

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS

Index No.: 719028/2018

CHARLES A. KRIEGER,

*Plaintiff,*

-against-

FIRST AMERICAN TITLE INSURANCE COMPANY,

*Defendant.*

**NOTICE OF ENTRY**

SIRS/MESDAMES:

**PLEASE TAKE NOTICE** that annexed hereto is a true copy of the **SHORT FORM ORDER** of the Honorable Leonard Livote, J.S.C. dated August 23, 2019 and entered in the Office of the County Clerk, Queens County on September 11, 2019.

Dated: New York, New York  
September 11, 2019

DESIDERIO, KAUFMAN & METZ, PC f/k/a  
ADAM LEITMAN BAILEY, P.C.

*Counsel for Defendant*

*Jackie Halpern Weinstein*

By: Jackie Halpern Weinstein, Esq.  
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**TO: Via NYSCEF**  
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SHORT FORM ORDER

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: Honorable Leonard Livote IAS TERM, PART 33
Acting Supreme Court Justice

Charles A. Krieger, Plaintiff, Index No: 719028/18

-- against -- Motion Date: 5/14/19

First American Title Insurance Company, Defendants. Seq. No: 1

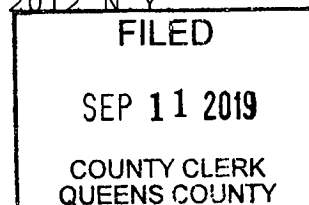
The following papers numbered 1 to 10 read on this motion by defendant for an Order: dismissing the complaint, pursuant to CPLR §3211 (a)(1), on the grounds that a defense is founded upon documentary evidence, to wit, the title policy, and/or (ii) dismissing the complaint, pursuant to CPLR §3211 (a)(7), on the grounds that the complaint fails to state a cause of action.

Table with 2 columns: Description of papers and PAPER NUMBERED. Includes entries for Notice of Motion, Cross Motion, Answering Affirmations, Reply Affirmations, and Other.

Upon the foregoing papers, the motion is granted.

By letter dated August 1, 2016, plaintiff asserted a claim under his title insurance policy with defendant. Defendant denied the claim by letter dated August 21, 2018. Plaintiff commenced this action for breach of contract, breach of fiduciary duty and attorney's fees. Defendant moves to dismiss the action.

"On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (Rabos v. R & R Bagels & Bakery, Inc., 100 AD3d 849, 2012 N.Y.



Slip Op 07974, 2012 WL 5870676 [2nd Dept 2012]).

To grant a motion to dismiss due to "a defense that is founded upon documentary evidence" pursuant to CPLR §3211(a)(1), the evidence in question must "utterly refute the plaintiff's allegations and establish a defense as a matter of law." (See, *Goshen v. Mutual Life Ins. Co.*, 98 NY2d 314, [2002]). "To be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*Fontanetta v Doe*, 73 AD3d 78, 86 [2d Dept 2010]).

With respect to the breach of contract claim, the documentary evidence establishes that plaintiff voluntarily assumed liability by settling the underlying claim without the prior written consent of the defendant.

Furthermore, the complaint fails to allege facts that would establish a special relationship in support of the cause of action for breach of fiduciary duty, separate from the parties' arm's-length contractual relationship. (*Coop. Centrale Raiffeisen-Boerenleenbank B.A. v Atradius Credit Ins. N.V.*, 149 AD3d 416, 416 [1st Dept 2017], lv to appeal denied, 29 NY3d 914 [2017]).

Finally, the general rule is that "[a]n attorney's fee is merely an incident of litigation and is not recoverable absent a specific contractual provision or statutory authority" (*Levine v. Infidelity, Inc.*, 2 A.D.3d 691, 692). Plaintiff has not alleged a contractual provision or statutory authority.

Accordingly, the motion is granted and it is,

Ordered, that the action is dismissed.

This constitutes the Order of the Court.

Dated: August 23, 2019

  
.....  
Leonard Livote, A.J.S.C.

FILED  
SEP 11 2019  
COUNTY CLERK  
QUEENS COUNTY



# NYSCEF - Queens County Supreme Court

## Confirmation Notice



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**719028/2018**

**Charles A Krieger v. FIRST AMERICAN TITLE INSURANCE COMPANY**

**Assigned Judge: Leonard Livote**

### Documents Received on 09/11/2019 05:34 PM

<b>Doc #</b>	<b>Document Type</b>
41	NOTICE OF ENTRY, Motion #001 Notice of Entry - Short Form Order

### Filing User

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An email regarding this filing has been sent to the following on 09/11/2019 05:34 PM:  
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