Fouly v Lepp
2014 NY Slip Op 32506(U)
September 22, 2014
Sup Ct, New York County
Docket Number: 600840/09
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES, *Justice* **PART 59**

SHARIF EL FOULY and 34-12 36TH AVENUE, LLC,

Plaintiff,

- v -

STEPHEN LEPP and STEPHEN LEPP, AIA ARCHITECT, a/k/a STEPHEN LEPP & ASSOCIATES, a/k/a STEPHEN LEPP & ASSOCIATES, P.C., a/k/a STEPHEN LEPP, P.C., a/k/a STEPHEN LEPP ASSOCIATES, ARCHITECTS & PLANNERS,

Defendants.

Index No.: 600840/09

Motion Date: 12/20/13

Motion Seq. No.: 07

The following papers, numbered 1 to 6 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	No(s). 1, 2
Answering Affidavits - Exhibits	No(s). 3, 4, 5, 6
Replying Affidavits - Exhibits	No(s).

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers,

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

Upon this motion, plaintiffs Sharif El Fouly (Owner) and 34-12 36th Avenue, LLC (the LLC) move for an order: (i) granting summary judgment, pursuant to CPLR 3212, against defendants Stephen Lepp and Stephen Lepp, AIA Architect, a/k/a Stephen Lepp & Associates, a/k/a Stephen Lepp & Associates, P.C., a/k/a Stephen Lepp, P.C., a/k/a Stephen Lepp Associates, Architects & Planners (collectively, Lepp) in the amount of $1.47 million with interest from February 22, 2013, based upon the third cause of action of the complaint for contractual indemnification; and (ii)

1. CHECK ONE: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☒ REFERENCE

scheduling an inquest to determine the amount of reasonable attorneys' fees due under the same contract.

This matter arises from a lease arrangement by which Owner and the LLC agreed to the let a property at 34-12 36th Avenue, Queens, New York (the Building), for conversion into a New York City public high school at the behest of the New York City Department of Education (DOE) (the Conversion). In a coordinate action (Index No. 604339/06, the DOE Action) the LLC sought recovery from the DOE based upon claims related to change orders and construction issues with the Conversion.

In this action, Owner and the LLC seek recovery against Lepp, as architect for design services associated with the Conversion.

The DOE Action and this action were consolidated for purposes of discovery. After joinder of issue in this action, discovery took place by document exchanges and depositions. As a result of that process, Lepp, as third-party plaintiffs, impleaded architect Emanuel Kambanis and Kambanis Architect, PLLC (collectively, Kambanis) as third-party defendants based upon their roles, as successors to Lepp, in an architectural capacity, in the Conversion of the Building.

In summary, this duo of cases comprised the LLC seeking payment from the DOE for work done in the Conversion, the DOE counterclaiming against the LLC for work done to complete the

Conversion, Owner and the LLC seeking damages covering the amounts sought by the DOE from Lepp for breach of his obligation to complete the Conversion, and Lepp seeking indemnification for any liability to Owner from a successor architect for the Conversion.

By order of December 7, 2012, the Honorable Shirley Werner Kornreich: (I) denied summary judgment on the third-party complaint that sought indemnification from the successor architect, Kambanis; (ii) granted summary judgment dismissing the third-party complaint against Kambanis; and (iii) granted summary judgment in favor of Owner and the LLC and against Lepp on causes of action for breach of contract and indemnification in this action (the Prior Decision). In the latter regard, the court found that Lepp breached his obligations under its contract with plaintiff, and that "[a]s it has been determined herein that Lepp are liable on the [contract] as a matter of law, [an] indemnification obligation attaches."

Owner and the LLC have now, as of February 22, 2013, settled the DOE Action (the Settlement). The Settlement provides that the DOE would provide $960,000 (comprising $260,000 for withheld retainage and $700,000 for claimed change orders) of the claimed $3.2 million, that the DOE would accept $2.17 million of the claimed $4.15 million for its counterclaim, and the DOE would renew its lease of the Building, which was due to expire in June

2013. This resulted in a net payment due to the DOE of $1.47 million, which was accepted as a $2.45 per square foot rent discount (40,000 square feet at a base rent of $28.25 per square foot reduced to $25.80 per square foot) over the 15-year lease renewal period. In addition, Owner and the LLC agreed to perform certain repairs to the envelope of the building at its sole cost and expense.

Owner and the LLC now move for summary judgment against Lepp in the amount of the Settlement ($1.47 million), together with interest from February 22, 2013, based upon the indemnification finding of the Prior Decision, and request an inquest to determine the amount of reasonable attorneys' fees due under the indemnity provision.

With regard to the Conversion, Owner and the LLC allegedly functioned in three capacities: as project owner, project general contractor, and landlord. On or about March 19, 2002, Owner entered into a contract with Lepp (the OA Contract) wherein Lepp agreed to provide architectural services to Owner in connection with the Conversion. The OA Contract was adapted from American Institute of Architects (AIA) standard form B151-1997, with certain modifications to the obligations of Lepp to manage, inspect, and direct the construction (the Rider).

More specifically, the OA Contract provided, in paragraph 10 of the Rider, that Lepp would, once per week, "visit and inspect

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the premises as necessary in the reasonable discretion of Owner in order to insure that the work and construction are being performed in a manner consistent with the contract documents (which include plans and specifications)."

Under paragraph 11 of the Rider to the OA Contract, "[i]n the event that [Lepp] discovers or otherwise becomes aware of the fact that any work performed at the project is not in accordance with the terms and conditions of the contract documents, [Lepp] shall immediately contact the Owner and assist in Owner in implementing same." That same paragraph goes on to state that Lepp "shall be primarily responsible for discovering facts [through its inspections] of any defects in work . . . ."

Under paragraph 12 of the Rider to the OA Contract, Lepp's "examination and inspection of the premises without notification thereof to Owner within two (2) business from said inspection shall be deemed the Architect's affirmation that the work at the project is continuing in accordance with the contract documents." Paragraph 16 of the Rider gave Lepp the "responsibility for detection regarding defects or faults in the project and non-conformance with the contract documents . . . ." The responsibilities under the OA Contract were to continue, according to paragraph 8 of the Rider, "until such time as a Final Certificate of Occupancy for the project has been issued by

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the pertinent governmental agency having jurisdiction there over."

Finally, paragraph 2 of the Rider to the OA Contract states that Lepp "shall defend, indemnify and hold the Owner harmless from any claims, losses, costs, liabilities, damages and expenses (including without limitation reasonable attorneys fees) arising out of or relating to a breach of any provision of this Agreement by [Lepp]" (the Indemnification Provision).

A Final Certificate of Occupancy for the public school was issued effective April 11, 2011.

Summary judgment may be granted only if the plaintiffs establish that there are no triable issues of fact. Andre v Pomeroy, 35 NY2d 361 (1974); see also Mosheyev v Pilevsky, 283 AD2d 469 (2d Dept 2001); Akseizer v Kramer, 265 AD2d 356 (2d Dept 1999). As such, plaintiffs must make a prima facie showing of entitlement to judgment as a matter of law. Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once plaintiffs have met this burden, then Lepp must come forward with proof in evidentiary form establishing the existence of triable issues of fact, or must demonstrate an acceptable excuse for its failure to do so. Zuckerman, 49 NY2d at 562; Davenport v County of Nassau, 279 AD2d 497 (2d Dept 2001); Bras v Atlas Constr. Corp., 166 AD2d 401 (2d Dept 1990).

On this motion, the court will view the evidence in a light most favorable to Lepp, and give Lepp the benefit of all reasonable inferences which can be drawn from the evidence (Negri v Stop & Shop, 65 NY2d 625 [1985]; Louniakov v M.R.O.D. Realty Corp., 282 AD2d 657 [2d Dept 2001]), in order to determine whether triable issues of fact exist (Matter of Suffolk County Dept. of Social Servs. v James M., 83 NY2d 178 [1994]; Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]). The motion will be denied if there is any doubt as to the existence of such issues of fact. Freese v Schwartz, 203 AD2d 513 (2d Dept 1994); Miceli v Purex Corp., 84 AD2d 562 (2d Dept 1981).

Plaintiffs simply point to the Prior Decision as proof that Lepp breached the contract, and that plaintiffs are entitled to indemnification as a matter of law. The court agrees. Lepp's arguments that they did not breach the OA Contract were heard in the Prior Decision, and, as this is not an appeal (see Becker v Becker, 56 AD2d 906 [2d Dept 1977] [law-of-the-case doctrine applies only to courts of co-ordinate or subordinate jurisdiction]), the law of the case in this matter is that Lepp breached its obligations under the OA Contract, and that an indemnification obligation thereby attaches. Compare Roldan v Astoria Generating Co., L.P., 90 AD3d 1014, 1015 (2d Dept 2011).

Therefore, the only open question is whether Lepp's indemnification obligation extends to the Settlement. The

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general rule is that "[w]hen an indemnitor has notice of the claim against it, . . . the indemnitor will be bound by any reasonable good faith settlement the indemnitee might thereafter make." Coleman v J.R.'s Tavern, 212 AD2d 568, 568 (2d Dept 1995). Here, Lepp not only had notice of the claims, but participated in the litigation, and had the benefit of *knowing*, via the Prior Decision, that it had an indemnification obligation. Compare Nesterczuk v Goldin Mgt., 77 AD3d 800, 804 (2d Dept 2010) ("[w]here the record establishes that the indemnitor [had] notice, the indemnitee made a reasonable settlement in good faith, and the indemnitee *could have been* held liable if it had proceeded to trial, the indemnitor is obligated to indemnify the indemnitee for the settlement amount" [internal quotation marks omitted] [emphasis added]), citing Fidelity Natl. Tit. Ins. Co. of N.Y. v First N.Y. Tit. & Abstract, 269 AD2d 560, 562 (2000). The plaintiffs have demonstrated entitlement to judgment as a matter of law.

In response to this prima facie showing, Lepp fails to raise any triable issues of fact. For example, Lepp could possibly have raised questions as to the plaintiffs' good faith in effecting the Settlement, or as to the reasonableness of the arrangement. Gray Mfg. Co. v Pathe Indus., 33 AD2d 739 (1st Dept 1969), *affd* 26 NY2d 1045 (1970). Lepp has failed to do so.

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Instead, of addressing any of the underlying aspects of the operation of the Indemnification Provision, or addressing plaintiffs' good faith or the fairness of the Settlement, Lepp attempts to muddy the waters. First, it states, without any legal support for the proposition whatsoever, that as the DOE Action and this action were never consolidated for trial, and Lepp was not a party to the negotiation, Lepp is not bound by the Settlement. Second, Lepp argues that the Settlement amount is not an instrument for the payment of money only or a sum certain, and, therefore, it does not satisfy the requirements of CPLR 3213. Finally, Lepp argues that as it will take 15 years for the structured rent credit to be paid, "[a]ny right of indemnification claimed by Plaintiffs will not ripen until Plaintiffs actually incur the alleged damage amount: 15 years hence."

With regard to the first point, there is no requirement that the actions be consolidated in order for an indemnification obligation to attach. As noted above, Lepp had notice of the litigation between the plaintiff and DOE, they had knowledge of their obligation to indemnify plaintiffs for the DOE Action, and they have not objected to the fairness of the Settlement. *Coleman*, 212 AD2d at 568.

With regard to the second point, the court sees no reason that the Settlement must satisfy the requirements of CPLR 3213.

The plaintiffs have not instituted an action based upon an instrument for the payment of money only, they have instituted an action which includes claims based on breach of contract and contractual indemnification; they now move for summary judgment executing the indemnification obligation. The language of the Indemnification Provision is clear and unambiguous, and Lepp is required to indemnify plaintiffs for the costs they incurred in the Settlement, including reasonable attorneys' fees. See Espinal v City of New York, 107 AD3d 411, 412 (1st Dept 2013), citing Hooper Assoc. v AGS Computers, 74 NY2d 487, 491-492 (1989).

The third point presents more of a problem. Despite the clear obligation to indemnify plaintiffs, Lepp is quite correct that such an obligation cannot precede actual incurring of the alleged damage. See Gampero v Mathai, 105 AD3d 995, 998 (2d Dept 2013) ("a cause of action seeking indemnification is not enforceable until payment is made or a loss is suffered by the party seeking indemnification") (citations omitted); see also McDermott v City of New York, 50 NY2d 211, 217 (1980); Bay Ridge Air Rights v State of New York, 44 NY2d 49, 54 (1978) ("[i]t is generally said that a cause of action for indemnity accrues on the date payment is made by the party seeking indemnity").

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The Settlement is structured such that effective payment of the $1.47 million is spaced out over a 15-year period.[1] As such, the damages are neither incurred as an initial lump sum of the full amount as plaintiffs imply, or as a final lump sum as Lepp implies. Rather, the damages are more of an installment mechanism. There are two problems with this.

First, only 1/15th of the Settlement is incurred as damage each calendar year, and, therefore, 14/15th of the Settlement is not yet subject to indemnification. Gampero, 105 AD3d at 998. As a result, waiting for the end of the 15-year lease would result in a loss of the right to enforce the indemnification provision with regard to the initial payments. Compare Loiacono v Goldberg, 240 AD2d 476, 477 (2d Dept 1997) ("[t]he law is well settled that with respect to a mortgage payable in installments, *there are separate causes of action for each installment accrued*, and the Statute of Limitations [begins] to run, on the date each installment [becomes] due unless the mortgage debt is accelerated" [internal quotation marks and citations omitted] [emphasis added]).

Second, to allow the plaintiffs to immediately recover a judgment from Lepp in the amount of $1.47 million would be, in

[1] The net payment due to the DOE of $1.47 million was applied as a $2.45 per square foot rent discount on the 40,000-square-foot Building over a 15-year lease renewal period. That is, $2.45/sq.ft x 40,000 sq.ft. x 15 years = $1.47 million.

effect, an acceleration of the total debt without discounting for the time value of the money. That is, while CPLR 5201 permits enforcement of a money judgment against debts yet to become due (Glassman v Hyder, 52 Misc 2d 618 [App Term 1966], *mod* 28 AD2d 974 [1st Dept 1967] *affd* 23 NY2d 354 [1968]), such a judgment that does not account for the timing of the payments would create a windfall profit over the Settlement amount.

The court therefore fixes immediate liability under the Indemnification Provision without indicating the specific amount for which money judgment shall be entered (i.e. the present value of $1.47 million payed out over 15 years). Compare Rohring v City of Niagara Falls, 84 NY2d 60, 70 (1994) ("[a] defendant's obligation to a personal injury plaintiff encompasses both past and future damages and becomes fixed as of the date of the liability verdict").

With regard to the reasonable attorneys' fees due under the Indemnification Provision, Lepp raise no issues of fact preventing summary judgment.

Accordingly, it is hereby

ORDERED that the motion of plaintiffs for an order granting summary judgment (CPLR 3212) against defendants in the amount of $1.47 million with interest from February 22, 2013 is granted to the extent of fixing the date of liability, and it is otherwise denied; and it is further

ORDERED that the motion of plaintiffs for an order directing a trial for an assessment to determine the amount of reasonable attorneys' fees due from defendants under the indemnification provisions of the contract between the parties is granted; and it is further

ORDERED that this matter is set down for such a trial before a Special Referee to hear and determine the issues of: (I) the amount, based on the date of settlement of February 22, 2013, of the money judgment to be entered against defendants in conjunction with their obligation to indemnify plaintiffs for the $1.47 million to be paid to non-party the New York City Department of Education over a 15-year period; and (ii) the amount of reasonable attorneys' fees and costs due under the indemnification provisions of the contract between the parties; and it is further

ORDERED that not later than October 24, 2014, plaintiff shall serve a copy of this Order with Notice of Entry and a Notice of Trial on defendants' counsel, and the matter of the amount based on the date of the settlement of February 22, 2013, of the money judgment to be entered against defendants in conjunction with their obligation to indemnify plaintiffs for the $1.47 million to be paid to non-party the New York City Department of Education and of the reasonable attorneys' fees is

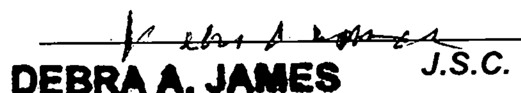
referred to a Special Referee to hear and report pursuant to CPLR 4320; and it further

ORDERED that within 30 days from the date of such service and upon payment of the appropriate fees, plaintiff shall cause a copy of this order with notice of entry, including proof of service thereof, to be filed with the Special Referee clerk (Room 119M, 646-386-3028 or spref@courts.state.ny.us) to arrange a date for a reference to hear and report pursuant to CPLR 4320 and for placement at the earliest convenient date upon the calendar of the Special Referees Part; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts.

This is the decision and order of the court.

Dated: September 22, 2014 ENTER:



DEBRA A. JAMES J.S.C.