

**Li-Shan Wang v TIAA-CREF Life Ins. Co.**

2014 NY Slip Op 30329(U)

January 28, 2014

Supreme Court, New York County

Docket Number: 106689/2009

Judge: Joan A. Madden

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: Hon Joan A. Madlew  
Justice

PART 11

Index Number : 106689/2009  
WANG, LI-SHAN  
vs.  
TIAA-CREFF LIFE INSURANCE  
SEQUENCE NUMBER : 005  
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 decided in accordance with the  
attached Memorandum Decision & Order.

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

*Q*

**FILED**  
FEB 06 2014  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: January 28, 2014  
*[Signature]*

*[Signature]*, 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

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TIAA-CREFF LIFE INSURANCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 11

-----X  
Li-Shan Wang,

Plaintiff,

Index  
Number:

-against-

106689/2009

TIAA-CREF Life Insurance  
Company a/k/a Teachers  
Insurance and Annuity  
Association, Michelle Xu  
a/k/a Yuan Xu, Individually  
and as Mother and Natural Guardian  
of Kaya Neftci and Kaan Neftci,  
Merv Neftci and Emre Neftci,

Defendants.

-----X

TIAA-CREF Life Insurance  
Company a/k/a Teachers Insurance  
and Annuity Association,

Interpleading Plaintiff,

-against-

Michelle Xu a/k/a Yuan  
Menager-Xu a/k/a Michelle Yuan  
Xu, Kaya Neftci, an Infant by  
his Mother and Natural Guardian,  
Michelle Xu, Kaan Neftci, an  
Infant by his Mother and  
Natural Guardian, Michelle Xu,  
Merve Neftci and Emre Neftci,

Interpleaded Defendants.

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Joan A. Madden, J.:

Michelle Xu (Xu), Kaya Neftci (Kaya), and Kaan Neftci (Kaan)  
(together "the Xu defendants) move, pursuant to CPLR 3211 (a)  
(8), to dismiss plaintiff's complaint for lack of personal

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jurisdiction over them and, pursuant to CPLR 3211 (a) (7) and CPLR 3016 (b) for failure to plead with sufficient particularity. TIAA-CREF Life Insurance Company (TIAA) cross-moves to dismiss plaintiff's complaint for failure to plead with sufficient particularity or, in the alternative, opposes the Xu defendants' motion to the extent it seeks dismissal for lack of personal jurisdiction and seeks leave to amend its answer to assert cross claims against the co-defendants for contribution and common-law indemnification, to consolidate this case with an action pending in Supreme Court, New York County, entitled *TIAA-CREF Life Insurance Company v Michelle Xu a/k/a Yuan Menager-Xu a/k/a Michelle Yuan Xu, Kaya Neftci, an Infant by his Mother and Natural Guardian, Michelle Xu, Kaan Neftci, an Infant by his Mother and Natural Guardian, Michelle Xu*, index number 152086/2012 (the Related Action) and for leave to serve Xu defendants in the manner set forth in this court's order dated December 14, 2012 (the December 2012 Order).

### **Background**

Unless otherwise noted, the following facts are based on the allegations in the amended complaint. On February 12, 2002, Salih Neftci (Salih) applied to TIAA for a life insurance policy and, on March 20, 2002, he was issued policy number 05014747 in the face amount of \$500,000 (the Policy) (amended complaint, ¶ 6; admitted, TIAA answer, ¶ 7; admitted, Xu defendants' answer ¶ 4).

Salih resided in New York at that time and plaintiff Li-Shan Wang (Wang) was the beneficiary under the Policy (amended complaint, ¶ 6).

A change of beneficiary form was sent by Salih on October 24, 2008 (the First Change of Beneficiary), purporting to change the primary beneficiaries to Kaya, Kaan, Emre Neftci (Emre) and Merve Neftci (Merve), who are identified as Salih's children, with contingent beneficiaries, Gul Neftci (Gul), identified as Salih's wife and Xu, identified as his friend. Kaya and Kaan are noted as being born on February 2, 2006, Emre's date of birth is given as July 8, 1982 and Merve's date of birth is given as June 24, 1975. On January 1, 2009, a second change of beneficiary form (the Second Change of Beneficiary) was sent by Salih, purporting to make Kaya and Kaan each 50% irrevocable primary beneficiaries and Xu the sole contingent beneficiaries. On January 29, 2009, a request to change ownership of the Policy (the Xu Ownership Transfer) was sent by Salih, notarized before a United States consul in Geneva, Switzerland, and purporting to transfer ownership of the Policy to Xu, with her address given at Temple City, California.

On March 9, 2009, Wang sent a request to transfer ownership of the Policy (the Wang Ownership Transfer), purporting to transfer ownership of the Policy from Salih to Wang and naming Wang as sole primary beneficiary. The Wang Ownership Transfer

was signed by Salih and notarized in Switzerland. On March 26, 2009, TIAA received a third beneficiary change form (the Third Change of Beneficiary), purporting to make Xu the irrevocable sole beneficiary under the Policy and naming her children, Kaya and Kaan as contingent beneficiaries.

On April 6, 2009, TIAA rejected the Wang Ownership Transfer, stating that on the date of the purported transfer in February 2009, Salih was not the owner of the Policy and, hence, lacked the power to make such a change. On April 15, 2009, Salih died (amended complaint, ¶ 7; admitted TIAA answer, ¶ 8).

On April 17, 2009, Wang made a claim under the Policy (*id.*, ¶ 8). On May 14, 2009, TIAA issued two checks in the amount of \$309,533.74 each, for a total of \$619,074.48 (the Proceeds), to Xu as guardian of Kaya and Kaan, in accordance with the terms of the Second Change of Beneficiary.

On May 12, 2009, Wang commenced this action by filing a summons and complaint, seeking a declaration that she was the rightful beneficiary under the Policy. TIAA was served via the Secretary of State and upon learning of this action on May 19, 2009, it issued a stop payment on the Proceeds (Eaker affirmation dated April 15, 2013, ¶ 16). It wrote to Xu, advising her not to cash the Proceeds. On or about May 27, 2009, Emre wrote to TIAA, stating that distribution of the Proceeds should not occur, since he was unaware of any change in his status as a beneficiary under

the Policy. On or about June 1, 2009, the Proceeds were paid to Xu's account (*id.*, ¶ 19).

On January 21, 2010, TIAA commenced an interpleader action in this court, seeking a determination of the proper party entitled to the Proceeds. On April 24, 2012, TIAA commenced the Related Action against the Xu defendants, seeking return of the Proceeds, leave to deposit the Proceeds into court and to be discharged from any liability. It has not served the Xu defendants (Eaker affirmation dated August 16, 2012, ¶¶ 43-47).

On February 13, 2013, the Xu defendants served their answer in this action with affirmative defenses including lack of personal jurisdiction over them and lack of particularity under CPLR 3016 (b), and on February 20, 2013, they made this motion to dismiss. On April 15, 2013, TIAA cross-moved to dismiss Wang's complaint for lack of particularity or, alternatively, for amendment to assert cross claims, consolidation of the Related Action into this case and for leave to serve the Xu defendants in the same manner as the court permitted in the December 2012 Order.

Plaintiff alleges that "[all of the ... beneficiary and policy ownership changes were the result of undue influence and/or of Salih's diminished capacity" (amended complaint, ¶ 13).

The Policy provides that it "is governed by the laws of the state of New York" (Policy at 6). There is no forum selection

clause in the Policy.

### **Personal Jurisdiction**

In support of the Xu defendants' motion to dismiss for lack of personal jurisdiction, Xu submits her affidavit in which she states that she, Kaya and Kaan were previously residents of Switzerland and that they now reside in China (Xu affidavit, ¶ 2). She asserts that she never executed any documents in New York, but rather in Switzerland and sent them to TIAA's office in Charlotte, North Carolina (*id.*, ¶ 3). She also states that neither she nor her seven-year-old children transacted, conducted or solicited any business in New York, derived any substantial revenue from New York goods or services or engaged in any persistent course of conduct in New York (*id.*, ¶¶ 4-6). Consequently, she seeks dismissal of Wang's complaint against her, Kaya and Kaan.

Wang opposes the motion, arguing that there is jurisdiction over the Xu defendants as Xu accepted ownership of the Policy which was written by a New York insurance company, and is a New York contract governed by New York law. Wang also points out the Xu, through counsel, appeared in an action brought by Wang which was removed to Federal court and concerned a different life insurance policy.

TIAA similarly argues that there is jurisdiction over the Xu defendants as Xu transacted business in New York based on her

involvement with a New York company which issued a Policy with a New York choice of law clause. In addition, TIAA argues that under these circumstances, Xu should have anticipated that any litigation arising out of the contract would be litigated in New York.

"New York's long-arm [jurisdiction] statute, CPLR 302, ... authorizes the court to exercise jurisdiction over nondomiciliaries for tort and contract claims arising from a defendant's transaction of business in this State ... even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted" (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]; *Kaprall v WE: Women's Entertainment, LLC*, 74 AD3d 1151, 1153 [2d Dept 2010]). "[T]o demonstrate that an individual is transacting business within the meaning of CPLR 302 [a] [1], 'there must have been some 'purposeful activities' within the State that would justify bringing the nondomiciliary defendant before the New York courts'" (*SPCA of Upstate N.Y., Inc. v American Working Collie Assn.*, 18 NY3d 400, 404 [2012], quoting *McGowan v Smith*, 52 NY2d 268, 271 [1981]; *Pramer S.C.A. v Abaplus Intl. Corp.*, 76 AD3d 89, 95 [1st Dept 2010]).

The court must examine "the particular facts in each case ... [and] closely examine the defendant's contacts for their

quality" (*Licci v Lebanese Can. Bank, SAL*, 20 NY3d 327, 338 [2012]). Where the nexus between between the defendant's activities and the claim is "too attenuated", the court lacks jurisdiction (*Copp v Ramirez*, 62 AD3d 23, 29 [1st Dept], lv denied 12 NY3d 711 [2009]). Also, where there was insufficient purposeful activity within New York, "defendant's action's [do] not amount to a purposeful invocation of the privileges of conducting business in New York [and hence, do not support jurisdiction]" (*Executive Life Ltd. v Silverman*, 68 AD3d 715, 717 [2d Dept 2009]; see also *Royalty Network, Inc. v Harris*, 95 AD3d 775, 775-776 [1st Dept 2012]).

However, the court has "recognized CPLR 302 [a] [1] long-arm jurisdiction over commercial actors and investors using electronic and telephonic means to project themselves into New York to conduct business transactions" (*Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71 [2006], cert denied 549 US 1095 [2006]).

"The burden of proving jurisdiction is upon the party asserting it and when challenged that party must sustain that burden [by producing appropriate evidence]" (*Green Point Sav. Bank v Taylor*, 92 AD2d 910, 910 [2d Dept 1983]).

Here, this burden has not been met based on Xu's ownership of a New York insurance policy governed by New York law. As a preliminary matter, while a forum selection clause can be binding

on a nondomiciliary that is a beneficiary of a contract (*Tate & Lyle Ingredients Ams., Inc. v Whitefox Tech. USA, Inc.*, 98 AD3d 401, 401 [1st Dept 2012]; *Freeford Ltd. v Pendleton*, 53 AD3d 32, 38-39 [1st Dept 2008], *lv denied* 12 NY3d 702 [2009]), a choice of law clause, like the one in the Policy, "while relevant, is insufficient by itself to confer personal jurisdiction over a defendant in New York" (*Executive Life Ltd. v Silverman*, 68 AD3d at 717).

Xu has asserted that neither she, nor her seven-year-old children, Kaya and Kaan, conducted, solicited or transacted any business in New York and that Xu's activities relating to the beneficiary changes occurred outside New York (Xu affidavit, ¶¶ 2-6). In particular, the Transfer of Ownership form was not executed in New York or transmitted to New York. To the contrary, as pointed out by Xu, she executed the form in Geneva, Switzerland and transmitted it to TIAA's offices in Charlotte, North Carolina. Moreover, neither Wang nor TIAA submit any evidence to the contrary. In fact, Wang concedes that all contact between Xu and TIAA was through TIAA's offices in North Carolina. In this connection, the courts have held that a non-domiciliary who executes a contract outside of New York is not subject to jurisdiction based on a plaintiff's issuance of a contract from New York (*Royalty Network, Inc. v Harris*, 95 AD3d at 775-776; *Libre Global Technology Services (UK) Ltd. v.*

*Telemedia Intl, Ltd*, 279 AD2d 326 [1<sup>st</sup> Dept 2001]); see also, *Insurance Co. of North America v. EMCOR, Inc.*, 9 AD3d 219 [1<sup>st</sup> Dept 2004][dismissing complaint against defendant California corporation for lack of long arm jurisdiction when defendant has not contacts with New York even though insurance policies under which plaintiff sought declaratory relief as against defendant were negotiated in New York by defendant's agent]).

Accordingly, as there is no personal jurisdiction over the Xu defendants their motion to dismiss must be granted. In any event, as set forth below, the claim of undue influence against the Xu defendants has not been pleaded with sufficient particularity and the complaint must be dismissed on this ground as well.

#### **Undue Influence**

CPLR 3016 (b) provides as follows:

"Where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail."

"The purpose of [this statute's] pleading requirement is to inform a defendant with respect to the incidents complained of ... [and it] should not be so strictly interpreted 'as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances'" (*Pludeman v*

*Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 [2008], quoting *Lanzi v Brooks*, 43 NY2d 778, 780 [1977]). “[T]here is certainly no requirement of ‘unassailable proof’ at the pleading stage, [but] the complaint must ‘allege the basic facts to establish the elements of a cause of action’ ... [and therefore] CPLR 3016 [b] is satisfied when the facts suffice to permit a ‘reasonable inference’ of the alleged misconduct” (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009], quoting *Pludeman*, 10 NY3d at 492).

However, “[b]are allegations” are insufficient (*Gervasio v Di Napoli*, 126 AD2d 514, 514 [2d Dept 1987]; *Pace v Raisman & Assoc., Esqs., LLP*, 95 AD3d 1185, 1189 [2d Dept 2012]). Also, “allegations [that] are wholly speculative” lack the required particularity under CPLR 3016 (b) (*Katz 737 Corp. v Cohen*, 104 AD3d 144, 154 [1st Dept 2012], *lv denied* -NY3d-, 2013 NY Slip Op 84042, 2013 WL 4711225 [2013]).

“‘To be ‘undue’, the influence exerted must amount to mental coercion that led the [person] to carry out the wishes of another, instead of [his] own wishes, because the [person] was unable to refuse or [was] too weak to resist’” (*Matter of Ryan*, 34 AD3d 212, 213 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007] [internal citation omitted]). “The elements of undue influence are ‘motive, opportunity and the actual exercise of that undue influence’” (*Matter of Nofal*, 35 AD3d 1132, 1134 [3d Dept 2006]

[internal citation omitted]).

Moreover, there must be "evidence that such influence was actually utilized" (*Matter of Walther*, 6 NY2d 49, 55 [1959]; *Matter of Castiglione*, 40 AD3d 1227, 1229 [3d Dept], lv denied 9 NY3d 806 [2007]; *Thea v Thea*, 284 AD2d 245, 245-246 [1st Dept 2001]). Finally, "[m]ere speculation and conclusory allegations, without specificity as to precisely where and when the influence was actually exerted, are insufficient to raise an issue of fact" (*Matter of Walker*, 80 AD3d 865, 867 [3d Dept], lv denied 16 NY3d 711 [2011]).

The amended complaint alleges that the beneficiary changes were due to "undue influence/diminished capacity" (amended complaint, ¶ 13), but has made no allegation of "mental coercion" over Salih (*Ryan*, 34 AD3d at 213) or how the purported undue influence was "actually utilized" (*Walther*, 6 NY2d at 55; *Thea*, 284 AD2d at 245). "Mere speculation and conclusory allegations [of undue influence]" are insufficient (*Walker*, 80 AD3d at 867). The record shows that Xu had an intimate relationship with Salih and that Kaya and Kaan are their children and, hence, natural objects of Salih's affections. Consequently, naming them as beneficiaries under the Policy is not, in and of itself, evidence of undue influence. Since Wang has failed to present any detail as to the purported undue influence, and as the claims against TIAA seek to hold TIAA jointly and severally liable for the undue

influence, the complaint must be dismissed.<sup>1</sup>

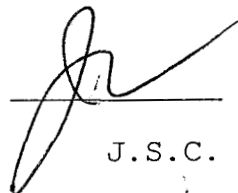
**Conclusion**

It is, therefore,

ORDERED that the motion of defendants Michelle Xu, Kaya Neftci and Kann Neftci and the cross motion of TIAA-CREF Life Insurance Company to dismiss plaintiff's complaint are granted and the complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: January 28, 2014

  
J.S.C.

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NEW YORK  
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<sup>1</sup>The Neftci defendants are named as defendants based solely on their potential interest in the Policy, and therefore in the absence of a cognizable claim against the Xu defendants and TIAA, the complaint must be dismissed.