

58 N.Y. Ave, LLC v Dortch
2020 NY Slip Op 34399(U)
December 4, 2020
Supreme Court, Queens County
Docket Number: 706004/2020
Judge: Frederick D.R. Sampson
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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE FREDERICK D.R. SAMPSON IAS TERM, PART 31

Justice

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58 NEW YORK AVE, LLC,

Plaintiff,

-against-

Index No: 706004/2020

Motion Date: 11/5/2020

Motion Cal. No: 81

Motion Seq. No: 1

FILED

12/7/2020

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BARBARA DORTCH, CHESS HOLDINGS
GROUP, LLC a/k/a CHESS HOLDINGS LLC,
HULL & COMPANY OF NEW YORK, INC.,
WESCO INSURANCE COMPANY and
ORLANDO CASE,

Defendants.

**COUNTY CLERK
QUEENS COUNTY**

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The following papers numbered E 3 to E 9 read on Defendant Wesco Insurance Company's motion to dismiss plaintiff's complaint pursuant to CPLR 3211 (a) (1) and (a) (7).

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits..... E 3 - E 9

Upon the foregoing papers, it is hereby ordered that the motion is disposed of as follows:

Plaintiff commenced the instant action alleging three causes of action arising from a lease agreement and an insurance policy relating to the property known as 184-17 140th Avenue, Springfield Gardens NY. Defendant Westco Insurance Company ("Westco") moves *inter alia* to dismiss Plaintiff's complaint pursuant to CPLR 3211 (a) (1) and (a) (7) arguing plaintiff's complaint fails to state a cause of action as against Westco and based upon documentary evidence.

It appears upon the papers that Plaintiff/lessee leases the property from defendant /lessor Barbara Dortch. The Complaint alleges that on February 13, 2020 there was a fire at the premises which caused severe damage. As the result of the fire, Wesco paid out insurance proceeds to Barbara Dortch pursuant to an underlying insurance policy. Plaintiff's Third Cause of Action as pled in the Complaint seeks declaratory judgement which declares any insurance proceeds issued by Westco as the result of the fire be delivered to Plaintiff pursuant to the terms of the lease.

On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), the court must accept the facts alleged by the plaintiff as true and liberally construe the complaint, according it the benefit of every possible favorable inference (see *Campaign for Fiscal Equity v State of New York*, 86 NY2d 307, 318, 655 NE2d 661, 631 NYS2d 565 [1995]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414, 754 NE2d 184, 729 NYS2d 425 [2001]). The role of the court is to "determine only whether the facts as alleged fit within any cognizable legal theory" (Leon v Martinez, 84 NY2d at 87-88). Pursuant to CPLR 3211 (a) (1), a defendant may move to dismiss a cause of action on the ground that "a defense is founded upon documentary evidence" (CPLR 3211 [a] [1]). A motion to dismiss a complaint based upon CPLR 3211 (a) (1) may be granted "only where the documentary evidence utterly refutes [a] plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 774 NE2d 1190, 746 NYS2d 858 [2002]). "In order for evidence to qualify as documentary' it must be unambiguous, authentic and undeniable" (*Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 996-997, 913 NYS2d 668 [2010]; *Sunset Café, Inc. v Mett's Surf & Sports Corp.*, 2013 NY Slip Op 905, ¶ 2, 103 A.D.3d 707, 708-09, 959 N.Y.S.2d 700, 702 (App. Div. 2nd Dept.)). Further, an insurance policy is a contract to which standard provisions of contract interpretation apply (see *Universal Am. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680, 16 NYS3d 21, 37 NE3d 78 [2015]; *Omanoff v Rohde*, 129 AD3d 510, 510, 10 NYS3d 245 [2015]). "Liability for breach of contract does not lie absent proof of a contractual relationship or privity between the parties" (*Hamlet at Willow Cr. Dev. Co., LLC v Northeast Land Dev. Corp.*, 64 AD3d 85, 104, 878 NYS2d 97 [2009]; *Siskin v Cassar*, 122 AD3d 714, 717, 997 NYS2d 86 [2014]). "One cannot be held liable under a contract to which he or she is not a party" (*Victory State Bank v EMBA Hylan, LLC*, 169 AD3d 963, 965, 95 NYS3d 97 [2019]; *Maki v Travelers Cos., Inc.*, 145 AD3d 1228, 1230, 44 NYS3d 220 [2016]; *1911 Richmond Ave. Assoc., LLC v G.L.G. Capitol, LLC*, 90 AD3d 627, 627, 933 NYS2d 899 [2011]).

Here, it appears upon the papers that Plaintiff is seeking to enforce a provision of the lease whereby Plaintiff is entitled to the insurance proceeds however, Westco is not a contracting party to the lease. Further, the insurance policy does not list Plaintiff as a loss payee but rather lists "Barbara Dortch c/o Sam Shrem". As such, based upon the documentary evidence presented, plaintiff's complaint fails to state a cause of action for declaratory judgement as against Westco.

Accordingly, based upon the foregoing, defendants' application pursuant to CPLR 3211 (a) (1) and (a) (7) is granted and Plaintiff's Complaint is dismissed solely as to Defendant Westco Insurance Company.

Dated: December 4, 2020



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