

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D28205
H/prt

_____AD3d_____

Argued - June 17, 2010

A. GAIL PRUDENTI, P.J.
REINALDO E. RIVERA
FRED T. SANTUCCI
HOWARD MILLER, JJ.

2010-01469

DECISION & ORDER

May Cheung, et al., respondents, v Chao Fu, et al.,
defendants, Red Apple Child Development Center,
et al., appellants.

(Index No. 16126/09)

Kenny, Sterns & Zonghetti, LLC, New York, N.Y. (Gino A. Zonghetti and Noreen D. Arralde of counsel), for appellants.

Sullivan Papain Block McGrath & Cannavo, P.C., New York, N.Y. (Stephen C. Glasser and Susan M. Jaffe of counsel), for respondents.

Michael E. Pressman, New York, N.Y. (Stuart B. Cholewa of counsel), for defendants Chao Fu and Imperial China, Inc., doing business as China Chalet.

In an action, inter alia, to recover damages for wrongful death, etc., the defendants Red Apple Child Development Center and Xiaoping Fan, also known as Joanna Fan, appeal from an order of the Supreme Court, Kings County (Jacobson, J.), dated December 22, 2009, which denied their motion pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint insofar as asserted against them.

ORDERED that the order is affirmed, with costs.

In considering a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court should “accept the facts as alleged in the complaint as true, accord [the] plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any

July 27, 2010

Page 1.

CHEUNG v CHAO FU

cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88; *see Caravousanos v Kings County Hosp.*, _____AD3d_____, 2010 NY Slip Op 04723 [2d Dept 2010]; *Sarva v Self Help Community Servs., Inc.*, 73 AD3d 1155). Moreover, “[o]n a motion to dismiss pursuant to CPLR 3211(a)(7), the pleading is to be afforded a liberal construction” (*Kempf v Magida*, 37 AD3d 763, 764).

Here, in accordance with this standard, the Supreme Court properly denied that branch of the appellants’ motion which was pursuant to CPLR 3211(a)(7) to dismiss the complaint insofar as asserted against them. Affording the plaintiffs a liberal construction of their pleading, as well as every favorable inference, the complaint states causes of action against the appellants to recover damages for negligent hiring, negligent supervision, negligent training, and negligent retention (*see generally Mirand v City of New York*, 84 NY2d 44, 49; *Oldham v Eastport Union Free School Dist.*, 26 AD3d 480).

Additionally, the Supreme Court correctly denied that branch of the appellants’ motion which was pursuant to CPLR 3211(a)(1) to dismiss the complaint insofar as asserted against them based on documentary evidence. The purported documentary evidence submitted by the appellants did not “resolve[] all factual issues as a matter of law and conclusively dispose of the plaintiffs[’] claim” as is required for dismissal under CPLR 3211(a)(1) (*Del Pozo v Impressive Homes, Inc.*, 29 AD3d 621, 622 quoting *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 347; *see Herrnsdorf v Bernard Janowitz Constr. Corp.*, 67 AD3d 640, 643).

Accordingly, the Supreme Court properly denied the appellants’ motion pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint insofar as asserted against them.

PRUDENTI, P.J., RIVERA, SANTUCCI and MILLER, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court