

**Generali China Ins. Co., Ltd. v Transatlantic Mar.
Claims Agency, Inc.**

2021 NY Slip Op 31923(U)

February 2, 2021

Supreme Court, Queens County

Docket Number: 701100/20

Judge: Janice A. Taylor

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

Short Form Order

FILED

NEW YORK SUPREME COURT - QUEENS COUNTY

2/2/2021

1:08 PM

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

**COUNTY CLERK
QUEENS COUNTY**

-----x
GENERALI CHINA INSURANCE CO., LTD.,

Plaintiff(s),

Index No.: 701100/20

Motion Date: 8/18/20

- and -

Motion Cal. No.: 16,
17

Motion Seq. No: 01,
02

TRANSATLANTIC MARINE CLAIMS AGENCY, INC.,
and DAVID TAN, individually and as
President of Transatlantic Marine Claims
Agency, Inc.,

Defendant(s).

-----x

The following papers numbered 1 - 11 read on the motion by plaintiff for summary judgment *in lieu* of a complaint, and on the motion by defendants to dismiss the complaint.

PAPERS
NUMBERED

- Notice of Motion (Seq. 1)-Affirmation-Exhibits-Service.. 1 - 4
- Notice of Motion (Seq. 2)-Affirmation-Exhibits-Service.. 5 - 8
- Affirmation in Opposition (Seq. 2)-Exhibits-Service..... 9 - 11

Upon the foregoing papers, it is **ORDERED** that the above-referenced motion is decided as follows:

Plaintiff alleges that by virtue of the December 4, 2018 judgment in the United States District Court for the Southern District of New York, convicting defendant David Tan, upon his plea of guilty made September 6, 2018, to one count of fraud in violation of 18 USC § 1343, it is entitled to a judgment against defendants in the amount of \$102,000.00, as part of the restitution ordered by the District Court during Mr. Tan's March 1, 2019 sentencing hearing. Defendant TransAtlantic Marine Claims Agency, Inc. ("TransAtlantic") was an insurance claims agency run by Mr. Tan, which served as an intermediary for the payment of money to claimants on behalf of various insurance companies who were clients of TransAtlantic. Mr. Tan's federal conviction arose out of allegations that he fraudulently retained payments given to him by

those clients, rather than distribute them to the claimants for whom the payments were meant. Plaintiff, an insurance company based in Beijing, China, alleges that it is one of the three victims identified as Insurance Company-1, Insurance Company-2, and Insurance Company-3, to whom Mr. Tan was ordered to pay a remaining restitution amount of \$155,985.80, after having already paid \$19,995.00.¹

In motion sequence no. 1, plaintiff moves, pursuant to CPLR § 3213, for summary judgment *in lieu* of a complaint, for a judgment against defendants in the amount of \$102,000.00. The statute permits a party to "bring a motion in lieu of complaint when the action is based upon an instrument for the payment of money only or upon any judgment" (*Bloom v Lugli*, 81 AD3d 579, 580 [2d Dept 2011] [internal quotation marks omitted]). Precedent instructs that

"a document comes within CPLR 3213 if a *prima facie* case would be made out by the instrument and a failure to make the payments called for by its terms ... The instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar *de minimis* deviation from the face of the document" (*Ro & Ke, Inc. v Stevens*, 61 AD3d 953, 953 [2d Dept 2009], quoting *Weissman v Sinorm Deli*, 88 NY2d 437, 444 [1996]).

A plaintiff moving under CPLR § 3213 bears the same burden on summary judgment to demonstrate the absence of triable issues of fact, thereby entitling it to judgment as a matter of law (see *Millennium Falcon Corp. v WRD Sales, Inc.*, 46 AD3d 862, 863 [2d Dept 2007]).

Plaintiff has failed to satisfy its burden to eliminate all triable issues of fact. At the outset, due to the quality of the electronically filed exhibits appended to the motion which purport to be the criminal complaint, judgment, and transcript of the sentencing hearing, it is unclear whether they are certified copies and, thus, are in admissible form, so as to satisfy the strict requirement that the proponent of summary judgment tender evidence in admissible form (see *Zuckerman v New York*, 49 NY2d 557, 562 [1980]).

Even assuming, *arguendo*, that plaintiff submitted certified copies of the documents from the United States District Court, they do not make out a *prima facie* case that defendants are obligated to pay the \$102,000.00 demanded by plaintiff in this action. The document purporting to be the judgment, annexed to the motion as

¹These more precise calculations are gleaned from a document purporting to be a copy of the U.S. District Court's sealed order of restitution, dated April 29, 2019, which was submitted with defendants' motion.

Exhibit C, indicates that Mr. Tan was ordered to, *inter alia*, make restitution in accordance with various federal statutes. The purported judgment does not, however, indicate the amount of restitution, nor identify to whom it must be paid. Rather, it notes that the determination of restitution would be deferred until April 1, 2019, at which time an amended judgment would be entered after such determination. Plaintiff did not submit with its motion papers any document purporting to be the amended judgment. Plaintiff's other submissions are similarly deficient. The document purporting to be the sealed complaint, annexed to the motion as Exhibit B, does not identify the insurance companies alleged to have been Mr. Tan's victims, and, since it predates the judgment, it obviously does not order Mr. Tan to pay restitution, much less contain an amount. Likewise, the document purporting to be the sentencing transcript, annexed to the motion as Exhibit D, neither identifies plaintiff as one of the intended beneficiaries of the anticipated restitution payments, nor specifies how much he would be ordered to pay to any of those companies. As plaintiff's evidentiary showing is insufficient to affirmatively establish that defendants are obligated to pay it pursuant to any applicable provisions for restitution in the judgment rendered by the U.S. District Court, its motion for summary judgment *in lieu* of a complaint is denied regardless of the sufficiency of the opposing papers (see *Von Fricken v Schaefer*, 118 AD3d 869, 870-871 [2d Dept 2014]).²

In motion sequence no. 2, defendants move to dismiss the complaint for failure to state a cause of action, arguing that the plaintiff is not one of the entities referenced in the U.S. District Court documents, to whom he was ordered to pay restitution. On such a motion, courts must "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [quotations and citations omitted]). In addition,

"[w]here evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the criterion is whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all, dismissal should not eventuate" (*Doe v Ascend*

²Rather than submit papers directly opposing plaintiff's motion, defendants appear to have separately moved to dismiss, asserting grounds responsive to plaintiff's motion. Plaintiff appears to have treated defendants' motion as the functional equivalent of papers in opposition to its own motion.

Charter Schs., 181 AD3d 648, 650 [2d Dept 2020])).

Although defendants denominate their motion as one made pursuant to CPLR 3211 (a)(7) for failure to state a cause of action, it presents more as one for summary judgment, as they purport to make a showing on the ultimate issue of fact, namely, that there is no judgment obligating Mr. Tan to pay restitution to plaintiff. Treating defendants' motion as one made under CPLR 3211, it must be denied, as the complaint clearly states a cause of action for such an obligation, even if plaintiff failed to meet its own *prima facie* burden on its motion. Moreover, construing defendants' motion as one for summary judgment, defendants have not satisfied their *prima facie* burden, as they did not submit certified copies of the judgment or other relevant documents from the U.S. District Court demonstrating exactly which entities Mr. Tan was ordered to pay restitution to, and that plaintiff was not included in their number. In addition, Mr. Tan's affidavit in support of the motion was, *per se*, inadequate, as he simply stated, in a conclusory manner, that his attorney's affirmation was "true and accurate." None of defendants' submissions constitute proof in admissible form in order to support a motion to dismiss under CPLR 3211 or a motion for summary judgment under CPLR 3212.

For the foregoing reasons, the above-referenced motions are denied, and it is

ORDERED that the moving papers by plaintiff shall be deemed the complaint, and the moving papers by defendants shall be deemed the answer, pursuant to CPLR § 3213.

The foregoing shall constitute the decision and order of this court.

Dated: February 2, 2021



JANICE A. TAYLOR, J.S.C.

FILED

**2/2/2021
1:08 PM**

**COUNTY CLERK
QUEENS COUNTY**

\\Supqns-vmfs1\jamf1\VOL1\DEPT\TAYLOR\Decisions - Part 15\Remote Decisions 2021\Summary Judgment Lieu Complaint CPLR 3213\701100-20_Generali_Transatlantic_SJLC_remotedecisions_SFO.wpd