

**Mei Lan Zhang v Wu & Kao, PLLC**

2025 NY Slip Op 34523(U)

November 25, 2025

Supreme Court, New York County

Docket Number: Index No. 153754/2023

Judge: Judy H. Kim

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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. JUDY H. KIM PART 04**

*Justice*

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MEI LAN ZHANG,

Plaintiff,

- v -

WU & KAO, PLLC,

Defendant.

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INDEX NO. 153754/2023

MOTION DATE 06/23/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 23, 25, 27, 28, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41 were read on this motion to DISMISS.

Upon the foregoing documents, Goldberger & Dubin, P.C.’s motion to dismiss defendant’s counterclaims asserted against it is granted, in part, to the extent set forth below.

In 2017, defendant Wu & Kao, PLLC commenced a lawsuit in New York State Supreme Court, Queens County on behalf of plaintiff and against Victoria Towers Development Corp., Jeffrey Wu, and W&L Construction Group, under index number 700176/2017 (the “Queens Action”). Defendant represented plaintiff in the Queens Action until approximately February 2020, at which time it was replaced by Goldberger & Dubin, P.C. (“G&D”), which also represents plaintiff in this action.

In this malpractice action, plaintiff alleges that defendant failed to timely move for a default judgment in the Queens Action, instead “churning” the file with unnecessary motion practice and, as a result, plaintiff’s motion for a default judgment against W&L Group Construction, Inc.—filed by G&D in February 2023—was denied and the Queens Action dismissed pursuant to CPLR

3215(c) by the Honorable Joseph J. Esposito (NYSCEF Doc Nos. 1 [complaint] and 12 [decision and order dated March 30, 2023]).

Defendant interposed an answer that, as relevant here, asserts counterclaims against G&D for “consent,” assumption of risk, contributory negligence, indemnification, “malicious action,” negligence, “false statement,” and perjury (NYSCEF Doc No. 17, answer). The gravamen of these counterclaims is that G&D: (1) negligently failed to offer a reasonable excuse for plaintiff’s delay in the default judgment motion in the Queens Action; (2) falsely represented to the court in its default judgment motion papers that it had communicated with plaintiff’s prior counsel before moving for a default judgment; (3) was negligent in discontinuing the Queens Action against Victoria Towers Development Corp. and Jeffrey Wu; and (4) maliciously “instigated” the present action.

G&D now moves, pursuant to CPLR 3211(a)(6) and (7),<sup>1</sup> to dismiss this action arguing that defendant’s “counterclaims allege no facts, and Judge Esposito’s Order [dismissing the Queens Action] demonstrates that any allegation which could be considered factual [are] flatly contradicted by documentary evidence” (NYSCEF Doc No. 11, memo of law at ¶55 [internal quotations and quotations omitted]). In opposition, defendant notes that G&D’s motion largely focuses on the merits of plaintiff’s complaint rather than the merits of defendant’s counterclaims. In reply, G&D submits an affirmation by its attorney, Stacey Van Malden, Esq., attesting that she spoke with the attorney who had handled the Queens Action for Wu & Kao PLLC (who subsequently left the firm) prior to moving for default judgment (NYSCEF Doc No. 41) and argues that, as a result, defendant’s counterclaims sounding in malpractice, perjury, “false statement,” and

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<sup>1</sup> G&D also moved to dismiss this action pursuant to CPLR 3211(a)(8) but withdrew this branch of motion in its reply.

Judicial Law §487<sup>2</sup> must be dismissed. G&D also asserts that defendant does not have standing to assert negligence claims on behalf of plaintiff.

### DISCUSSION

In addressing a motion to dismiss pursuant to CPLR 3211(a)(7), the pleading is afforded a liberal construction and the court must accept as true the facts alleged in the answer, accord the pleading the benefit of every reasonable inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83 [1994]). Most of defendant's counterclaims do not satisfy this standard.

As a threshold matter, defendant's counterclaims for "consent" and "malicious action" are dismissed as non-cognizable claims. Neither may defendant maintain a counterclaim for perjury (*see Kinberg v Kinberg*, 48 AD3d 387 [1st Dept 2008] ["Plaintiff wife's first cause of action, in which she sought defendant husband's imprisonment and a fine for his alleged perjury, failed to state a cause of action, since it is the district attorney who generally retains sole authority to prosecute such criminal activity"]).

Defendant's Answer does not plead facts implicating the assumption of risk doctrine (*see Garnett v Strike Holdings LLC*, 131 AD3d 817 [1st Dept 2015] [assumption of risk doctrine precludes recover in tort for athletic activities in which plaintiff has freely accepted a known risk inherent to that activity]) or establishing that G&D owes it a duty sufficient to support a negligence claim (*see SH575 Holdings LLC v Reliable Abstract Co., L.L.C.*, 195 AD3d 429 [1st Dept 2021]). Neither does an indemnification claim lie. "[T]o recover on a claim for common law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was

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<sup>2</sup> Defendant's Answer does not include a Judicial Law §487 claim.

guilty of some negligence that contributed to the [harm] for which the indemnitee was held liable to the injured party by virtue of some obligation imposed by law” (*Blank Rome, LLP v Parrish*, 92 AD3d 444, 444-45 [1st Dept 2012] [internal citations and quotations omitted]). Here, as defendant does not allege that its “liability is solely statutory and not based upon its own negligence, [it] fail[s] to state a cause of action for common law indemnification” (*id.* [internal citations and quotations omitted]). Moreover, as defendant does not allege that it entered into a contract with G&D, it has no claim for contractual indemnification (*id.*).

Defendant has, however, stated a claim for contribution. “It is well settled that an attorney sued for malpractice may assert a third party claim against another lawyer who advised the plaintiff on the same matter” (*Millennium Import, LLC v Reed Smith LLP*, 104 AD3d 190, 193 [1st Dept 2013]). “In the context of a legal malpractice claim, as in any other case, in determining whether a valid third-party claim for contribution exists, the critical issue is whether the third-party defendant owed a duty to the plaintiff which was breached and which contributed to or aggravated plaintiff’s damages” (*Aglira v Julien & Schlesinger, P.C.*, 214 AD2d 178, 183-84 [1st Dept 1995] [internal citations and quotations omitted]). Defendant’s Answer, read liberally, satisfies this standard with allegations that G&D had a duty to plaintiff as her lawyer, that it breached this duty by failing to contact prior counsel to establish a reasonable excuse for plaintiff’s delay in moving for a default judgment and by discontinuing the action against Victoria Towers Development Corp. and Jeffrey Wu, and that these breaches aggravated or otherwise contributed to plaintiff’s failure to recover in the Queens Action (*see Bivona v Danna & Assoc., P.C.*, 123 AD3d 956, 959 [2d Dept 2014] [“third-party plaintiffs properly stated a cause of action alleging that M&S’s legal malpractice contributed to the plaintiff’s damages, and documentary evidence did not conclusively establish a complete defense to that cause of action”]).

Contrary to G&D's position, Justice Esposito's order in the Queens Action does not conclusively rebut these allegations. In addition, Van Malden's affirmation cannot be considered on this motion, as it was submitted for the first time on reply and is not, in any event, documentary evidence for purpose of a CPLR 3211 motion (*see Zatorski v Is. Transportation Corp.*, 238 AD3d 689, 691 [1st Dept 2025]).

Accordingly, it is

**ORDERED** that Goldberger & Dubin, P.C. motion to dismiss is granted to the extent that defendant's counterclaims for consent, assumption of risk, indemnification, malicious action negligence, false statement, and perjury are dismissed as against Goldberger & Dubin, P.C., and denied as to defendant's contribution counterclaim; and it is further

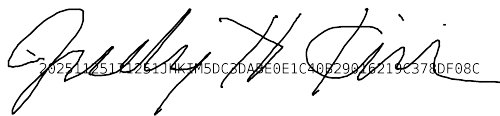
**ORDERED** that Goldberger & Dubin, P.C. shall, within ten days of the date of this decision and order serve a copy of same, with notice of entry, on plaintiff and defendant; and it is further

**ORDERED** that defendant shall, within twenty days of the date of this decision and order, file and serve an Amended Answer upon plaintiff and the counterclaim defendant that reflects the foregoing and clearly delineates each counterclaim; and it is further

**ORDERED** that Goldberger & Dubin, P.C. shall reply to the Amended Answer within thirty days of defendant's service of same; and it is further

**ORDERED** that the Clerk is to set this matter down for a preliminary conference on the next available date.

This constitutes the decision and order of the Court.



153754/2023 11/25/2025 10:40 AM NYSCEF DOC. NO. 42 RECEIVED NYSCEF: 11/25/2025

11/25/2025  
DATE

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HON. JUDY H. KIM, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE