court dismissed Deng's counterclaims with prejudice after a two day trial, and this judgment was subsequently affirmed on appeal to the Supreme Court of Delaware (see *Deng v*

Zhou, 2022 WL 16832660, 2022 Del LEXIS 340 [Del Sup Ct, Nov. 9, 2022, No. 152, 2022]).

An adverse determination

Finally, in the Delaware proceeding, the aiding and abetting claim against the defendant was decided adversely to Deng. Because, as previously stated, Deng and the plaintiff are parties in privity with one another, this adverse determination also extends to the plaintiff. Nevertheless, in his opposition papers, the plaintiff appears to infer that because the Delaware court determined that Deng had waived this claim and did not substantively address it, there was no adverse determination in the Delaware proceeding. The Court disagrees.

"The procedural bar of res judicata extends to all issues which might have been raised and decided in the first suit as well as to all issues that actually were decided" (*LaPoint v AmerisourceBergen Corp.*, 970 A2d 185, 191-192 [Del Sup Ct 2009] [internal quotation marks and footnotes omitted]). Because issues that are not briefed are deemed waived (*Emerald Partners v Berlin*, 726 A2d 1215, 1224 [Del Sup Ct 1999]), where a party has had a full opportunity to present his or her facts, "but has neglected to present some of them or has failed to assert claims which should in fairness have been asserted, he will ordinarily be precluded by the doctrine of res judicata from subsequently pressing his omitted claim in a subsequent action" (*Maldonado v Flynn*, 417 A2d 378, 382 [Del Ch Ct 1980]). Under this rule against "claim splitting" (see generally *Wilson v Brown*, 36 A3d 351 [Del Sup Ct 2012] [table; text at 2012 WL 195393, *4, 2012 Del LEXIS 33, *12-13]), an express determination that a claim has been waived is adverse to the party asserting the claim because it prevents that party from raising the claim in a subsequent action. As the defendant established, this is precisely what happened here (see *Zhou*, 2022 WL 1024809 at *7, 2022 Del Ch LEXIS 79 at *12 [internal quotation marks and footnotes omitted]).

Upon a showing that a plaintiff's claim is barred by res judicata and the rule against claim splitting, in order to defeat a motion to dismiss, the plaintiff "must then show that there was some impediment to the presentation of the entire claim for relief in the prior forum" (*Kossol v Ashton Condominium Assn., Inc.*, 637 A2d 827 [Del Sup Ct 1994] [table; text at 1994 WL 10861, *2, 1994 Del LEXIS 16, *8]). "[W]here it appears that a plaintiff could not for jurisdictional reasons have presented his claim in its entirety in a prior adjudication, the rule against claim splitting will not be applied to bar this claim" (*Maldonado*, 417 A2d at 383). However, in opposition to the defendant's motion, the plaintiff

failed to meet this burden. As previously discussed, the plaintiff's arguments in opposition are insufficient to show that the Delaware court lacked jurisdiction over the parties or the claim at issue.

Therefore, the plaintiff's sole claim against the defendant is barred by res judicata (see *Sutton v Coons*, 940 A2d 946 [Del Sup Ct 2007] [table; text at 2007 WL 4293073, *2, 2007 Del LEXIS 529, *4; *Genger v Genger*, 121 AD3d 270, 279-280 [1st Dept 2014]; cf. *Spectris Inc. v 1997 Milton B. Hollander Family Trust*, 138 AD3d 626, 626-627 [1st Dept 2016]). Under these circumstances, the defendant's remaining arguments need not be addressed.

The plaintiff's cross motion

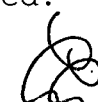
The plaintiff also cross-moves for leave to file a second amended complaint. In support of his cross motion, the plaintiff submits, among other things, a proposed second amended complaint. The proposed second amended complaint is a redlined version of the first amended complaint which makes specific changes to certain factual allegations. These proposed changes, however, do not address the defendant's argument that the cause of action asserted against him is precluded by the outcome of the Delaware proceeding.

Accordingly, it is

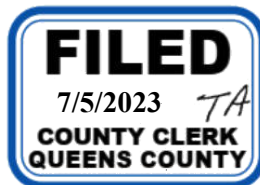
ORDERED that the defendant's motion to dismiss the complaint insofar as asserted against him is granted; and it is further

ORDERED that the plaintiff's cross motion for leave to serve and file a second amended complaint is denied.

Dated: 6/29/2023



J.S.C.



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

YAN DENG, *derivatively on behalf of nominal
defendant iFresh, Inc.*

Plaintiff,

-v-

PING ZHOU, AMY XUE, DENGRONG ZHOU,
KAIRUI TONG, HAO HUANG, HUBEI
RONGENTANG WINE CO., LTD, HUBEI
RONGENTANG HERBAL WINE CO., LTD.
FEI ZHANG, MENG LIU, and JIUXIANG BLUE
SKY TECHNOLOGY (BEIJING) CO., LTD.,

Defendants.

Index No. 712408/2022

Motion Seq. No. 001

IAS Part: 33

NOTICE OF ENTRY

CARTER LEDYARD & MILBURN LLP
28 Liberty Street
New York, NY 10005
(212) 732-3200