

**CGM-LLNR LLC v Sylvia Ward & Po Kim Art
Gallery**

2024 NY Slip Op 30595(U)

February 23, 2024

Supreme Court, New York County

Docket Number: Index No. 153910/2017

Judge: Lyle E. Frank

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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. LYLE E. FRANK PART 11M

Justice

-----X

CGM-LLNR LLC,

Plaintiff,

- v -

THE SYLVIA WARD AND PO KIM ART GALLERY,

Defendant.

-----X

THE SYLVIA WARD AND PO KIM ART GALLERY

Plaintiff,

-against-

EPSTEIN ENGINEERING P.C., and BELLET CONSTRUCTION CO., INC.,

Defendant.

-----X

INDEX NO. 153910/2017
MOTION DATE 06/26/2023
MOTION SEQ. NO. 012

AMENDED DECISION + ORDER ON MOTION

Third-Party Index No. 595488/2020

The following e-filed documents, listed by NYSCEF document number (Motion 012) 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 341, 357, 358, 359, 364, 365, 366, 367, 368, 369, 370, 371, 372, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 397, 398, 399, 400

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, defendant and third-party plaintiff the Sylvia Ward and Po Kim Art Gallery's motion for summary judgment is denied.

Background

Plaintiff CGM-LLNR LLC ("CGM") commenced an action against the Defendant The Sylvia Ward and Po Kim Art Gallery ("the Ward Gallery") alleging that the Ward Gallery unreasonably delayed the removal of sidewalk scaffolding outside of its restaurant, causing a

substantial decrease in revenue that ultimately led to its closure. The Court previously dismissed each of CGM's claims against the Ward Gallery, except its claim for nuisance.

Subsequently, the Ward Gallery commenced a third-party action against third party defendants Epstein Engineering ("Epstein") and the Bellet Construction Co ("Bellet"). The Ward Gallery now moves for summary judgment dismissing CGM's outstanding nuisance claim and seeking common law indemnity from third-party defendants Epstein and Bellet.

Discussion

I. Dismissal of CGM'S Nuisance Claim

First, the Ward Gallery moves to dismiss CGM's outstanding nuisance claim, contending that CGM's own admissions defeat its allegation of nuisance. Specifically, the Ward Gallery argues that as CGM has conceded in its papers that the gallery was legally required to install the sidewalk shed and the shed was legally sound, CGM cannot sustain its nuisance claim. In opposition, CGM argues that while it concedes the sidewalk shed was initially constructed pursuant to code requirements, the Ward Gallery created a nuisance by keeping the sidewalk shed erected for an unreasonable and extensive period of time, thus interfering with CGM's business.

The elements of a claim for nuisance in New York are, (1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act. *Chelsea 18 Partners, LP v Sheck Yee Mak*, 90 A.D.3d 38 [2011]. Here, plaintiff alleges the installation of plaintiff's sidewalk shed was erected for an unreasonable amount of time and as such caused substantial interference with plaintiff's business, an adjacent restaurant.

The Court agrees with CGM that its acknowledgment that the erection of the scaffolding was legally required initially, is not fatal to its claim. Providing CGM with all favorable inferences, if the sidewalk shed was left for an unreasonable amount of time and thus caused hardship to CGM's restaurant earnings, plaintiff has adequately plead a claim for nuisance. Moreover, that CGM renewed its lease does not disqualify its ability to make a claim for private nuisance.

Next, the Ward Gallery argues that under the new business rule, plaintiffs cannot sustain their lost profits claim, as it has failed to establish its entitlement to any profits and thus has failed to establish damages. In opposition, plaintiff argues pecuniary damages are not an element of the cause of action of private nuisance and thus the new business rule is irrelevant.

The Court agrees with CGM. The Ward Gallery has not established that the lack of specific damages at this stage requires dismissal. Moreover, each of the Ward Gallery's cited cases are distinguishable from the circumstances in the present matter. Therefore, the Court finds the Ward Gallery has failed to establish its entitlement to summary judgment as a matter of law.

II. Indemnification against Epstein and Bellet

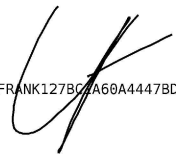
Next, in its third-party action against Epstein and Bellet, the Ward Gallery moves for common law indemnification against both third-party defendants pursuant to CPLR 14.

Implied indemnity is restitution concept which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other. *Mas v. Two Bridges Assocs.*, 75 N.Y.2d 680 [1990]. Conceptually, implied indemnification finds its roots in the principles of equity. It is nothing short of simple fairness to recognize that "[a] person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity."

McDermott v. New York, 50 N.Y.2d 211 [1980]. Where one is held liable solely on account of the negligence of another, indemnification, not contribution, principles apply to shift the entire liability to the one who was negligent. Glaser v. M. Fortunoff of Westbury Corp., 71 N.Y.2d 643 [1988]; see also Guzman v. Haven Plaza Housing Dev. Fund Co., 69 N.Y.2d 559 [1987].

Here, the Ward Gallery contends “there is no doubt or issue of fact that Bellet and/or Epstein failed to perform under the subject contracts and in liable to defendant/third-party defendant Wald in the form of common law indemnity.” However, the Ward Gallery had failed to support this conclusory statement with evidence of the third-party defendant’s conclusive negligence. That Epstein and Bellet contracted to perform the job in a workmanlike manner is not sufficient to require indemnification as a matter of law. The Court finds that the Ward Gallery has failed to make its prima facie case for entitlement to summary judgment for indemnification by Epstein and Bellet. Accordingly, it is hereby

ADJUDGED that defendant and third-party plaintiff the Sylvia Ward and Po Kim Art Gallery’s motion for summary judgment is denied.

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LYLE E. FRANK, J.S.C.

2/23/2024

DATE

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"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE