

Zhen Zhen Zhang v Yan Yun Wang

2019 NY Slip Op 35216(U)

September 26, 2019

Supreme Court, Queens County

Docket Number: Index No. 710895/18

Judge: Timothy J. Dufficy

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

-----X

ZHEN ZHEN ZHANG,
Plaintiff,
-against-

Index No. : 710895/18
Mot. Date: 9/17/19
Mot. Seq. 1

YAN YUN WANG and ZHEN WEI CAO,
Defendants.

-----X

YAN YUN WANG and ZHEN WEI CAO,
Third-Party Plaintiffs,
-against-

FILED
OCT - 3 2019
COUNTY CLERK
QUEENS COUNTY

G LENDING INC., PIONEER LENDING LLC,
IVAN GAO AND EASTONE INSURANCE
BROKERAGE INC.,

Third-Party Defendants.

-----X

The following papers were read on this motion by third-party defendant **EASTONE INSURANCE BROKERAGE INC. (Eastone)** for an order, pursuant to CPLR 3211(a)(1) and (7), dismissing the third-party Complaint as against Eastone; and on the cross-motion by third-party defendants **G LENDING INC. and IVAN GAO** for an order, pursuant to CPLR 3211(a)(1) and (7), dismissing the third-party Complaint as against G Lending Inc. and Ivan Gao and severing defendants G Lending Inc. and Ivan Gao from the instant action.

	<u>PAPERS</u>
	<u>NUMBERED</u>
Notice of Motion-Affidavits-Exhibits.....	EF 19-25
Memorandum of Law in Support.....	EF 26
Notice of Cross-Motion-Affidavits-Exhibits.....	EF 27

Affidavits in Opposition to Motion and Cross-Motion Exhibits.....	EF 30-39
Notice of Rejection.....	EF 40
Memorandum of Law in Reply.....	EF 41
Replying Affidavits-Exhibits.....	EF 42

Upon the foregoing papers it is ordered that this motion by third-party defendant **EASTONE INSURANCE BROKERAGE INC. (Eastone)** for an order, pursuant to CPLR 3211(a)(1) and (7), dismissing the third-party Complaint as against Eastone; and on the cross-motion by third-party defendants **G LENDING INC. AND IVAN GAO** for an order, pursuant to CPLR 3211(a)(1) and (7), dismissing the third-party Complaint as against G Lending Inc. and Ivan Gao, and severing defendants G Lending Inc. and Ivan Gao from the instant action, are hereby denied.

The underlying action arises out of an alleged slip-and-fall by plaintiff Zhen Zhen Zhang, on January 10, 2018, on the sidewalk abutting the premises, located at 144-28 35th Avenue, Queens, New York. Plaintiff maintains that he sustained serious personal injuries due to the negligence of defendants Yan Yun Wang and Zhen Wai Cao, who are undisputedly the owners of the subject premises. Defendants/third-party plaintiffs Yan Yun Wang and Zhen Wai Cao allege, via a third-party Complaint, that they were denied coverage for the plaintiff’s accident under their homeowner’s liability insurance policy issued by Hyundai Fire and Marine Insurance Company, Ltd. because they did not “reside at the subject premises” and had not resided there since the premises were purchased. Defendants/third-party plaintiffs further allege that third-party defendants Eastone, G Lending Inc., and Ivan Gao “advised, recommended, assisted and procured” the subject insurance policy for them and in doing so, third-party defendants Eastone, G Lending Inc., and Ivan Gao were negligent in obtaining the policy because they “knew or should have known that the premises were purchased solely for investment purposes and defendant/third-party plaintiffs would not be residing there.”

Moving third-party defendant Eastone and cross-moving third-party defendants, G Lending Inc. and Ivan Gao now move to dismiss the third-party plaintiffs’ Complaint, pursuant to CPLR 3211(a)(1) and (7).

Moving third-party defendant Eastone moves to dismiss the third-party Complaint against it, claiming that, *inter alia*, it was not negligent because the “Dwelling Policy Application” for the initial Policy, dated March 18, 2015, indicated that the defendants/third-party plaintiffs requested coverage for an “owner occupied” dwelling; as did the application for the renewal policy, dated April 4, 2016. It is undisputed that the subject dwelling was NOT “owner occupied.” In support of its motion, moving defendant Eastone submits, *inter alia*, the affidavit of Grace Zhang, Chief Executive Officer of third-party defendant Eastone.

Cross-Moving third-party defendants, G Lending Inc. and Ivan Gao move to dismiss the third-party Complaint against them, claiming that, *inter alia*, they were not negligent and did not breach any contract with third-party plaintiffs. In support of their cross-motion, cross-moving defendants submit, *inter alia*, the affidavit of Yunxian Gao, President of third-party defendant, G Lending Inc.

In opposition, defendants/third-party plaintiffs Yan Yun Wang and Zhen Wei Cao, maintain that they relied on third-party defendant Ivan Gao to apply for and to complete the forms necessary to procure homeowners insurance for them, and that there is a dispute as to whether defendant Eastone took the proper steps to fulfill their duties as an insurance broker to obtain proper insurance for third-party plaintiffs. Furthermore, defendants/third-party plaintiffs maintain that third-party defendants G Lending Inc. and Iva Gao were negligent in failing to disclose to Eastone that the subject premises were for investment purposes, rather than for occupancy by owner.

The branches of the motion and cross-motion to dismiss plaintiff’s Complaint pursuant to CPLR 3211(a)(1) are denied.

CPLR 3211 provides in relevant part: “(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. A defense is founded on documentary evidence ***”. 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; *Vanderminden v Vanderminden*, 226 AD2d 1037; *Bronxville Knolls, Inc. v Webster Town Center Partnership*, 221 AD2d 248).

“However, dismissal is warranted if the documentary evidence contradicts the claims raised in the complaint” (*Jericho Group, Ltd. v Midtown Development, L.P.*, 32 AD3d 294 [1st Dept 2006][internal citations omitted]). “To some extent, ‘documentary evidence’ is a ‘fuzzy’ term, and what is documentary evidence for one purpose, might not be documentary evidence for another” (*Fontanetta v John Doe 1*, 73 AD3d 78 [2d Dept 2010]). However, it is well-established law that affidavits and deposition testimony are not documentary evidence, and deeds and contracts are documentary evidence (*Id.*) “[T]o be considered ‘documentary’, evidence must be unambiguous and of undisputed authenticity” (*Id.*)(*internal citations omitted*).

The documentary evidence submitted in the instant matter, which consists of, *inter alia*, a “Dwelling Policy Application” is insufficient to dispose of third-party Complaint as against moving third-party defendant Eastone or cross-moving third-party defendants G Lending Inc. and Ivan Gao. While moving third-party defendant and cross-moving third-party defendants submit affidavits in support of the motion and cross-motion, such documentation is not considered “documentary evidence” within the intended scope of CPLR 3211(a) (*Suchmacher v Manana Grocery*, 73 AD3d 1017 [2d Dept 2010][internal citations omitted]; *see, Fontanetta, supra*). The documentary evidence that forms the basis of a 3211(a)(1) motion must resolve all factual issues and completely dispose of the claim (*Held v Kaufman* 91 NY2d 425 [1998]; *Teitler v Max J. Pollack & Sons*, 288 AD2d 302 [2001]). Here, the documentary evidence is insufficient to dispose of the third-party Complaint as against moving third-party defendant and cross-moving third-party defendants as issues of fact remain regarding, *inter alia*, whether there was any negligence on the part of third-party defendants.

The branches of the motion and cross-motion to dismiss the third-party Complaint pursuant to CPLR 3211(a)(7) are denied.

"It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference ****" (*Jacobs v Macy's East, Inc.*, 262 AD2d 607, 608 [2d Dept 1999]; *Leon v Martinez*, 84 NY2d 83 [NY 1994]). The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (*see Stukuls v*

State of New York, 42 NY2d 272 [1977]; *Jacobs v Macy's East, Inc.*, *supra*), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading (*see Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633[NY 1976]). Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits (*Given v County of Suffolk*, 187 AD2d 560 [2d Dept 1992]). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint (*see Rovello v Orofino Realty Co., Inc.*, *supra*; *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 AD2d 159.)

The Court finds that the third-party Complaint adequately states causes of action as against moving third-party defendant and cross-moving third-party defendants.

Furthermore, moving third-party defendant and cross-moving third-party defendants have improperly sought to reach the merits of the third-party complaint on this mere CPLR 3211(a) motion (*see Stukuls v State of New York*, *supra*; *Jacobs v Macy's East Inc.*, *supra.*)

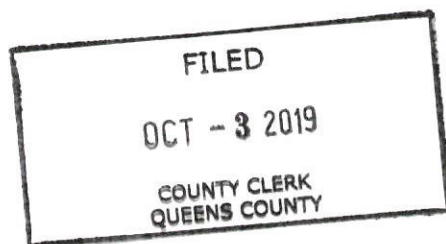
Accordingly, it is

ORDERED that the motion is denied; and it is further

ORDERED that the cross-motion is denied.

The foregoing constitutes the decision and order of this Court.

Dated: September 26, 2019





TIMOTHY J. DUFFICY, J.S.C.