

**Seward Park Hous. Corp. v Greater New
York Mut. Ins. Co.**

2008 NY Slip Op 33123(U)

April 10, 2008

Supreme Court, New York County

Docket Number: 600059/01

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

LOUIS B. YORK
J.S.C.

PRESENT: _____

PART 2

Index Number : 600059/2001

SEWARD PARK HOUSING

vs
GREATER NEW YORK MUTUAL

Sequence Number : 013

ORDER TO PAY MONIES INTO COURT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

_____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS GRANTED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.

FILED

APR 16 2008

COUNTY CLERK
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 4/10/08

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LOUIS B. YORK J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

-----X
SEWARD PARK HOUSING CORPORATION,
Plaintiff,

Index No. 600059/01

-against-

GREATER NEW YORK MUTUAL INSURANCE CO.,
Defendant.
-----X

FILED
APR 16 2008
COUNTY CLERK'S OFFICE
NEW YORK

LOUIS B. YORK, J.:

This action for breach of contract based on the defendant Insurance Company's denial of coverage was tried before a jury over a two-month period.

The jury returned a verdict in favor of the plaintiff. On May 13, 2005, the defendant satisfied the judgment by issuing a check for the entire judgment which with interest, cost and disbursements came to \$18,409,267.24. On appeal, the Supreme Court vacated the damages portion of the judgment and remanded the matter to this Court with directions on how to proceed on the remand. Based on the Supreme Court decision, the defendant now moves for restitution of the amount paid together with accrued interest.

The Court instructed the jury that if the weight of rain was a partial cause of collapse of the garage, then the plaintiff was entitled to the full replacement cost in accordance with the contract of insurance. The jury found that the weight of rain was indeed a cause in part of the collapse and awarded the plaintiff the sum of \$12,075,503.74 as the replacement cost.

The Appellate Division remanded the question of whether plaintiff was entitled to the replacement cost of the garage or its actual cash value. To be entitled to replacement cost, the insurance policy required that plaintiff have rebuilt the garage "as soon as reasonably possible." The Appellate Court remanded the matter "for trial on the issue of whether the plaintiff rebuilt the garage ... as soon as reasonably possible and whether damages were properly awarded on a replacement value basis, and for a recalculation of damages with respect only to paved surfaces and fences ..." [emphasis supplied]. This language does not require a recalculation of damages if the jury ultimately determines that the plaintiff commenced rebuilding as soon as it was possible. That number has already been determined by the prior jury. Only if the jury decides that plaintiff is entitled only to the actual cash value that a recalculation of damages is necessary because the prior jury never addressed this issue.

The Court also vacated the part of the judgment allocated for underground pipes and trenching amounting to \$375,800, trees and shrubs amounting to \$164,400 the roof garden and lawns, amounting to \$204,890, and excavations and foundations amounting to \$851,549.14. These expenses add up to \$1,596,639.14. These amounts incorrectly formed a constituent part of the verdict and should have been subtracted from the replacement value. Because they were incorrectly awarded to plaintiff, defendant is entitled to restitution in that amount with interest. Plaintiff

argues that because we don't know what the final award might be, and it could be more than plaintiff was awarded in damages in the first action, we should wait until the next jury arrives at a verdict amount before we order the return of any sums of money. However, plaintiff has been holding these amounts to which the Appellate Division has clearly and unequivocally declared it is not entitled to. Furthermore, if the jury again decides that plaintiff rebuilt the garage as quickly as was reasonably possible, the award will be the same for replacement cost as it was for the previous jury, less the amount which the Appellate Division has held is not to be considered as part of the replacement cost. And if the jury decides that plaintiff is only entitled to the cash value, it is highly unlikely, if not nearly impossible, for a reasonable cash value award for this 40-year-old building in the decrepit shape it's in to be awarded a sum equal to or larger to the sum awarded by the prior verdict. Unlike the cases cited by plaintiff, such as *Key Bank of Western New York v Kessler Graphics*, 199 AD2d 979, 821 NYS2d 649 [4th Dept 1993], where the Court reversed an order of restitution because the Court did not determine the rights of the parties with respect to damages but only that factual issues regarding damages existed, requiring a trial, there is no issue here as to the sum ordered to be paid back to the plaintiff. The defendant has been clearly determined to be entitled to the approximately \$1.6 million. It is only where, unlike in the instant matter, that the amount to be paid back cannot be determined until there is a factual hearing, that the Court might deny restitution (*Danziger and Cook, Inc. v Duck Creek*, 32

AD3d 989, 821 NYS2d 649 [2d Dept 2006]). But where, as here, it is clear that plaintiff has no right to continue to hold the money it must be returned to the defendant (*Polipo v Sanders*, 170 Misc2d 833, 650 NYS2d 941, affd 245 AD2d 2, 666 NYS2d 406 [1997]; lv to app den 92 NY2d 845, 677 NYS2d 75 [1998]). [Payment was made to satisfy the judgment to stop the running of interest and the cost of an appeal bond. Judgment was reversed and plaintiff was ordered to pay the entire sum back.]

We have also been directed that on the date from which to retrial the interest on rentals lost and finance charges be redetermined at trial, to commence from a reasonable intermediary date. This will necessitate a new determination by the jury on the amount of interest awarded on these two items.

Accordingly, it is

ORDERED that the defendant shall pay to the defendant, the sum of \$1,596,639.14 with interest at the statutory rate from May 13, 2003 to the date of payment; and it is further

ORDERED that a trial shall be scheduled to determine whether the plaintiff is to be awarded the cost of replacing the subject garage, which sum has already been determined, or the cash value of the garage at the time of its collapse; and it is further

ORDERED that the amount of interest that plaintiff would be entitled to for refinancing the cost of rebuilding and the lost rental income shall be calculated from an intermediate date of payment due for each of these items.

Dated: 4/10/08

Enter:

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Louis B. York, J.S.C.

**LOUIS B. YORK
J.S.C.**

FILED
APR 16 2008
COUNTY CLERK'S OFFICE
NEW YORK