

<b>Lihong Dong v Ming Hal</b>
2011 NY Slip Op 33712(U)
November 15, 2011
Sup Ct, Queens County
Docket Number: 700221/11
Judge: Denis J. Butler
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable DENIS J. BUTLER IAS PART 12  
Justice

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LIHONG DONG and LUIJANG LAI,

Plaintiffs,

-against-

MING HAL, AN INDIVIDUAL; LAW OFFICE OF  
MING HAI, P.C., A NEW YORK PROFESSIONAL  
SERVICE CORPORATION; LI SHEN, AN  
INDIVIDUAL; AND DOES 1 THROUGH 15,  
INCLUSIVE,

Defendants.  
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Index No.: 700221/11

Motion Date:  
October 4, 2011

Cal. No.: 9 & 10  
Seq. No.: 1 & 2

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QUEENS COUNTY CLERK  
FILED

The following papers numbered 1 to 40 read on this motion by defendants, Ming Hai and Law Office of Ming Hai, P.C. ("Hai"), seeking to dismiss plaintiffs' complaint, pursuant to CPLR §3211(a)(1) and (7), and motion by defendant, Li Shen ("Shen"), seeking to dismiss plaintiffs' complaint as against him, pursuant to, inter alia, CPLR §3211(a)(7), (8) and (10).

Papers  
Numbered

- Hai Notice of Motion, Affirmation, Exhibits.... 1-14
- Plaintiff's Memorandum of Law in Opposition,  
Affirmation, Exhibits..... 15-21
- Reply Affirmation..... 22
- Shen Notice of Motion, Affirmation, Affidavit,  
Exhibits..... 23-32
- Plaintiff's Memorandum of Law in Opposition,  
Affirmation, Exhibits..... 33-39
- Affirmation in Further Support..... 40

Upon the foregoing papers, it is ordered that these motions are determined as follows:

Defendants, Hai, move to dismiss plaintiffs' complaint (Ex. A), pursuant to CPLR §3211(a)(1) and (7), on the grounds of a defense based upon documentary evidence and for failure of plaintiffs to state a cause of action. Defendant, Shen, moves to dismiss the First, Tenth, Eleventh, Twelfth and Thirteenth Causes of Action in plaintiffs' complaint (Ex. A), pursuant to CPLR §3211(a)(7), for failure of plaintiffs to state a cause of action; §3211(a)(8), for lack of jurisdiction; §3211(a)(10), for lack of a necessary party; and for prior actions pending.

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (see, Leon v. Martinez, 84 N.Y.2d 83 [1994]) and the plaintiff is to be accorded the benefit of every possible inference (see, Cueto v. Hamilton Plaza Co., Inc., 67 A.D.3d 722 [2 Dept. 2009]). Initially, the sole criterion to dismiss a complaint is whether the pleading, and the factual allegations contained within its four corners, manifests any cause of action cognizable at law (see, Gaidon v. Guardian Life Ins. Co. Of America, 94 N.Y.2d 330 [1999]). The Court must find plaintiff's complaint to be legally sufficient if it finds that plaintiff is entitled to recovery upon any reasonable view of the stated facts (see, Hoag v. Chancellor, Inc., 246 A.D.2d 224 [1 Dept. 1998]).

A motion made pursuant to CPLR §3211(a)(1) warrants dismissal only if the evidence submitted utterly refutes, and conclusively establishes a defense to, the asserted claims as a matter of law (see, Goshen v. Mutual Life Ins. Co., 98 N.Y.2d 314 [2002]). For the evidence to be considered "documentary" under that statute, such evidence must be of undisputed authenticity, unambiguous and undeniable (see, Kopelowitz & Co., Inc. v. Mann, 83 A.D.3d 793 [2 Dept. 2011]). Defendants, Hai, have failed to submit "documentary" evidence in support of the branch of the Hai motion seeking to dismiss the plaintiffs' complaint, pursuant to CPLR §3211(a)(1), and have failed to conclusively establish such defense to the asserted claims as a matter of law. As such, the branch of the Hai motion seeking to dismiss the plaintiffs' complaint, pursuant to CPLR §3211(a)(1), is hereby denied.

The branch of the Hai motion seeking to dismiss the plaintiffs' complaint, pursuant to CPLR §3211(a)(7), for failure to state a cause of action, is hereby granted. Plaintiffs have failed to demonstrate that the subject "blog" statements made by the Hai defendants on Backchina.com, dated February 17, 2011 (Ex. A to Complaint), which do not identify plaintiffs by name or by any other discernible fact, would lead persons reading the "blog" to understand, in light of the surrounding circumstances, that the defamatory statements were "of and concerning" plaintiffs (Springer v. Viking Press, 60 N.Y.2d 916, 917 [1983]; see, Salvatore v. Kumar, 45 A.D.3d 560 [2 Dept. 2007]; DeBlasio v. North Shore Univ. Hosp., 213 A.D.2d 584 [2 Dept. 1995]). While it is not necessary that the plaintiff be named in the subject material, the allusion to plaintiff must be apparent (see, Giaimo v. Literary Guild, 79 A.D.2d 917 [1 Dept. 1981]). Such is not the case here. The references contained in the subject "blog" differ substantially from the facts regarding the plaintiffs herein, rendering as too remote any reasonable interpretation that plaintiffs were the subject of such statements. As such, the branch of the Hai motion seeking to dismiss the plaintiffs' complaint, pursuant to CPLR §3211(a)(7), for failure to state a cause of action in defamation, is hereby granted.

The branch of the motion by defendant, Shen, seeking to dismiss the First, Tenth, Eleventh, Twelfth and Thirteenth Causes of Action against defendant, Shen, for failure to state a cause of action, pursuant to CPLR §3211(a)(7), is hereby denied. The Tenth Cause of Action, regarding the "press conference" statement (Ex. F to Complaint) contains sufficiently particular factual details to demonstrate the material elements of the cause of action for defamation against defendant, Shen, herein, especially in light of the fact that defendant, Shen, allegedly identified the plaintiffs by name (see, Staskowski v. Nassau Community College, 53 A.D.3d 611 [2 Dept. 2008]). On a motion to dismiss the complaint for failure to state a cause of action, a single legally sufficient cause of action requires denial of the entire motion (see, Advance Music Corp. V. American Tobacco Co., 296 N.Y. 79 [1946]; Paulsen v. Paulsen, 148 A.D.2d 685 [2 Dept. 1989]).

The Court has considered defendant, Shen's remaining contentions regarding dismissal, including lack of personal jurisdiction, failure to name indispensable parties, and prior

actions pending, and find them to be without merit.

Accordingly, the motion by defendants, Hai, seeking to dismiss plaintiffs' complaint, pursuant to CPLR §3211(a)(1) and (7), for failure to state a cause of action and upon a defense founded upon documentary evidence, is hereby granted. The motion by defendant, Shen, seeking to dismiss the Causes of Action in plaintiff's complaint against defendant, Shen, pursuant to, inter alia, CPLR §3211(a)(7), is hereby denied.

This Constitutes the Decision and Order of the Court.

Dated: November 15, 2011

  
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Denis J. Butler, J.S.C.

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