

**Seiden v Simry Realty Corp.**

2010 NY Slip Op 31797(U)

July 12, 2010

Sup Ct, NY County

Docket Number: 100469/2009

Judge: Louis B. York

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

**LOUIS B. YORK**

PRESENT: \_\_\_\_\_  
**J.S.C.** Justice

PART 2

Index Number : 100469/2009
<b>SEIDEN, MASCHA</b>
vs.
<b>SIMRY REALTY CORP.</b>
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

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 *is decided in accordance with the accompanying decision and order.*

**FILED**

JUL 15 2010

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 7/12/10

*Ray*  
\_\_\_\_\_  
**LOUIS B. YORK** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

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

-----X  
MASCHA SEIDEN,

Plaintiff,

Index No.: 100469/2009

-against-

SIMRY REALTY CORP. and USA  
CONSTRUCTION & PAINTING, INC.,

Defendants.  
-----X

LOUIS B. YORK, J.S.C.:

In this action for property damages, plaintiff Mascha Seiden ("Selden") moves for summary judgment pursuant to CPLR 3212 against defendant Simry Realty Corporation ("Simry"). Simry, in turn, cross-moves for summary judgment on its claim against co-defendant USA Construction & Painting, Inc. ("USA"). For the reasons stated below, the Court grants Seiden's motion with respect to Simry's liability, but reserves the award of damages for trial. The Court denies Simry's cross-motion against USA.

**BACKGROUND**

Plaintiff Selden owns the four-story building located at 240 West 74th Street, New York, New York. Adjacent to Seiden's building, at 244 West 74th Street, stands a nine-story building belonging to defendant Simry. In summer 2008, Simry was in the process of renovating the exterior of its building, performing certain repair work to the façade and roof parapet walls. Co-defendant USA was Simry's contractor during this project.

The renovation work required, among other things, the installation and maintenance of a roof protection device ("Roof Protection") and of a sidewalk shed ("Sidewalk Shed") on Seiden's property. Accordingly, on August 5, 2008, Seiden and Simry entered into the License, Indemnity and Temporary Protection Agreement ("License Agreement"), which allowed Simry to erect and maintain these

structures. The License Agreement played a second important role as well, detailing Simry's liabilities in case any damages befall Seiden's property as a result of the renovation work. Thus, in paragraph 2(C) of the Agreement, Simry agreed to be "solely responsible for all costs, professional fees, expenses, taxes, and all other costs incurred with respect to the design, construction, maintenance and all other costs relating to the Temporary and Permanent Repairs at the Premises," and Simry further agreed to release and hold Seiden harmless "with respect to such costs and expenses." In paragraph 5, Simry promised to "promptly pay the fees, costs and expenses of Seiden's structural engineering consultant for all services rendered and expenses incurred relating to the damage to the Premises" and to reimburse Seiden for "reasonable attorney's fees required as a result of damage caused to the Premises as a result of construction activities at the Project." Furthermore, under paragraph 10(B), Simry agreed to "indemnify, defend and hold harmless Seiden . . . from and against . . . any third parties suffering bodily injury and/or death or property damage arising from the construction . . . for the Project." Finally, in paragraph 6 of the Agreement, Simry pledged to pay Seiden a \$2,500 fee for each 30-day extension of the licenses for the Roof Protection and Sidewalk Shed.

The parties do not dispute that on August 15, 2008, in the course of its work, USA deposited bricks and other debris down the chimney that runs along the eastern wall of 244 West 74th Street, allegedly under the impression that the chimney led to the basement of 244 West 74th Street. As it happened, however, the chimney led directly to the ground-floor apartment of 240 West 74th Street, Seiden's building. The debris caused a layer of soot to spread throughout the ground-floor apartment, forcing the tenant and his family to vacate the premises. A certain amount of soot also infiltrated the second floor duplex apartment and the building's common areas. Additionally, the heavier pieces of debris that were tossed down the chimney appeared to damage the chimney's internal flues.

Within a short amount of time, Seiden was faced with a number of expenses: in addition to covering the costs of the vacated tenant, Seiden retained an engineering firm to inspect the damages to

her building and an environmental consulting firm to analyze the soot and to ensure that the remediation work could be safely conducted. A separate contractor was hired to perform the necessary cleanup. Seiden also paid for a chimney inspection, and the estimated cost of actually repairing the chimney stands at \$75,000. The Roof Protection and Sidewalk Shed have also remained in place, despite Simry's failure to pay for two 30-day extensions. On top of these charges, Seiden incurred over \$32,000 in legal fees. All in all, Seiden claims that her various expenses in the aftermath of the August 15 incident exceed \$170,000.

Consequently, on January 8, 2009, after making two fruitless requests for Simry to foot the bill, Seiden filed a complaint against both Simry and USA, stating causes of action in breach of contract and in negligence. In turn, Simry and USA filed cross-claims against each other for contribution and indemnification, with Simry claiming in addition that USA failed to obtain proper liability insurance.

Seiden now moves for summary judgment on its breach of contract claim against Simry. In opposition, Simry argues that the motion is premature—the parties to this action have not yet been deposed, and as such, “essential discovery remains outstanding.” However, the lack of discovery has not deterred Simry from itself moving for summary judgment against USA for common-law indemnification. Unsurprisingly, USA opposes the motion on the ground of prematurity, but also argues that indemnification is inappropriate because Simry's engineer, Epstein Engineering, P.C. (“Epstein Engineering”), controlled, managed and supervised USA's work throughout the entire project.

### **ANALYSIS**

#### **I. Seiden's Motion for Summary Judgment Against Simry**

A court will grant summary judgment when, “upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” CPLR § 3212(b). “Summary judgment is a drastic remedy that should only be employed where no doubts exist as to the absence of triable issues.” *Leighton v.*

*Leighton*, 46 A.D.3d 264, 265, 847 N.Y.S.2d 64, 65 (1st Dep't 2007) (Internal quotation marks omitted).

When deciding a motion for summary judgment, the court must view the evidence in a light most favorable to the non-moving party. See *Valderrama v. New York City Tr. Auth.*, 18 A.D.3d 251, 253, 795 N.Y.S.2d 12, 13 (1st Dep't 2005).

While the burden of proof rests with the party moving for summary judgment, if the movant makes a prima facie showing of entitlement to judgment as a matter of law, "the burden shifts to the party opposing the motion . . . to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 925-26 (1986). An opposing party will not defeat a prima facie showing by submitting merely "a hearsay affirmation by counsel." *Zuckerman v. City of New York*, 49 N.Y.2d 557, 560, 427 N.Y.S.2d 595, 596 (1980). Similarly, a party whose opposition comprises of "mere conclusions, expressions of hope or unsubstantiated allegations or assertions" will not defeat a motion for summary judgment. *Id.* at 562, 427 N.Y.S.2d at 598.

Here, Seiden has presented sufficient documentary evidence to establish a prima facie showing of entitlement to judgment as a matter of law. See *Donovan v. All-Weld Prods. Corp.*, 38 A.D.3d 227, 228-29, 832 N.Y.S.2d 148, 149 (1st Dep't 2007). Seiden has produced reports and photographs depicting the damages to the ground floor apartment and to the chimney. She has also attached the invoices of the various engineers, consultants, and specialists who have inspected or worked on her building since the incident occurred. Of course, at the heart of Seiden's motion is the License Agreement itself, which, in unambiguous terms, spells out Simry's liability in the event that any damages befall Seiden's property. "[W]hen parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms." *W.W.W. Assocs. v. Giancontieri*, 77 N.Y.2d 157, 162, 565 N.Y.S.2d 440, 443 (1990). Thus, as Seiden's and Simry's intent "can be determined from the face of the [License

Agreement],” Seiden’s case is “ripe for summary judgment.” *American Express Bank, Ltd. v. Uniroyal, Inc.*, 164 A.D.2d 275, 277, 562 N.Y.S.2d 613, 614 (1st Dep’t 1990).

To defeat Seiden’s prima facie showing, the burden now shifts to Simry to raise a triable issue of fact. However, rather than challenge the factual record, Simry argues that Seiden’s motion is altogether premature because “essential discovery remains outstanding.” Simry hangs its proverbial hat on CPLR 3212(f), which reads in relevant part:

Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

In addition to calling upon the Court’s discretion, Simry also attempts to ground its prematurity argument in case law, citing *Groves v. Land’s End Hous. Co.*, 80 N.Y.2d 978, 592 N.Y.S.2d 643 (1992) and *McGlynn v. Palace Co.*, 262 A.D.2d 116, 691 N.Y.S.2d 514 (1st Dep’t 1999). Thus, with an eye toward *Groves* and *McGlynn*, Simry asserts that Seiden’s pending deposition would shed some light on “the circumstances surrounding the alleged [August 15] incident,” particularly with regard to “issues surrounding negligence or fault on the part of [Seiden].” Furthermore, Simry contends that the Court must allow for additional discovery because Simry should be given the opportunity to examine Seiden about her knowledge of the License Agreement.

However, Simry’s arguments do not overcome Seiden’s prima facie showing of entitlement to summary judgment. First, Simry’s contention that triable issues loom on the horizon—to be coaxed out through further discovery—is unaccompanied by concrete or specific support. Instead, in claiming that “essential discovery remains outstanding” and that “issues” still surround the “circumstances” of the August 15 incident, Simry resorts to the kind of broad, conclusory language cautioned against in *Zuckerman*. 49 N.Y.2d at 562, 427 N.Y.S.2d at 598. Subsequent cases have echoed *Zuckerman’s* warning that a “general belief, unsupported by any specific details . . . does not provide sufficient basis pursuant

to CPLR 3212(f) for delaying determination of the summary judgment motion.” *Lewis v. Safety Disposal Sys. of Pa., Inc.*, 12 A.D.3d 324, 325, 786 N.Y.S.2d 146, 148 (1st Dep’t 2004); *see also Perez v. Brux Cab Corp.*, 251 A.D.2d 157, 160, 674 N.Y.S.2d 343, 345 (1st Dep’t 1998). As Simry offers here little beyond a “general belief” that additional discovery will raise triable issues of fact, Seiden’s prima facie showing remains unscathed.

Second, while Simry avows the importance of deposing Seiden for her knowledge of the License Agreement, nowhere does Simry address the critical preliminary question of the Agreement’s validity and applicability. As Seiden points out, Simry does not dispute the content of the Agreement, nor does it refute Seiden’s argument that the terms of the Agreement are controlling. Thus, no controversy exists with regard to the License Agreement and its clear delineation of Simry’s liabilities, and the Court finds no compelling reason to delay its determination of Seiden’s motion until party depositions have been conducted.

Finally, Seiden persuasively distinguishes *Groves’s* and *McGlynn’s* prematurity arguments from the instant motion. In *Groves*, summary judgment was deemed premature because the plaintiff offered “half-dozen or more varying versions of the accident” that led to his injury, and the defendants had not yet “depose[d] witnesses as to the use and existence of safety devices.” 80 N.Y.2d at 980-81. Unlike in *Groves*, however, here there are no competing factual narratives behind the August 15 incident, and no disputes exist with respect to Simry’s liability under the License Agreement. In *McGlynn*, on the other hand, the Appellate Division, First Department reversed a grant of summary judgment in favor of plaintiff because, inter alia, the defendants had not been provided with any discovery. 262 A.D.2d at 117, 691 N.Y.S.2d at 515. Here, though, Seiden addressed Simry’s discovery demands with invoices, receipts, expert reports, photographs, and other documentary evidence.

Though Seiden’s motion for summary judgment is granted with respect to Simry’s liability, the calculation of a proper damages award is reserved for trial. “The law imposes upon a party subjected to

injury from breach of contract . . . the duty of making reasonable exertions to minimize the injury.” *Holy Props., Ltd. v. Kenneth Cole Prods., Inc.*, 87 N.Y.2d 130, 133, 637 N.Y.S.2d 964, 966 (1995). Justifiably, Simry argues that it should be afforded the opportunity to ascertain whether Seiden obtained alternative estimates in selecting its experts and consultants, and whether Seiden’s actions contributed to the need for the continued presence of the Roof Protection and Sidewalk Shed. Furthermore, Simry reasonably contends that Is entitled to depose Seiden’s vacated ground-floor tenant, William Knight, with regard to his alleged alternate living expenses.

### II. Simry’s Cross-Motion for Summary Judgment Against USA

“[C]ommon-law indemnification is available to one who has committed no wrong but is held liable to the injured party because of some relationship with the tortfeasor or obligation imposed by law.” *Edge Mgt. Consulting v. Blank*, 25 A.D.3d 364, 366, 807 N.Y.S.2d 353, 357 (1st Dep’t 2006) (citation and internal quotation marks omitted). Common-law or implied indemnification may be appropriate when an injury occurs but only “one of two parties is considered actively negligent or the primary or principal wrongdoer.” *Bellevue South Assocs. v. HRH Const. Corp.*, 78 N.Y.2d 282, 296, 574 N.Y.S.2d 165, 171 (1991). However, as common-law indemnification is predicated on “vicarious liability without actual fault[,] . . . a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine.” *Edge Mgt. Consulting*, 25 A.D.3d at 367, 807 N.Y.S.2d at 357 (citation and internal quotation marks omitted).

Simry’s motion for summary judgment against USA for common-law indemnification must be denied because an issue of fact exists as to the identity of the principal wrongdoer in the August 15 incident. In his affidavit, Arthur Haruvi, Simry’s President, attests to the fact that the renovation work at 244 West 74th Street was performed exclusively by USA, with no supervision, management, or control exercised by Simry. However, in diametric opposition, Amir Razzaq, the principal of USA, alleges that Simry’s agent—Epstein Engineering—was present throughout the renovation period, supervising USA’s

work and ensuring that the renovations were done according to plan. Razzaq further contends that Epstein misleadingly informed USA that all of the chimneys at the project site belonged to Simry's building. Thus, as Simry's and USA's affidavits give conflicting accounts of the parties' respective roles in the August 15 incident, summary judgment is effectively precluded.

As the Court finds summary judgment inappropriate based on the above, it need not reach USA's alternative argument that the motion is premature.

**CONCLUSION**

It appearing to the Court that plaintiff Seiden is entitled to judgment on liability and that the only triable issues of fact arising on Seiden's motion for summary judgment relate to the amount of damages to which Seiden is entitled, It is

ORDERED that plaintiff Seiden's motion against defendant Simry is granted with regard to liability; and It is further

ORDERED that the aforesaid issues of fact relating to the amount of damages are reserved for trial before the Court; and it is further

ORDERED that defendant Simry may take the deposition of Mascha Seiden limited to the issue of mitigation of damages, provided that said deposition shall be completed no later than 30 days from service of a copy of this order with notice of entry; and it is further

ORDERED that defendant Simry may take the deposition of William F. Knight III limited to the issue of alternate living expenses, provided that said deposition shall be completed no later than 30 days from service of a copy of this order with notice of entry; and it is further

ORDERED that defendant Simry's motion against defendant USA is denied.

Dated: 7/12/10

ENTER:

*[Signature]*

LOUIS B. YORK, J.S.C.

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

**FILED**  
JUL 15 2010  
NEW YORK  
COUNTY CLERK'S OFFICE