

Jing Deng v JPMorgan Chase & Co.

2021 NY Slip Op 30655(U)

March 2, 2021

Supreme Court, New York County

Docket Number: 650330/2019

Judge: Barbara Jaffe

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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. BARBARA JAFFE **PART** **IAS MOTION 12**

Justice

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JING DENG, GOOD CARE MEDICAL, P.C.,

Plaintiffs,

- v -

JPMORGAN CHASE & CO, QUEENS LUMBER
CO., INC., P.M. TUNG ARTS, ELLIOT STEVENS
ASSOCIATES, LTD., RB GALLERY, MICHAANS
AUCTIONS, DOUGLAS W MORSE ANTIQUES,
ABC CO. 1, ABC CO. 2, JOHN DOE, JANE DOE,

Defendants.

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INDEX NO. 650330/2019

MOTION DATE _____

MOTION SEQ. NO. 007

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 007) 77-95, 102, 105, 106, 108-113

were read on this motion for _____ default judgment _____.

By notice of motion, plaintiffs move for a default judgment against defendant Queens Lumber Co., Inc. (QL). QL opposes and cross-moves pursuant to CPLR 3211(a)(7) for an order dismissing the complaint. Plaintiffs fail to oppose.

By amended summons and verified complaint dated January 15, 2019, plaintiffs advance claims for conversion, misappropriation, fraud, negligence, and unjust enrichment against QL, as it allegedly charged plaintiffs' credit card for purchases that plaintiffs deny having made. Plaintiffs allege that they refused to pay defendant JPMorgan the amounts charged by QL. (NYSCEF 80).

By affidavit dated April 17, 2019, plaintiffs' process server states that on April 16, 2019, the amended summons, summons, and complaint were served on "Queens Lumber Co., LTD" by serving "an individual authorized to receive the legal papers on behalf of the entity." (NYSCEF

81).

By affidavit dated April 26, 2019, another process server for plaintiffs states that on April 18, 2019, he served “Queens Lumber Co., Inc.” by delivering the amended summons and verified complaint to the Office of the Secretary of State pursuant to Business Corporation Law § 306. (NYSCEF 82).

While QL denies, *inter alia*, that it was properly served as the affidavit of service dated April 17, 2019 reflects that “Queens Lumber Co., LTD” was served, and in his affidavit, QL’s president claims that the name of the entity is “Queens Lumber Co., Inc.” and that he is solely authorized to accept service of process on QL’s behalf (NYSCEF 110), plaintiffs properly served QL via the Office of the Secretary of State. (BCL § 306[b]).

Having served QL pursuant to BCL § 306(b), however, plaintiffs were obliged, pursuant to CPLR 3215(g)(4)(i), to effect additional service of the summons by first-class mail within at least 20 days before entry of the judgment. Their additional service of the summons by first-class mail was not completed at least 20 days before the entry of judgment, and thus plaintiffs are not entitled to a default judgment.

In support of its cross motion to dismiss, QL refers to the decision and order dated October 18, 2019, in which plaintiffs’ claims against other defendants in this action were dismissed (NYSCEF 112), and contends that plaintiffs’ claims for conversion and misappropriation should be dismissed, as no tangible property is alleged to have been diverted or misappropriated. In addition, QL argues that plaintiffs’ fraud claim should be dismissed, as they fail to separate their allegations against each defendant, and that plaintiffs’ unjust enrichment claim should be dismissed, as the complaint affords no notice as to how QL was unjustly enriched. Nor do plaintiffs allege any direct relationship with it, asserts QL and they allege that

they had no knowledge of QL and its transactions. (NYSCEF 109).

In considering a motion to dismiss pursuant to CPLR 3211(a)(7) for a failure to state a cause of action, the court must construe the pleadings liberally, accept the facts alleged as true, and afford the plaintiff “the benefit of every possible favorable inference.” (*JP Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 334 [2013][citation omitted]; *AG Cap. Funding Partners, LP v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). “The motion must be denied if from the four corners of the pleadings ‘factual allegations are discerned which taken together manifest any cause of action cognizable at law.’” (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002], quoting *Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001]; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

As plaintiffs allege only that QL’s unauthorized charges lowered their credit limit, not that they had paid the allegedly unauthorized charges, they fail to state a claim for conversion or misappropriation. (*See e.g. Austin v Gould*, 168 AD3d 626 [1st Dept 2019] [conversion of intangible property not actionable; claim that defendant transferred interest in company to nonparty without consideration or consent not conversion]; *Ippolito v Lennon*, 150 AD2d 300 [1st Dept 1989] [conversion and misappropriation claims dismissed where interest at issue intangible]).

Plaintiffs’ fraud claim is insufficiently particularized, especially given their failure to separate the allegations against each defendant. (CPLR 3016[b]; *Tsinias Enter. Ltd. v Taza Grocery, Inc.*, 172 AD3d 1271 [2d Dept 2019] [fraud claim dismissed as complaint contained no specific allegations setting forth misrepresentations allegedly made by defendants]).

Plaintiffs’ negligence cause of action fails, absent an allegation of a duty owed by QL to

them. Nor do they sufficiently allege that QL’s conduct was the proximate cause of plaintiffs’ credit-limit decrease. Rather, JPMorgan is the sole entity that extended credit to plaintiffs.

To state a claim for unjust enrichment, a plaintiff must allege, *inter alia*, that defendant was enriched at the plaintiff’s expense (*Georgia Malone & Co. v Rieder*, 19 NY3d 511, 516 [2012]), and as plaintiffs admit that they did not pay QL or that they otherwise lost money due to QL’s charges, they fail to state a claim for unjust enrichment.

Accordingly, it is hereby

ORDERED, that plaintiffs’ motion for a default judgment is denied; it is further

ORDERED, that defendant Queens Lumber Co., Inc.’s cross motion to dismiss is granted, and the causes of action asserted against it are severed and dismissed; and it is further ORDERED, that the Clerk is directed to enter judgment.

3/2/2021
DATE

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BARBARA JAFFE, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
			<input type="checkbox"/>	DENIED	OTHER
					REFERENCE