

Jian-Guo Yu v Greenway Mew Realty L.L.C.
2015 NY Slip Op 32105(U)
January 14, 2015
Supreme Court, New York County
Docket Number: 116885/05
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARTIN SHULMAN, J S C
Justice

PART 1

Index Number : 116885/2005
YU, JIAN-GUO
vs.
GREENWAY MEWS REALTY
SEQUENCE NUMBER : 015
SUMMARY JUDGMENT

INDEX NO. 116885/05
MOTION DATE _____
MOTION SEQ. NO. 015

The following papers, numbered 1 to _____, were read on this motion for summary judgment
Notice of Motion/~~Order to Show Cause~~ — Affidavits — Exhibits A-K | No(s) 1
Answering Affidavits — Exhibits A | No(s) 2
Replying Affidavits - Exhibit A | No(s) 3

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

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

FILED
JAN 16 2015
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
JAN 16 2015
GENERAL CLERK'S OFFICE
NYS SUPREME COURT CIVIL

Dated: Jan. 14, 2015

_____, J.S.C.
HON. MARTIN SHULMAN, J S C

- 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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1**

-----X
JIAN-GUO YU and HUI-DI TU,

Index No.: 116885/05

Plaintiffs,

-against-

GREENWAY MEWS REALTY L.L.C., LITTLE REST
TWELVE, INC., DAVID AIM, GEORGE V.
RESTAURANTS (NY) LLC and C&A SENECA ENTERPRISES,
INC.,

Defendants.

-----X
GREENWAY MEWS REALTY L.L.C. and LITTLE
REST TWELVE, INC.,

Third-Party Index No.:
590639/10

Third-Party Plaintiffs

FILED

-against-

JAN 16 2015

UAD GROUP,

**NEW YORK
COUNTY CLERK'S OFFICE**

Third-Party Defendant

-----X
Shulman, J.:

This is an action to recover damages for injuries plaintiff Jian-Guo Yu (Yu or plaintiff) sustained when he fell while installing panels in a skylight at a renovation project taking place at 416 West 13th Street, New York, New York (the premises) on October 27, 2005. In motion sequence number 015, defendant/third-party plaintiff Greenway Mews Realty L.L.C. (Greenway) moves pursuant to CPLR 3212 for summary judgment against third-party defendant UAD Group (UAD) in the amount of \$3,424,495.89, together with its attorneys' fees incurred in defense of defendant/third-party plaintiff Little Rest Twelve, Inc. (LRT), on Greenway's claim, as assignee of its tenant, LRT, for contractual indemnification against UAD.

BACKGROUND

Yu was injured while performing renovation work at the premises, which was owned by Greenway. Plaintiff and his wife commenced the main action against, among others, Greenway, as owner, and LRT, Greenway's tenant. Greenway cross-claimed for contractual indemnification against LRT because, under the terms of the lease between them, LRT was required to indemnify Greenway for any claims arising out of LRT's use of the premises. In their third-party action, Greenway and LRT sought contractual indemnification from UAD, Yu's employer and the contractor LRT retained to perform the renovation work at the premises.

In the third-party action, LRT alleged that, under the indemnification provision contained in the construction contract between UAD and LRT (the construction contract), UAD was required to indemnify LRT and hold it harmless with respect to claims, damages, losses and expenses arising out of UAD's work, to the extent that said claims, damages, losses and expenses resulted from UAD's negligence. Specifically, the indemnification provision contained in the construction contract stated, in pertinent part, as follows:

To the fullest extent permitted by law . . . [UAD] shall indemnify and hold harmless [LRT], Architect, Architect's consultants and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work . . . but only to the extent caused by the negligent acts or omissions of [UAD], a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

(Greenway's notice of motion, exhibit W, the construction contract).

By order entered September 19, 2011 (the September 19, 2011 order), this court granted Greenway's motion for summary judgment on its indemnity claim against LRT, but denied LRT's motion for indemnification against UAD. In denying LRT's motion, this court reasoned that LRT had not established that UAD was negligent or that LRT had suffered any loss. This court also denied LRT's motion for renewal and reargument, adhering to its prior decision.

By decision and order entered October 25, 2012 (the October 25, 2012 order), the Appellate Division, First Department reversed that part of the September 19, 2011 order pertaining to LRT's motion, holding, as a matter of law, that UAD's negligence was the sole cause of the accident because only UAD had directed the manner and means by which plaintiff did his work (*Yu v Greenway Mews Realty LLC*, 99 AD3d 619 [1st Dept 2012]). The First Department further determined that, as LRT was free of negligence, LRT was entitled to contractual indemnification from UAD. In addition, the First Department rejected UAD's argument that LRT was not entitled to indemnity from UAD because LRT had not yet paid a judgment or settlement, and therefore, had suffered no loss. Specifically, in the October 25, 2012 order, the First Department reasoned, in pertinent part:

The contract between [LRT] and [UAD] provided that [UAD] would indemnify [LRT] against claims, damages, losses and expenses to the extent caused by the negligence of [UAD] or anyone directly or indirectly employed by it. [LRT] established prima facie that [UAD] was negligent in connection with the accident in which plaintiff, an employee of [UAD], was injured, and that [LRT] was completely free from negligence. . . . [UAD's] argument that [LRT] is not entitled to contractual indemnification because it has not paid plaintiff any money and therefore has not sustained a loss mistakes the award of summary judgment for the execution of judgment. "[I]t serves the interest of justice and judicial economy [to] afford [] the indemnitee the earliest possible determination as to the extent to which [it]

may expect to be reimbursed” (*Lowe v Dollar Tree Stores, Inc.*, 40 AD3d 264, 265 [1st Dept 2007] [internal quotation marks omitted], *lv dismissed* 9 NY3d 891 [2007]).

(*id.* at 620).

Thereafter, via an agreement between Greenway and LRT entitled “Assignment and Covenant to Limit Execution” (the assignment), Greenway obtained an assignment of all of LRT’s rights to indemnity from UAD. The assignment stated, in pertinent part, as follows:

LRT hereby assigns, conveys and transfers to Greenway . . . any and all claims, causes of action, and/or rights of whatever nature or kind, including LRT’s Contractual Indemnification and Hold Harmless Claim and the LRT Summary Judgment against UAD, which LRT has or may hereafter have against UAD and/or any insurer(s) that provide insurance coverage to UAD . . . for the Yu action and/or for the Third-Party Action (“the Assigned Claims”).

(Greenway’s notice of motion, exhibit R, the assignment). In addition, pursuant to the assignment, Greenway waived its right to execute judgment against LRT, except to the extent that recovery could be had from UAD. Thereafter, Greenway settled the main action with the plaintiffs for \$3,300,000.

By order entered on November 26, 2013, this court granted Greenway’s motion to restore this case to the trial calendar and to sever the third-party action, so that Greenway could litigate the issue of UAD’s duty to indemnify it. On January 8, 2014, Greenway entered a judgment against LRT for \$3,424,495.89 (the judgment), which reflects the \$3,300,000 that Greenway paid in settlement with plaintiffs, plus statutory interest to the date of the judgment.

DISCUSSION

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

In its motion, Greenway argues that as a result of LRT’s assignment of its right to indemnity from UAD to Greenway, Greenway is entitled to a judgment against UAD in the amount of the judgment, \$3,424,495.89, together with its attorney’s fees incurred in defense of LRT in the main action. In support of its argument, Greenway contends that it has already been judicially determined that under LRT’s lease for the premises, Greenway is entitled to full indemnification from LRT with respect to any claims arising out of LRT’s use thereof. In addition, it has already been judicially determined that under the construction contract, LRT is entitled to full indemnification from UAD for accidents caused by UAD’s sole negligence, and UAD’s sole negligence caused the

accident at issue in this case. Further, the judgment quantifies LRT's obligation to Greenway, thus quantifying UAD's obligation to Greenway, as LRT's assignee.

In its opposition, UAD argues that Greenway cannot recover from UAD via the assignment of LRT's right to contractual indemnification from UAD because, in the October 25, 2012 order, the First Department determined that until LRT sustains a loss, it is not entitled to reimbursement from UAD. UAD asserts that LRT will never sustain a loss and thus, LRT will never be entitled to indemnification from UAD, because Greenway settled all plaintiffs' claims against LRT. In addition, in the assignment, Greenway waived its right to execute judgment against LRT, except to the extent that recovery can be had from UAD. As such, as "[a]n assignee's rights are measured by those of his assignor and, generally, the assignee acquires no greater right than his assignor," Greenway, as assignee, will never be entitled to reimbursement from UAD (*151 W. Assoc. v Printsiples Fabric Corp.*, 92 AD2d 76, 84 [1st Dept 1983], *affd* 61 NY2d 732 [1984]).

However, a review of the October 25, 2012 order reveals that the First Department clearly rejected UAD's argument that LRT was not entitled to indemnity from UAD because it had not yet paid a judgment or settlement, and therefore had suffered no loss. In fact, the First Department stated that to require LRT to pay a judgment or settlement before entitling it to indemnity would improperly "[mistake] the award of summary judgment for the execution of judgment" (*Yu*, 99 AD3d at 620). The First Department further noted that "it serves the interest of justice and judicial economy [to] afford [] the indemnitee the earliest possible determination as to the extent to which [it] may expect to be reimbursed [internal quotation marks and citation omitted]" (*id.*).

In any event, LRT did in fact sustain a loss. LRT obtained a benefit of the \$3,300,000 settlement amount paid by Greenway to plaintiffs, which resulted in extinguishing plaintiffs' claims against LRT. LRT funded this settlement by assigning to Greenway its right to obtain indemnity from UAD. Moreover, Greenway is not seeking to enforce rights greater than those held by its assignee, LRT. Greenway entered a judgment against LRT for \$3,424,495.89, which reflects the \$3,300,000 that Greenway paid in settlement to plaintiffs, plus statutory interest to the date of the judgment. Notably, in its opposition, UAD has not contested the reasonableness of Greenway's settling with plaintiffs or the reasonableness of the amount of the settlement. As such, these issues are deemed abandoned (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003]; *Musillo v Marist Coll.*, 306 AD2d 782, 784 n 1 [3d Dept 2003]).

Thus, as UAD is obligated to indemnify LRT for the judgment amount, and as Greenway, by virtue of the assignment, has obtained LRT's right to recover said sum, Greenway is entitled to summary judgment against UAD in the amount of \$3,424,495.89, together with Greenway's attorney's fees incurred in defense of LRT in the main action. The court has considered UAD's remaining contentions in opposition and finds them to be without merit.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that defendant/third-party plaintiff Greenway Mews Realty L.L.C.'s motion (motion sequence number 15) pursuant to CPLR 3212 for summary judgment against third-party defendant UAD Group in the amount of \$3,424,495.89, together with

Greenway's attorney's fees incurred in defense of defendant/third-party plaintiff Little Rest Twelve, Inc. in the instant action, on Greenway's claim, as assignee of LRT, for contractual indemnification against UAD is granted; and it is further

ORDERED that the portion of Greenway's action that seeks the recovery of attorney's fees is severed and the issue of the amount of reasonable attorney's fees Greenway may recover against UAD is referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for Greenway shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed information sheet, upon the Special Referee Clerk in the General Clerk's Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

Dated: January 14, 2015

ENTER:



Martin Shulman, J.S.C.

FILED
JAN 16 2015
NEW YORK
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