

<b>Wen Gao v Mehran Enters. Ltd.</b>
2019 NY Slip Op 31874(U)
June 28, 2019
Supreme Court, New York County
Docket Number: 159168/2013
Judge: Kelly A. O'Neill Levy
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. KELLY O'NEILL LEVY** PART IAS MOTION 19

*Justice*

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INDEX NO. 159168/2013

WEN GAO,

MOTION DATE 03/04/2019

Plaintiff,

MOTION SEQ. NO. 008

- v -

MEHRAN ENTERPRISES LTD.,

**DECISION + ORDER ON  
MOTION**

Defendant.

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MEHRAN ENTERPRISES LTD.

Third-Party  
Index No. 595565/2014

Plaintiff,

-against-

OCEANICA CHINESE RESTAURANT, INC., SEAPORT  
RESTAURANT, INC., TIN CHENG, WANG GANG, QIN CHEN,  
JIN ZHO

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 008) 216, 217, 218, 219,  
220, 221, 222, 223, 224

were read on this motion to/for JUDGMENT - DEFAULT

HON. KELLY O'NEILL LEVY:

In this action to recover damages for personal injuries, defendants Jin Pin Zhu ("Zhu") and Qin Zhou Chen ("Chen") (collectively, "the Movants") move for default judgment against co-defendants Oceanica Chinese Restaurant, Inc. ("Oceanica"), Seaport Restaurant, Inc. ("Seaport"), Tian Ming Zheng (otherwise known as "Tin Cheng", hereinafter "Cheng"), and Wang Zhi Gang ("Gang") pursuant to CPLR § 3215(a) on the theory that above named defendants have failed to appear and therefore the Movants may seek a default judgment against them. Defendants have not opposed this motion.

On September 7, 2012, Plaintiff We Ling Gao was allegedly injured while working as a construction laborer for Oceanica. Plaintiff commenced this action for personal injuries against

Mehran Enterprises, Ltd. (“Mehran”), the landlord of 37-02 Main Street, Flushing, New York, the building at which Plaintiff was working. Mehran had previously leased the building to defendant Future Queens Realty, Inc. who, on May 30, 2012, sublet the second floor of the building to the Movants, Gang, and Cheng collectively. In a lease dated June 1, 2012, the Movants, Gang, and Cheng assigned their sublease of the second floor of the building to Oceanica, with Seaport as guarantor. On November 14, 2014, Mehran impleaded the Movants, Oceanica, Seaport, Cheng, Gang, and Future Queens Realty, Inc. as third-party defendants.

Plaintiff amended his complaint to include these additional parties as direct defendants on March 11, 2015. Oceanica was the only party besides the Movants to respond to this amended complaint. Plaintiff therefore brought a motion for default judgment against Gang, Cheng, and Seaport, which this court granted on March 1, 2016. On October 1, 2017, Plaintiff was also granted partial summary judgment against Mehran as to liability on the Labor Law § 240(1). Furthermore, in an order dated February 6, 2018, this court: 1) denied Mehran’s motion for summary judgment on its contractual and common law indemnification claims against Cheng, Gang, and the Movants; 2) granted Oceanica’s motion for summary judgment dismissing the third-party complaint against it; and 3) granted Mehran’s cross-motion for summary judgment on Plaintiff’s Labor Law § 241(6) and § 200 claims.

Critically to the matter at hand, on September 2, 2015, the Movants cross-claimed for indemnification and contribution upon co-defendants Oceanica, Seaport, Cheng, and Gang. Seaport, Cheng, and Gang never responded to Movants’ cross-claim. Oceanica responded, and otherwise participated in the case, but did not appear at the pre-trial conference on October 1, 2018. The Movants subsequently brought this motion for default judgment against Oceanica, Seaport, Cheng, and Gang on February 14, 2019.

To be entitled to default judgment, the applicant must demonstrate “proof of service of the summons and the complaint, or a summons and notice served. . . and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party...or at least a verified complaint.” CPLR § 3215(f); *Zelnik v. Bidermann Indus. U.S.A.*, 242 A.D.2d 227, 228 (1st Dep’t 1997). The Movants have provided a summons and notice served as well as proof of the facts constituting the claim through their Verified Answer to Amended Verified Complaint with cross-claims for indemnification and contribution and have therefore satisfied this requirement.

An additional requirement arises in CPLR 3215(c) in which the plaintiff must “take proceedings for the entry of judgment within one year after the default.” *See* CPLR 3215(c).<sup>1</sup> Oceanica defaulted on October 1, 2018, when they did not appear for the pre-trial conference, thus the Movants motion against Oceanica is well within the one-year time bar. Seaport, Cheng, and Gang defaulted much earlier, however. None of them responded within thirty days to Movants’ cross-claims served September 2, 2015, and so, under the general rule of CPLR 3215(c), the Movants had until October 2, 2016, to enter a motion for default judgment, which they did not do.

However, courts have recognized a special exception under CPLR 3215(c) for defaults on third party claims or cross-claims for indemnification and contribution. *See IMP Plumbing & Heating Corp. v. 317 E. 34th St., LLC*, 89 A.D.3d 593, 933 N.Y.S.2d 252 (1st Dep’t 2011); *Multari v. Glalin Arms Corp.*, 28 A.D.2d 122, 282 N.Y.S.2d 782 (2nd Dep’t 1967). In these special circumstances, movants must file within one year of when the indemnification and contribution claims accrue, rather than within one year of when the default occurs.

For example, in *Multari*, the plaintiff was employed by third-party defendant, M. Krugman Construction Corp. (“Krugman”) and was killed by falling through a hole in the floor of a building under construction. *See* 28 A.D.2d at 123. Glalin Arms Corporation (“Glatin”) was the owner and general contractor against whom the plaintiff’s intestate brought the complaint. *See id.* Glalin sought indemnification against Krugman, but Krugman did not reply. *See id.* The Court entered judgment against Krugman on the third-party complaint despite the fact that Glalin brought the motion for default judgment three years after the default. *See id.* The Court held that:

[i]n the case of a default in answering a third-party complaint...the one-year period referred to in subdivisions (c) and (f) of CPLR 3215 starts to run with the entry of judgment against the third-party plaintiff in the main action. The entry of a default judgment in a third-party action should not be required prior to the determination of liability in the main action and before the cause of action for indemnity has accrued. A construction of the statute which would lead to such an awkward and illogical result, and which would not serve to effectuate the statutory purpose of expediting the termination of the action, presumably was not within the legislative intent.

*Id.* at 124-25 (internal citations omitted).

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<sup>1</sup> If the plaintiff does not move for default judgment within one year of the party’s default, the court is to deny the motion, “unless sufficient cause is shown why” it should not be dismissed. In order to show sufficient cause, the party must provide: 1) a reasonable excuse for the lateness, and 2) a showing of a potentially meritorious position on its claim. *See generally* CPLR 3215(c).

In *IMP Plumbing*, the Appellate Division, First Department further applied the exception to the one-year time bar to cross-claims, holding:

Dismissal of NYU's cross claims against the general contractor was [] not warranted. NYU correctly asserts that, as in third-party actions, CPLR 3215(c)'s mandate that an action is deemed abandoned unless 'proceedings' towards a default are taken within one-year of the default, *does not apply to indemnification claims until liability is established in the main action* ... To the extent the second cross claim is one for contribution, the same principle applies, as the claim is asserted in the verified answer as specifically contingent upon a finding of liability against NYU in the main action.

89 A.D.3d at 594 (citations omitted) (emphasis added). In the current matter, liability was established more than a year ago for all defendants except the Movants and Oceanica. However, after consideration of the principles underpinning *IMP Plumbing* and the indemnification exception to CPLR 3215(c), the court finds that CPLR 3215(c)'s mandate that an action is deemed abandoned unless 'proceedings' towards a default are taken within one-year of the default, does not apply to indemnification claims until liability *of the movant(s)* is established in the main action. *See IMP Plumbing* at 594; *Multari* at 124-25. As no liability has yet been established against the Movants in the main action, this motion for default judgment is timely.

However, it is generally accepted that "[t]he statute of limitations for indemnity or contribution accrues only when the person seeking indemnity or contribution has paid the underlying claim." *Tedesco v. A.P. Green Industries, Inc.*, 8 N.Y.3d 243, 247 (2007); *see also Pertucci v. City of New York*, 167 A.D.2d 29 (1st Dept. 1991). For instance, in *J.P. Morgan Chase Bank, N.A. v. Luxor Capital, LLC.*, the First Department held that:

The indemnification clause...at issue provides, among other things, that CIC shall indemnify Luxor for any costs or expenses arising out of a breach of CIC's representations and warranties under the agreement. The IAS court correctly denied Luxor's motion [for summary judgment on this issue] as premature, as it cannot be determined on this record whether CIC breached the LSTA agreement.

101 A.D.3d 575, 575 (1st Dept. 2012). Thus, because liability had not yet been determined, the Court concluded that the motion for summary judgment on the issue of indemnification was premature. *See id.* The same reasoning applies here. Movants' motion for summary judgment on the issue of indemnification is premature because liability has not been established against the movants in the main action. *See Luxor Capital*, 101 A.D.3d at 575.

Accordingly, it is

ORDERED that Movants' motion for default judgment against Oceanica, Gang, Cheng, and Seaport is denied without prejudice.

This constitutes the decision and order of the court.

6/28/2019  
DATE

*Kelly O'Neill Levy*  
KELLY O'NEILL LEVY, J.S.C.  
**KELLY O'NEILL LEVY**  
**JSC**

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	