

Reward Realty Corp. v Kam Cheung Constr., Inc.

2020 NY Slip Op 30234(U)

January 8, 2020

Supreme Court, Kings County

Docket Number: 509116/2017

Judge: Peter P. Sweeney

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No.: 509116/2017
Motion Date: 10-28-19
Mot. Cal. No.: 48

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REWARD REALTY CORP.,

Plaintiff,

-against-

DECISION/ORDER

KAM CHEUNG CONSTRUCTION, INC., T&K
CONSTRUCTION OF NY, INC., TDL CONSTRUCTION,
INC., TOMMY TSANG, "JOHN DOE" 1-10" and XYZ
COMPANY 1-10",

Defendants.
-----x

The following papers numbered 1 to 3 were read on this motion:

Papers:	Numbered:
Notice of Motion/Order to Show Cause	
Affidavits/Affirmations/Exhibits/Memos of Law.....	1
Answering Affirmations/Affidavits/Exhibits/Memos of Law.....	2
Reply Affirmations/Affidavits/Exhibits/Memos of Law.....	3
Other.....	

Upon the foregoing papers, the motion is decided as follows:

In this action for, *inter alia*, breach of contract, the plaintiff, REWARD REALTY CORP. ("Reward") moves for an order pursuant to CPLR 3212 awarding it summary judgment on all its claims against defendants, KAM CHEUNG CONSTRUCTION, INC. ("KAM") and TOMMY TSANG ("Tsang") and striking their affirmative defenses.

In support of the motion, plaintiff Reward submitted a copy a contract between Reward and Kam for the renovation of a building located at 524 New Lots Avenue, Brooklyn, New York, pursuant to the contract, Kam was responsible to pay for all the costs

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of “insurances (accident insurance, labor insurance, disability insurance)....” in connection with the project. Plaintiff also submitted the affidavit of Fen Zheng, the majority shareholder of Reward, who averred that Tsang, the principle of both Kam and T&K CONSTRUCTION OF NY, INC. (“T&K”), repeatedly assured him that the contract contained an indemnification provision running to the benefit of Reward. While the contract contains no such provision, in support of the motion, the plaintiff also submitted Tsang’s deposition transcript wherein he admitted that Kam agreed to indemnify Reward against accidents.

Plaintiff also submitted admissible proof demonstrating that on March 8, 2010, Reward was added to Kam’s insurance, that renovation project began the same day and on April 21, 2010, Ben Wei Chen, who Zheng identified as “one of the Contractor’s workers, was injured while working on the project. Plaintiff demonstrated that Chen commenced a personal injury action seeking damages for his injuries which included Reward as a defendant. When Reward submitted the claim to its insurance company, U.S. Liability Insurance Company, and to Kam’s Insurer, Underwriters of Lloyds of London, both carriers denied coverage. Kam refused to indemnify and hold harmless Reward in the action and Reward ultimately settled case for the sum of \$250,000.

Along with a reply affirmation, Reward submitted a contract between T&K Construction of NY, Inc. and Reward containing an indemnification provision running in its favor and which required T&K to procure insurance for Reward in specified amounts. While the contract is dated February 5, 2010 and is signed by Tsang, according to plaintiff’s attorney, the contract was signed sometime in 2015 and backdated to February 5,

2010.

Reward now seeks summary judgment against Kam and Tsang on its claims for contractual indemnification, failure to procure insurance, fraud and common law indemnification. The fraud claim is based on Reward's contention that Tsang fraudulently misrepresented that the contract between Kam and Reward contained an indemnification provision running in Reward's favor.

The proponent of a motion for summary judgment has the initial burden of making a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient proof eliminating any material issues of fact (see, *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404). If the proponent meets this burden, the burden shifts to any party opposing the motion to come forward with proof in admissible form raising a triable issue of fact (see *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324; *Zuckerman*, 49 N.Y.2d at 562; *Friends of Animals v. Associated Fur Mfrs.*, 46 N.Y.2d at 1068). If the proponent fails to meet its initial burden, the Court must deny the motion regardless of the sufficiency of the opposition papers (see *Winegrad*, 64 N.Y.2d at 853; *New York & Presbyt. Hosp. v. Allstate Ins. Co.*, 29 A.D.3d 547).

Plaintiff Reward did not meet its initial burden of making a prima facie showing of entitlement to judgment as a matter of law on its claim for contractual indemnification. As stated above, the written contract between the parties does not contain an indemnification provision running to Reward's benefit.

To the extent that plaintiff maintains that Tsang orally agreed to indemnify Reward

for any personal claims made during the renovation, the parol evidence rule generally operates to preclude evidence of a prior or contemporaneous communication during negotiations of the agreement that contradicts, varies, or explains a written agreement which is clear and unambiguous in its terms and expresses the parties' entire agreement and intentions (*see Annis v. Phillips*, 256 A.D.2d 531, 531, 683 N.Y.S.2d 107; *Stone v. Schulz*, 231 A.D.2d 707, 707, 647 N.Y.S.2d 822; *Katz v. American Tech. Indus.*, 96 A.D.2d 932, 933, 466 N.Y.S.2d 378). Plaintiff has not demonstrated, as a matter of law, that there are any exceptions to the parol evidence rule that apply in this case.

While Tsang testimony that he orally represented to the plaintiff that the Kam would indemnify Reward supports the argument that the parol evidence rule does not apply in this case since the contract did not embody the entire agreement between the parties, plaintiff's moving papers did not demonstrate, as a matter of law, the exact wording of the indemnification provision that was supposed to be included in the contract. For this reason, the Court can not determine whether any such indemnification provision would entitle Reward to contractual indemnification in this case or whether any such indemnification provision would be enforceable under G.O.L. § 5-322.1(1)¹.

Likewise, plaintiff Reward did not meet its initial burden of making a prima facie showing of entitlement to judgment as a matter of law on its failure to provide insurance

¹G.O.L. § 5-322.1(1), in pertinent part, provides that an agreement or contract "in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building" which purports "to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable ...".

claim. The contract, which obligated Kam to pay all of the costs of “insurances (accident insurance, labor insurance, disability insurance)....” is ambiguous and did not demonstrate as a matter of law that Kam was obligated to procure Reward insurance, in its own name, that would provided it with coverage for claims asserted by Chen.

Plaintiff Reward also failed to meet its initial burden of making a prima facie showing of entitlement to judgment as a matter of law on its fraud claim. “The elements of a cause of action [alleging] fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages” (*Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559, 883 N.Y.S.2d 147, 910 N.E.2d 976). Here, plaintiff Reward did not demonstrate as a matter of law that it justifiably relied on Tsang’s representations that the contract contained an indemnification provision. Plaintiff certainly could have reviewed the contract to determine whether such a provision was contained therein .

Finally, plaintiff Reward failed to meet its initial burden of making a prima facie showing of entitlement to judgment as a matter of law on its claim for common law indemnification. No admissible evidence was submitted demonstrating as a matte of law how the underlying action occurred and that Reward was not negligent as a matter of law. (*see Nasuro v. PI Assocs., LLC*, 49 A.D.3d 829, 831–32, 858 N.Y.S.2d 175, 178–79; *Benedetto v. Carrera Realty Corp.*, 32 A.D.3d 874, 875, 822 N.Y.S.2d 542).

The Court has not considered the contract between T& K and Reward dated February 5, 2010 which plaintiff submitted in reply. A party cannot sustain its prima facie burden by relying on evidence submitted for the first time in its reply papers (*see Matthews*

v. Bright Star Messenger Ctr., LLC, 173 A.D.3d 732, 734, 102 N.Y.S.3d 250, 252; *Refuse v. Wehbeh*, 167 A.D.3d 956, 959, 89 N.Y.S.3d 302; *Troia v. City of New York*, 162 A.D.3d 1089, 1093, 80 N.Y.S.3d 117; *Lorde v. Margaret Tietz Nursing & Rehabilitation Ctr.*, 162 A.D.3d 878, 879, 79 N.Y.S.3d 89).

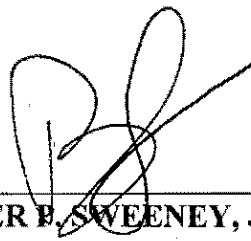
The Court has considered plaintiff's remaining contentions as to why summary judgment should be granted and find them to be without merit.

For all of the above reasons, it is hereby

ORDERED that plaintiff's motion is **DENIED**.

This constitutes the decision and order of the Court.

Dated: January 8, 2020



PETER P. SWEENEY, J.S.C.

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KINGS COUNTY CLERK
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