

New Fuzhou Senior Assn. USA, Inc. v Sang Kwai Yan
2012 NY Slip Op 33513(U)
October 19, 2012
Sup Ct, NY County
Docket Number: 153441/12
Judge: Cynthia S. Kern
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: CYNTHIA S. KERN
J.S.C.
Justice

PART _____

Index Number : 153441/2012
NEW FUZHOU SENIOR
vs.
YAN, SANG KWAI
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 10/19/12

CYNTHIA S. KERN, J.S.C.
J.S.C.

1. CHECK ONE: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
NEW FUZHOU SENIOR ASSOCIATION USA, INC.,

Plaintiff,

Index No. 153441/12

-against-

DECISION/ORDER

SANG KWAI YAN, ZHUOGUAN WANG, SIN TSE
CHIU, ZHANG DE TANG, JINXIANG ZHANG,
EASTWEST BANK, solely as a stakeholder,

Defendants.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Cross-Motion and Affidavits Annexed.....	<u>3</u>
Answering Affidavits to Cross-Motion.....	<u>4</u>
Replying Affidavits.....	<u>5</u>
Exhibits.....	<u>6</u>

Plaintiff New Fouzhou Senior Association USA, Inc. (the “Association”) commenced the instant action (“Action No. 2”) against defendants Sang Kwai Yan (“Yan”), Zhuoguan Wang (“Wang”), Sin Tse Chiu (“Chiu”), Zhang De Tang (“Tang”), Jinxiang Zhang (“Zhang”) and EastWest Bank (“EastWest”), solely as a stakeholder, alleging, among other things, fraud, conversion, unjust enrichment, breach of fiduciary duty, prima facie tort, conspiracy and accounting stemming from the Association’s election on April 23, 2012 of President and Chairman and defendants’ conduct as a result of that election. Defendants now move pursuant to

CPLR § 3211(a)(4) and (a)(7) to dismiss plaintiff's complaint on the grounds that (1) there is another action pending between the same parties for the same cause of action in this court and (2) the complaint fails to state a cause of action. Plaintiff cross-moves for an Order pursuant to CPLR § 602 consolidating Action No. 2 with an action pending in this court, Index No. 152176/12 ("Action No. 1"); and removing defendants' counsel Peter L. Quan, Esq. from representation of defendants in this matter. For the reasons set forth below, defendants' motion is granted and plaintiff's cross-motion is denied.

The relevant facts are as follows. Defendant Yan was elected the Chairman and President of the Association in 2011. On or about September 24, 2011, Yan traveled abroad and authorized Yan Tuen Chan ("Chan"), the Vice President of the Association, to oversee matters of the Association in his place. In defendant Yan's absence, defendants allege that Chan ran the Association with regard only to his own interest and benefit and gravely violated the By-laws of the Association in the process. On or about April 26, 2012, defendants commenced Action No. 1 on behalf of the Association in New York State Supreme Court, Index No. 152176/12, against Chan, Renkai Zheng ("Zheng") and Zuelong Chen ("Chen"), the plaintiff in the current action, alleging fraud, misrepresentation, conversion, breach of fiduciary duty, defamation and violation of the Association's By-laws, among other things. Action No. 2 was commenced on or about June 6, 2012.

The court first turns to defendants' motion to dismiss the complaint pursuant to CPLR § 3211. As an initial matter, defendants' motion to dismiss the complaint pursuant to CPLR § 3211 (a)(4) on the ground that there is another action pending in this court between the same parties for the same cause of action is granted. It is undisputed that the parties in both Action

No. 1 and Action No. 2 are substantially identical. Action No. 1 was commenced on behalf of the Association by Yan, Wang, Chiu, Tang and Zhang, the named defendants in Action No. 2, against Chan, Zheng and Chen, all of whom commenced Action No. 2 on behalf of the Association. The sole party not shared by Action No. 1 and Action No. 2 is EastWest, which was named as a defendant in Action No. 2 solely for its role as the stakeholder of the Association's funds.

Further, it is undisputed that the causes of action in both Action No. 1 and Action No. 2 arise from the same subject matter and have the same purpose. Both Action No. 1 and Action No. 2 revolve around the Association's election on April 23, 2012 for President and Chairman and seek to have the court adjudicate the validity of the election. Both Actions are brought on behalf of the Association seeking damages for the unauthorized use or misuse of the Association's funds and for conduct of the defendants in both actions regarding the election and its result. Therefore, as Action No. 1 and Action No. 2 are substantially identical in parties and the relief sought, plaintiffs in Action No. 2 can assert cross-claims against defendants in Action No. 1 and will have the opportunity to seek the requested relief. Thus, Action No. 2 is hereby dismissed.

The court declines to address defendants' motion to dismiss the complaint pursuant to CPLR § 3211(a)(7) as this court has already dismissed the complaint pursuant to CPLR § 3211(a)(4).

The court now turns to plaintiff's cross-motion for an order (1) pursuant to CPLR § 602 consolidating Action No. 1 and Action No. 2; and (2) removing defendants' counsel Peter L. Quan, Esq. from representation of defendants in this matter. As an initial matter, plaintiff's

cross-motion for an order consolidating Action No. 1 and Action No. 2 is denied as this court has already found that the appropriate remedy is to dismiss Action No. 2 pursuant to CPLR § 3211(a)(4). Additionally, plaintiff's cross-motion for an order removing defendants' counsel Peter L. Quan, Esq. from representation of defendants in Action No. 2 is denied as moot as this action is being dismissed in its entirety.

Accordingly, defendants' motion to dismiss the complaint is granted and plaintiff's cross-motion is denied. The complaint in Action No. 2 is hereby dismissed in its entirety. This constitutes the decision and order of the court.

Dated: 10/19/12

Enter: PK
J.S.C.

CYNTHIA S. KERN
J.S.C.