

**Bell v Ben-Mol Realty Corp.**

2019 NY Slip Op 32106(U)

July 19, 2019

Supreme Court, New York County

Docket Number: 152067/2015

Judge: Barbara Jaffe

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

*Justice*

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RAYMOND BELL,

Plaintiff,

- v -

INDEX NO. 152067/2015

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 006

BEN-MOL REALTY CORP., YUE FUNG USA  
ENTERPRISE, INC., BOWERY 123 LLC,

Defendants.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 198-234, 237-247 were read on this motion to/for summary judgment.

By notice of motion, defendant Bowery 123 LLC moves pursuant to CPLR 3212 for an order granting it as against defendant Yue Fung USA Enterprise, Inc.: (1) conditional summary judgment on its claim for contractual indemnification, (2) summary judgment on its claim for breach of contract to procure insurance coverage, and (3) costs and attorney fees. Yue Fung and plaintiff oppose the motion.

I. PERTINENT BACKGROUND

In this action, plaintiff claims that on March 14, 2014, he tripped and fell on the sidewalk at or adjacent to the premises located at 123 Bowery Street in Manhattan. (NYSCEF 1). In his bill of particulars, plaintiff alleges that he fell as a result of a defective, cracked, broken, raised, dilapidated, uneven, unsafe, and hazardous area of the sidewalk in front of the premises. (NYSCEF 224). At his deposition, plaintiff testified that he fell on the sidewalk in front of the building. (NYSCEF 230, 231).

Bowery 123 owns the premises at issue, and by lease dated July 15, 2013, it leased the ground floor store and basement to Yue Fung from July 1, 2013 to June 30, 2021. (NYSCEF 227). The lease requires Bowery 123 to maintain and repair the exterior and interior public portions of the building, and that Yue Fung “take good care” of the premises, including the sidewalks adjacent thereto, “and at its sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition, reasonable wear and tear, obsolescence and damage from the elements, fire or other casualty, excepted.” Another lease provision requires that Yue Fung perform repairs and replacement to the sidewalks and curbs adjacent thereto, and keep them free from snow, ice, dirt, and rubbish. (*Id.*). In the rider to the lease, Yue Fung’s obligations are reiterated as follows: to keep and maintain the sidewalks at its sole cost and expense, “in thorough repair and good order and safe condition” and

repair the portions attributable to the Leased Premises and each and every part thereof in order to keep the same at all times during the terms hereof in thorough repair and good order and SAFE CONDITION and free from dirt, snow, ice, rubbish and other obstructions or encumbrances.

(*Id.* [emphasis in original]). Bowery 123’s sole responsibility under the lease is to make underground repairs to the building line, if necessary, and structural repairs to the building. (*Id.*). In another portion of the rider, liability and responsibility for replacing any part of the sidewalk that may be damaged is attributed to Yue Fung.

Similarly, the lease rider requires Yue Fung to obtain and maintain, for the mutual benefit of Bowery 123, liability insurance against claims for personal injury occurring in or about the demised premises and sidewalk with certain minimum limits and naming Bowery 123 as a covered party. Yue Fung is also required to indemnify Bowery 123 from all liability “of any kind or nature arising or growing out of or in any way connected with the use and occupation” of the

leased premises “and/or by reason of any breach, violation, or non-performance of any covenant or condition thereof on the part of [Yue Fung] to be performed.” It must also hold harmless and indemnify Bowery 123 for all claims for damages and suits brought on account of personal injury “sustained by the use or occupation of the Leased Premises or sidewalks . . .” (*Id.*).

By affidavit dated December 9, 2018, Bowery 123’s managing member denies making any repairs and/or alterations or performing any maintenance or work to the sidewalk adjacent to the premises before plaintiff’s accident, having hired or contracted with anyone to perform such work, having made special use of the sidewalk, or having received any complaints or violations about the sidewalk. (NYSCEF 232).

## II. CONTENTIONS

Bowery 123 asserts that it is entitled to contractual indemnification from Yue Fung given the parties’ lease and rider and in the absence of evidence of negligence by it, and that a grant of judgment on its claim is not premature even though there has been no finding of liability against it. It also contends that Yue Fung failed to obtain insurance coverage covering Bowery 123 as an additional insured, thereby breaching the parties’ lease. As it is entitled to judgment on its claims, it also claims entitlement to attorney fees and costs pursuant to the lease. (NYSCEF 215).

In opposition, Yue Fung argues that plaintiff denied at his deposition that he had fallen in front of the store. Rather, he fell in front of the entrance door to 123 Bowery and that the lease does not give it control of the area in front of the building’s entrance. It also asserts that absent proof that Bowery 123 sustained damages as a result of Yue Fung’s breach of its obligation to procure insurance coverage, the claim is premature, or alternatively, that Bowery 123’s damages must be limited to its out-of-pocket expenses or costs. As Bowery 123 is not entitled to judgment on its claims, Yue Fung claims that there is no basis on which to award its attorney fees and

expenses. (NYSCEF 237).

In reply, Bowery 123 posits that even if plaintiff fell in front of the entrance door, he still fell on the sidewalk adjacent to the premises, and that it was Yue Fung's obligation to maintain and repair the sidewalks. It denies any need on this motion to prove the amount of damages sustained on its breach of insurance coverage claim. (NYSCEF 244).

### III. ANALYSIS

If the party seeking a conditional judgment on contractual indemnity establishes that it is free from negligence in the happening of the underlying occurrence, granting judgment is not premature even if there has not yet been a finding of liability against the moving party. (*Arriola v City of New York*, 128 AD3d 747 [2d Dept 2015]).

Here, as the parties' lease required Yue Fung to maintain and repair the sidewalk and all areas adjacent to the building entrance, and absent evidence or an allegation that Bowery 123 acted negligently in maintaining and/or repairing the sidewalk or made special use of it, Bowery 123 establishes its freedom from negligence. In any event, plaintiff alleges that he fell in a hole on the sidewalk in front of the building, and the lease requires Yue Fung to repair and maintain all sidewalks adjacent to the premises, and does not exclude the sidewalk at the building's entrance.

Absent any dispute that Yue Fung breached its obligation to procure certain insurance coverage, that Bowery 123 may not yet have sustained damages resulting from the breach does not preclude a conditional judgment on the claim. (*See e.g., Calvitti v 40 Garden, LLC*, 155 AD3d 1399 [3d Dept 2017] [defendant entitled to summary judgment once it established other party's failure to procure required insurance coverage]).

And, as Bowery 123 is granted partial summary judgment on its claims against Yue

Fung, it is also entitled to recover its attorney fees and costs from Yue Fung.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, defendant Bowery 123 LLC's motion is granted as follows:

- (1) conditional summary judgment is awarded to Bowery 123 LLC for contractual indemnification against defendant Yue Fung USA Enterprise, Inc., pending a finding of liability against Bowery 123 LLC,
- (2) summary judgment is granted on its claim for breach of contract to procure insurance coverage against Yue Fung, and
- (3) costs and attorney fees are awarded against Yue Fung;

And it is further

ORDERED, that Bowery 123 LLC may submit proof of its costs and attorney fees at its earliest convenience.

7/19/2019

DATE

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BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE