

**Yan Kan Wong Realty Corp. v Leading Ins. Group
Ins. Co., Ltd.**

2017 NY Slip Op 30004(U)

January 3, 2017

Supreme Court, New York County

Docket Number: 158857/2015

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
YAN KAN WONG REALTY CORP. and
NOVA CASUALTY COMPANY,

Plaintiffs,

- v -

LEADING INSURANCE GROUP
INSURANCE CO., LTD. and 55 JC REALTY INC.,

Defendants.
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Index No.
158857/2015

**DECISION
and ORDER**

Mot. Seq. 001

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiffs commenced the instant declaratory judgment action on August 26, 2016. Plaintiffs allege that defendant Leading Insurance Group Insurance Co., Ltd. (“LIG”) must indemnify and defend Yan Kan Wong Realty Corp. (“YKWRC” or “Wong Realty”) in an underlying action commenced by Charlie Chow (“the Chow Underlying Action”) under an insurance policy that LIG issued to defendant, 55 JC Realty Inc. (“55 JC Realty”).

The first cause of action is for contractual indemnification, alleging, “[P]ursuant to the Lease [entered between YKWRC and 55 JC Realty], the insurance policy that Leading Insurance Group Insurance Co., Ltd. issued to its insured [55 JC Realty], and Mr. Chow’s allegations, Leading Insurance Group Insurance Co., Ltd., and 55 JC Realty, Inc., must fully

defend and indemnify YKWR for Mr. Chow's claims and for any past and future damages, losses, expenses, costs and attorneys fees that arise from that claim, the defense thereto and this action." The second cause of action is for breach of contract, alleging, "That to the extent that no insurance coverage is available to YKWR by Leading Insurance Group Insurance Co., Ltd., then 55 JC Realty, Inc. breached its contract with YKWR and YKWR and Nova have been damaged by said breach."

LIG moves, pursuant to CPLR 3211(a)(1) (documentary evidence), to dismiss the Complaint filed by plaintiffs YKWRC and Nova Casualty Company ("Nova") (collectively, "Plaintiffs") based upon the ground that YKWRC is not a named additional insured on the LIG Policy Policy" issued to 55 JC Realty. In the alternative, LIG moves, pursuant to CPLR 3212, for an Order declaring that it has no duty to provide YKWRC with insurance coverage in the Chow Underlying Action, and it has no obligation to reimburse Nova for any costs, fees, or disbursements that it paid on YKWRC's behalf. Plaintiffs oppose LIG's motion.

Plaintiffs cross move for an Order granting summary judgment in Plaintiffs' favor and declaring that LIG must fully defend and indemnify YKWRC in the Chow Underlying Action and must reimburse Plaintiffs for all expenses, costs and attorneys' fees that arise from that claim, the defense and this action. LIG opposes.

Procedural Posture and Background

Lease Between YKWRC and 55 JC Realty

YKWRC owns real property located at 201 Canal Street/102 Mulberry Street New York, New York, New York ("the Premises"). On August 15, 2011, 55 JC Realty entered into a lease ("the Lease") with YKWRC to occupy three storefronts at the Premises ("Leased Premises"). The Lease requires 55 JC Realty to indemnify and hold harmless YKWRC for any claim, damage, loss and expense arising from 55 JC Realty's occupancy of the Leased Premises. The Lease requires 55 JC Realty to

maintain the sidewalks of the Leased Premises in a safe manner and to obtain primary commercial general liability insurance on which YKWRC is an additional insured.

The Underlying Chow Action

On November 15, 2013, Mr. Chow commenced the Chow Underlying Action against YKWRC and the City of New York under New York County Index No. 160652/2013. In that action, Mr. Chow claims that he slipped and fell on snow and ice on the sidewalk adjacent to 201 Canal Street on February 21, 2013.

Nova is YKWRC's general liability insurance carrier for the period that encompasses Mr. Chow's alleged accident.

On May 8, 2014, YKWRC's counsel sent a letter to LIG tendering the defense of the Chow Underlying Action to LIG. On July 14, 2014, LIG sent a letter to YKWRC's counsel indicating that LIG was investigating the tender. On July 25, 2014, YKWRC's counsel emailed the LIG employee assigned to this claim and again requested a decision on the tender. LIG did not provide any further response to the tender.

On September 23, 2014, YKWRC commenced a third-party action in the Chow Underlying Action against, *inter alia*, 55 JC Realty. YKWRC alleges that it is entitled to contractual indemnification from 55 JC Realty pursuant to the Lease between YKWRC and 55 JC Realty. 55 JC Realty did not answer or otherwise appear. On May 27, 2015, Judge Chan issued a decision which granted default judgment in YKWRC's favor against 55 JC Realty on YKWRC's contractual indemnification claim against 55 JC Realty based on the terms of the Lease ("the Default Judgment"). 55 JC Realty moved to vacate the Default Judgment, which YKWRC opposed.

By Decision and Order dated September 28, 2016, Judge Chan granted 55 JC Realty's motion to vacate the Default Judgment, vacated

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the Default Judgment, and compelled YKWRC to accept JC Realty's late filed answer.

LIG Policy

LIG issued a general liability insurance policy to 55 JC Realty for the period during which Mr. Chow's alleged accident occurred.

The LIG Policy contains a "Businessowners Coverage Form" which requires that LIG provide coverage for any liability that its insured [55 JC Realty] assumes pursuant to an "insured contract", which the Policy defines as a lease. It states, in relevant part:

SECTION II – LIABILITY

A. Coverages

1. Business Liability

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies ..."

B. Exclusions

1. Applicable to Business Liability Coverage

This insurance does not apply to:

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement or

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(2) Assumed in a contract or agreement that is an “insured contract”, provided the “bodily injury” or “property damage” occurs subsequently to the execution of the contract or agreement. Solely for the purposes of liability assumed in an “insured contract”, reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of “bodily injury” or “property damage,” provided:

(a) Liability to such party for, or for the cost of, that party’s defense has also been assumed in the same “insured contract”, and

(b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

F. Liability and Medical Expenses Definitions

9. “Insured contract” means:

A. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damages by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an “insured contract”; ...

Pending Motions

Turning to LIG’s motion to dismiss the Complaint under CPLR § 3211(a)(1), on such a motion, “the court may grant dismissal when

terms of the Policy, and that LIG agreed to provide full coverage for the liability that 55 JC incurred pursuant to that lease.” Plaintiffs further argue, “[T]here is absolutely no question that 55 JC incurred complete liability to YKWRC in the underlying Chow lawsuit pursuant to their lease since YKWRC obtained default judgment on its contractual indemnity claim against 55 JC. YKWRC’s indemnity claim against JC 55 also included its defense costs and fees in that underlying lawsuit, meaning that the default judgment also encompassed those costs and fees.” However, as stated above, the Default Judgment has now been vacated in the Chow Underlying Action, and no determination on the merits of YKWRC’s contractual indemnity claim has been rendered.¹

While the LIG Policy does not name YKWRC as the insured or an “additional insured” under the LIG Policy as 55 JC Realty argues, the LIG Policy may still afford coverage to YKWRC on its third party contractual indemnification claim if it is determined that 55 JC Realty owes contractual indemnity to YKWRC under the terms of the Lease, an “insured contract” under the policy. If in fact it is determined that 55 JC Realty owes contractual indemnity to YKWRC under the lease, YKWRC’s claim for coverage under the Policy would be as third party beneficiary of the LIG Policy. However, here, since the Default Judgment in the Underlying Chow Action has now been vacated and 55 JC Realty’s late answer has been permitted, there has been no determination concerning that claim. Accordingly, LIG has failed to submit documentary evidence that flatly contradicts the Complaint or conclusively establishes a defense to the asserted claims as a matter of law.

Turning to Plaintiffs’ cross motion for summary judgment, CPLR 3211(c) states:

¹ At oral argument of the pending motions, Judge Chan had not entered her decision to vacate the Default Judgment in the Underlying Chow Action. Neither the Court nor the parties were aware of that decision.

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(c) Evidence permitted; immediate trial; motion treated as one for summary judgment. Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment. The court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion. (emphasis added).

A motion for summary judgment by either party is premature because there has been no determination concerning the merits of YKWRC's claim for contractual indemnification against 55 JC Realty in the Underlying Chow Action.

Wherefore, it is hereby

ORDERED that defendant Leading Insurance Group Insurance Co., Ltd.'s motion to dismiss is denied; and it is further

ORDERED that defendant Leading Insurance Group Insurance Co., Ltd shall file and serve an answer within 20 days of receipt of this Order with Notice of Entry thereof; and it is further

ORDERED that Plaintiffs' cross motion for summary judgment is denied as premature.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: JANUARY 3 2017


EILEEN A. RAKOWER, J.S.C.