

<b>Hong Kong Sta., Inc. v 128 Hester LLC</b>
2012 NY Slip Op 33888(U)
March 26, 2012
Supreme Court, New York County
Docket Number: 602686/2009
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 49

-----X  
HONG KONG STATION, INC.,

Plaintiff,

-against-

DECISION AND  
ORDER

Index No. 602686/2009

128 HESTER LLC a/k/a 128 HESTER, LLC, 128  
HESTER REALTY LLC a/k/a 128 HESTER REALTY,  
LLC, LEE'S FAMILY REALTY INC., 93 BOWERY  
HOLDINGS LLC, a/k/a 93 BOWERY HOLDINGS,  
LLC, LEE PAN REALTY CORP., CALABRESE  
ASSOCIATES, INC., MANHATTAN DEMOLITION  
CO., INC., H&M CONTRACTORS INC., M.S.S.  
CONSTRUCTION CO., INC. a/k/a M.S.S.  
CONSTRUCTION CORP., SAFETY DYNAMICS, LLC,  
MING DAX CONSTRUCTION INC., JUMP TECH  
CONSTRUCTION CO., INC., KYAW MYINT,  
WILLIAM CHAN, SECURE MANAGEMENT, LLC,  
SIMON WONG, WILLIAM SU, KYAW TUN, SY GAGE  
and S.S.B. SHENNAWY SPECIAL BUILDING,

Defendants.

-----X  
128 HESTER LLC, KYAW MINT, SIMON WONG,  
WILLIAM SU and KYAW TUN,

Third-Party Plaintiffs,

-against-

Third-Party Index No.  
590504/2011

S.S.B. SHENNAWY SPECIAL BUILDING,

Third-Party Defendant.

-----X  
O. PETER SHERWOOD, J.:

On or about August 28, 2009, plaintiff commenced the instant action by filing the summons and complaint alleging eight causes of action.<sup>1</sup> Plaintiff alleges that it was not able to peacefully

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<sup>1</sup>Defendants 128 Hester LLC, Simon Wong, William Su, Kyaw Myint and Kyaw Tun commenced a third-party plaintiff, action against S.S.B. Shennawy Special Building. On or

occupy the Premises since July 14, 2006 and that it sustained damages to its leased space as a result of on-going construction work, which began in 2007, at 126 Hester, 128 Hester and 93 Bowery Streets in New York, New York. In its first cause of action, plaintiff alleges that defendants breached the Lease by failing to make repairs to the exterior walls, repair the leaning of the Premises, repair the entrance door, the interior columns and walls, remove the scaffolding blocking plaintiff's storefront window and correct repeated leakage of water into the Premises. Other cause of action are stated against the various contractors hired to perform work on the two properties adjoining the Premises for failing to perform work properly and/or negligently performing such work thereby causing the Premises to become unsafe and unusable. Plaintiff seeks to recover compensatory damages in the sum of \$2 million dollars and punitive damages in an undefined amount.

Defendants 128 Hester, Safety Dynamics, Lee's Family Realty and 93 Bowery each answered the amended complaint in which cross claims for contribution and indemnification were interposed against all co-defendants, including Manhattan Demolition.

On or about September 21, 2011, plaintiff entered into a settlement agreement with Manhattan Demolition and executed a Stipulation of Discontinuance providing for the discontinuance, with prejudice, of all claims, counter claims, cross claims and third party claims as against Manhattan Demolition only. The Stipulation was signed by the attorneys for plaintiff and Manhattan Demolition and circulated amongst counsel for the other defendants. However, with the apparent exception of defendant, Jump Tech Construction which signed the Stipulation, none of the other defendants was willing to execute the Stipulation of Discontinuance.

Manhattan Demolition appeals to the discretion of the Court and has moved for an order, pursuant to CPLR § 3217 (b), discontinuing the action, together with any and all cross claims, asserted against it on the ground that plaintiff, having settled the action against Manhattan Demolition and signed the Stipulation of Discontinuance, has voluntarily chosen to end the action as against Manhattan Demolition. Movant contends that no substantial right of any party to this action would be prejudiced or impaired by permitting the discontinuance as it contends that such cross claims as are asserted against it are entirely baseless. Rather, Manhattan Demolition maintains

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about September 1, 2011, the complaint was amended adding two additional causes of action and naming S.S.B. Shennawy as a direct defendant.

that the only prejudice would be to its rights if it is forced to continue to participate in this litigation despite plaintiff having resolved the claim against it.

93 Bowery opposes the motion, noting that it has cross claims for contribution and indemnification predicated upon a contract between 93 Bowery and Manhattan Demolition whereby Manhattan Demolition was to remove and demolish a building on the 93 Bowery site. 93 Bowery claims that Manhattan Demolition's performance under the contract was unsatisfactory.

In reply, Manhattan Demolition states that where a party refuses to sign a stipulation discontinuing an action, the court may, on motion, discontinue the action. Manhattan Demolition argues that despite sixteen or so depositions having been conducted in this case, 93 Bowery fails to provide any support for its contention that Manhattan Demolition failed to perform satisfactorily. Manhattan Demolition claims that it demolished the building to grade using a low impact method that did not include use of a wrecking ball or blasting and it did no work below street level, such as excavation, underpinning or shoring. It further claims that if such allegation had any basis, it would be hard pressed to understand why plaintiff's attorneys would settle the case against it for *de minimis* value. These arguments may be relevant on a motion for summary judgment. They are inapplicable here.

### ***DISCUSSION***

An action can be discontinued by a plaintiff only by stipulation signed by all parties *or* by order of a court (*see* CPLR § 3217). Since most of the defendants refused to sign the Stipulation of Discontinuance, Manhattan Demolition seeks a court order permitting discontinuance of all claims and counterclaims against it pursuant to CPLR 3217(b). CPLR 3217(b) authorizes a voluntary discontinuance by court order on motion of "a party asserting a claim". In this regard, the Court of Appeals has held that this provision may not be the basis of a dismissal motion by a party defending a claim unless the party asserting the claim consents or joins in the motion (*see Shamley v ITT Corp.*, 67 NY2d 910, 911 [1986]; *cf. Skrobul v Brathwaite, M.D.*, 2007 WL 2236511 [Sup Ct. Suffolk Co. 2007]).

Plaintiff here has executed the stipulation of discontinuance discontinuing all claims against Manhattan Demolition, including any cross claims. However, plaintiff's submission on this motion indicates that it is in partial opposition and does not specifically state that it either consents to or

joins in the motion. Thus, Manhattan Demolition is seeking to dismiss involuntarily claims as to which CPLR 3217(b) does not apply because that section governs voluntary dismissals. The *Shamley* decision held that dismissal of such claims are not permissible (67 NY2d at 911). Even if the court were to approve discontinuance as to the direct claims against Manhattan Demolition, the cross claims must survive because the other defendants were not parties to the settlement and did not sign off on the Stipulation of Discontinuance.

The motion of defendant, Manhattan Demolition, pursuant to CPLR 3217, directing issuance of an order of involuntary discontinuance of all claims, cross claims, counterclaims and third-party claims against Manhattan Demolition is DENIED.

This constitutes the decision and order of the court.

**DATED: March 26, 2012**

**ENTER,**

A handwritten signature in black ink, appearing to read "O. P. Sherwood", written over a horizontal line.

**O. PETER SHERWOOD**

**J.S.C.**