

**Teresharan Realty v B'Way & 5th, Inc.**

2015 NY Slip Op 30492(U)

April 2, 2015

Sup Ct, New York County

Docket Number: 154909/2014

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
TERESHARAN REALTY,

Plaintiff,

Index No. 154909/2014

-against-

**DECISION/ORDER**

B'WAY & 5<sup>TH</sup>, INC. and KYUNG RIM CHOI,

Defendants.

-----X  
KYUNG RIM CHOI,

Third-Party Plaintiff,

-against-

HAN IK CHO and STEVE KIM a/k/a SIN Y. KIM,

Third-Party Defendants.

-----X  
**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Affirmations in Opposition to the Cross-Motion.....	<u>3</u>
Replying Affidavits.....	<u>4</u>
Exhibits.....	<u>4</u>

Plaintiff commenced the present action to recover unpaid rents stemming from a commercial lease and accompanying guaranty. Third-party defendant Steve Kim a/k/a Sin Y. Kim ("Kim") now moves for an Order pursuant to CPLR 3211(a)(1) and (7) dismissing third-party plaintiff Kyung Rim Choi's ("Choi") third-party complaint. For the reasons set forth

below, Kim's motion is granted in part and denied in part.

The relevant facts are as follows. Choi, Kim and third-party defendant Han Ik Cho ("Cho") are shareholders, directors and officers of defendant B'way & 5th, Inc. ("the corporation") pursuant to a shareholder's agreement (the "Shareholder Agreement"). On or about April 17, 2008, the corporation entered into a lease agreement with plaintiff Teresharan Realty ("Teresharan") to lease the premises at 39 West 32nd Street, New York, NY (the "premises") whereat the corporation ran a restaurant known as "Korea Spoon." In connection with the lease, Choi signed and executed a personal guaranty (the "Guaranty") wherein he personally guaranteed all obligations due and owing under the lease. Sometime thereafter, the corporation defaulted under the lease by failing to pay rent and it was evicted from the premises.

On or about July 1, 2014, plaintiff commenced the instant action against the corporation and Choi seeking to recover all unpaid rents and damages stemming from the corporation's default. Thereafter, Choi commenced a third-party action against Kim and Cho asserting causes of action for common law and contractual indemnity. Kim now moves to dismiss these claims.

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). "[A] complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept 1990). Additionally, in order to prevail on a defense founded on documentary evidence pursuant to CPLR § 3211(a)(1), the documents relied upon must definitively dispose of plaintiff's claim. *See Bronxville Knolls, Inc. v. Webster Town Partnership*, 221 A.D.2d 248 (1st Dept 1995). Indeed, the documentary evidence must be such

that it resolves all factual issues as a matter of law. *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314 (2002).

In the present case, Kim's motion for an order pursuant to CPLR § 3211 (a)(1) and (7) dismissing Choi's indemnification claims is granted as to Choi's claims for common law indemnity but is denied as to Choi's claim for contractual indemnity. A claim for "indemnity involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another party who should more properly bear responsibility for the loss because it was the actual wrongdoer." *Trustees of Columbia University v. Mitchell/Giurgola Associates*, 109 A.D.2d 449 (1<sup>st</sup> Dept 1985). The right to indemnification can be created by an express contract or may be implied by law. *Id.* Implied indemnity allows one who "is held vicariously liable solely on account of the negligence of another to shift the entire burden of the loss to the actual wrongdoer." *Id.* The one seeking indemnity must prove not only that it was not guilty of any negligence beyond statutory liability, but must also prove that the indemnitor was guilty of some negligence that contributed to the causation of the accident. *Corieia v. Professional Data Management, Inc.*, 259 A.D.2d 60 (1<sup>st</sup> Dept 1999).

In the instant case, Choi cannot maintain a common law indemnity claim against Kim as there is no valid claim asserted against Choi based on his vicarious liability. In its complaint, Teresharan alleges that Choi signed a personal guaranty wherein he personally guaranteed all obligations, including rent payments, due under the lease with the corporation. As such, Choi is being charged with liability based on his own alleged failure to make payment as guaranteed under his personal guaranty and not merely vicariously for any actions taken by Kim.

However, the court finds that Choi has sufficiently stated a claim for contractual

indemnity against Kim based on the parties' Shareholder Agreement. Paragraph 9 of the Shareholders Agreement provides as follows:

Each of KR Choi, Cho and Kim shall protect, indemnify and save harmless each other and the Corporation from and against all liabilities, obligations, claims, damages, judgments, costs, expenses (including, without limitation, reasonable attorneys' fees) and actions or proceedings asserted against such indemnified party arising from or in connection with the occurrence or existence actions or inaction of the indemnifying party in its individual capacity and/or which were not authorized on behalf of the Corporation.

Based on this contractual provision, Kim must indemnify Choi for any action or proceeding brought against Choi arising from or in connection with an action or inaction taken by Kim in his individual capacity and/or which was not authorized on behalf of the corporation. Here, Choi alleges in his third-party complaint that he is entitled to indemnification in this matter from Kim under said provision as this action was only brought against him as a guarantor of the lease based on the fact that Kim and Cho improperly diverted corporation assets for their own use that were supposed to be used to pay rent to plaintiff. Specifically, Choi alleges that "Cho and Kim improperly took and diverted Corporation assets and money for their own benefit which should have been used to pay rent" and "Kim and Cho have made or caused to be made false written entries of rent payments in the business records of the Corporation with the intent of concealing their improper diversion of Corporation Funds and failure to pay corporate obligations." Giving these allegations the benefit of every favorable inference, the court finds that they sufficiently state a claim for contractual indemnification against Kim under the Shareholder Agreement as an inference can be made that these alleged actions by Cho and Kim were not authorized by the corporation and were made in their individual capacity. Thus, Choi's third-party complaint sufficiently states a claim for contractual indemnification against Kim.

Accordingly, Kim's motion to dismiss is granted only to the extent that Choi's claim for common law indemnity is hereby dismissed but is otherwise denied. This constitutes the decision and order of the court.

Dated: 4/2/15

Enter: CK  
J.S.C.

**CYNTHIA S. KERN**  
J.S.C.