Yu v Greenway Mews Realty LLC
2011 NY Slip Op 34114(U)
September 14, 2011
Sup Ct, New York County
Docket Number: 116885/05
Judge: Martin Shulman

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

MARTIN SHULMAN J.S.C.

Index Number : 116885/2005

YU, JIAN-GUO

VS.

GREENWAY MEWS REALTY

SEQUENCE NUMBER : 010

SUMMARY JUDGMENT

PART 1

ıstice

INDEX NO. 116885/05

MOTION DATE

MOTION SEQ. NO. 010

ıotion to/for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s). 1, 2

Answering Affidavits — Exhibits No(s). 3

Replying Affidavits No(s). 4

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED

SEP 19 2011

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: Sept. 14, 2011

MARTIN SHULMAN J.S.C.

, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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JIAN-GUO YU and HUI-DI TU,

Plaintiffs,

-against-

GREENWAY MEWS REALTY LLC, LITTLE REST TWELVE, INC., DAVID AIM, GEORGE V. RESTAURANTS (NY) LLC, and C&A SENECA ENTERPRISES, INC.,

Defendants.

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GREENWAY MEWS REALTY LLC, LITTLE REST TWELVE, INC.,

Third-Party Plaintiffs,

-against-

UAD GROUP,

Third-Party Defendant.

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Index No.: 116885/05

Decision & Order

TP Index No.: 590639/10

MARTIN SHULMAN, J.:

Defendant/third-party plaintiff Little Rest Twelve, Inc. ("LRT") moves, pursuant to CPLR 3212, for summary judgment on its contractual indemnification claim against third-party defendant UAD Group ("UAD"), declaring that UAD is obligated to indemnify LRT fully from any liability that LRT has to plaintiffs in the main action.

On December 8, 2009, this court granted partial summary judgment holding LRT strictly liable for plaintiff Jian-Guo Yu's ("plaintiff" or "Yu") injuries pursuant to Labor Law §240(1) (the "scaffold law"). On November 24, 2008, this court granted co-defendant Greenway Mews Realty LLC summary judgment on its contractual indemnification claim against LRT. UAD, through its insurer, agreed to provide a defense and indemnity to

LRT by letter dated August 10, 2006[1] (Motion, Ex. 10), but now refuses to indemnify LRT.

BACKGROUND

The facts of this personal injury action have been discussed in the court's previous orders and will not be reiterated here in detail. The only issue currently before the court is whether the contract entered into between LRT and UAD obligates UAD to indemnify LRT for its liability to the plaintiffs in the main action.

LRT, the lessee of the premises where Yu's accident occurred, hired UAD to fabricate and install a skylight system, including the skylight glass, framing and truss at such premises. Yu, a UAD employee, was injured on October 27, 2005 when he fell through an open section of the aluminum skylight framing while installing the skylight glass. The contract between LRT and UAD provides in relevant part:

> § 8.2.1 The Contractor [UAD] shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures, and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters. If the Contract Documents give specific instructions concerning means, methods, techniques, sequences or procedures, the Contractor shall be fully and solely responsible for the jobsite safety thereof unless the Contractor gives timely written notice to the Owner and Architect that such means, methods, techniques, sequences or procedures may not be safe.
>
> § 8.2.2. The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons or entities performing portions of the Work for or on behalf of the Contractor or any of its Subsidiaries.
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> * * *

[1] UAD no longer exists, and the real party in interest to this proceeding is UAD's insurer.

> § 8.13.1. To the fullest extent permitted by law and to the extent claims, damages, losses or expenses are not covered by Project Management Protective Liability insurance ... the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death ... but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor ..., regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.
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> * * *
>
> § 15.1. The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract. The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to: 1. employees on the Work and other persons who may be affected thereby ...

Aff. in Support, Ex. 1.

LRT maintains that it is entitled to full contractual indemnification from UAD because UAD supervised and controlled Yu's work, the contract between LRT and UAD provides for such indemnification and LRT was only held vicariously liable under the scaffold law.

In opposition, UAD contends that it has not been established that UAD was negligent or, if negligent, the extent to which such negligence contributed or caused the injuries to the plaintiff. Therefore, UAD argues that since the indemnification provisions of the contract between UAD and LRT limit UAD's indemnification obligations to injuries caused by its own negligence, it is premature to hold that UAD must fully indemnify LRT. Further, UAD argues that LRT has failed to respond to its demand for a bill of particulars or its discovery demands so as to substantiate its claims for indemnification.

UAD asserts that questions of fact preclude granting LRT's motion. Specifically, in support of its position, UAD provides the affidavit of Nina Zajic ("Zajic"), LRT's chief executive officer. Opp., Ex. B. Zajic avers that she was at the construction site on a daily basis, attended the job site safety meetings and that safety harnesses were available to UAD employees who were specifically instructed as to how to use the harnesses. *Id.* Zajic also affirmed that UAD employees were provided with "guy wires," which allowed them to be secure while installing the skylight. *Id.* Further, Zajic states that had Yu used this equipment, the accident would not have happened. *Id.* UAD argues that this affidavit, prepared by a LRT employee, raises a question as to whether the plaintiff failed to use the safety equipment that UAD provided for him.

UAD also maintains that other facts appear to exist, currently within LRT's possession, which would preclude granting LRT's motion, including photographs of the job site, whether anyone from LRT directed plaintiff's work and whether safety equipment was available to Yu. UAD asserts that it has not had a reasonable opportunity to conduct discovery and explore these questions since issue was joined only a month before the instant motion was filed.

Moreover, UAD states that LRT has yet to establish that it has suffered any damages based on the court's prior ruling, not having provided any information as to whether it has, in fact, paid any damages to Yu. According to UAD, its contract with LRT only mandates indemnification for loss, not for liability.

In reply, LRT points to a portion of the plaintiff's deposition which LRT characterizes as the plaintiff testifying that his UAD supervisor instructed him to climb

on top of the glass skylight. This testimony, LRT contends, evidences that UAD was responsible for Yu's accident. Motion, Ex. 4. Hence, LRT claims it is entitled to full indemnification from UAD.

The court notes that Yu speaks Mandarin and that a Mandarin interpreter was present at the deposition. However, the answers plaintiff gave were not exactly responsive to the questions asked regarding who instructed him to perform the work that allegedly caused his accident. It is also noted that each side quotes portions of this deposition as support for its position.

LRT has also supplied the unsworn transcript of an interview with a worker for another company who was at the job site on the day of the accident who says that UAD personnel supervised the installation of the skylight.

LRT asserts that all discovery in the main action has taken place, so UAD's claim that it needs additional discovery is a red herring. Further, LRT maintains that actual payment of damages is not necessary to invoke contractual indemnification.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562

(1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

LRT's motion is denied. As stated in *Cunha v City of New York,* 45 AD3d 624, 625 (2d Dept 2007), *affd* 12 NY3d 504 (2009):

> [T]he right to contractual indemnification depends upon the specific language of the contract. The indemnification provisions in the contract at issue here required the third-party defendant to indemnify the appellant for personal injuries arising out of the negligent performance of services by the third-party defendant or its employees or any error, omission, or negligent act of the third-party defendant or its employees in the performance of the contract [internal quotation marks and citations omitted].

Pursuant to the terms of the contract between LRT and UAD, UAD is required to indemnify LRT for any loss incurred because of UAD's negligence; however, such negligence on the part of UAD has yet to be established. The instant motion does not request the court to determine UAD's alleged negligence but, rather, insists that the court automatically assume such negligence so as to grant LRT's motion seeking contractual indemnification. This the court cannot do:

> The indemnification provision at issue here requires [UAD] to indemnify [LRT] for 'all claims, damages, losses and expenses ... arising out of or resulting from the performance of the Work ... provided that such claim, damage, loss or expense is caused in whole or in part by any act or omission of [UAD]. Since it has not been determined whether [the plaintiff]'s injury was caused by any act or omission by [UAD], an award of summary judgment here would be premature.

D'Angelo v Bldrs. Group, 45 AD3d 522, 524-525 (2d Dept 2007); *see Gillmore v Duke/Fluor Daniel,* 221 AD2d 938 (4th Dept 1995).

Notwithstanding the foregoing, questions of credibility exist based on the inconclusive responses plaintiff made at his deposition. Questions of credibility are to be resolved by the trier of fact, not the court on a summary judgment motion. *Venetal v City of New York,* 21 AD3d 1087 (2d Dept 2005); *Greco v Posillico,* 290 AD2d 532 (2d Dept 2002).

Moreover, "[i]t is well settled that a cause of action based upon a contract of indemnification does not arise until liability is incurred by way of actual payment [internal quotation marks and citation omitted]." *Varo, Inc. v Alvis PLC,* 261 AD2d 262, 265 (1st Dept 1999); *Santamaria v Kelly,* 280 AD2d 536 (2d Dept 2001). In the case at bar, LRT has provided no evidence to indicate that it has satisfied the judgment entered against it.

Although LRT cites to *Madeira v Affordable Hous. Found., Inc.,* 323 Fed Appx 89 (2d Cir 2009), for the proposition that a party seeking contractual indemnification need not have satisfied the underlying judgment prior to being granted the indemnification relief sought, the facts of that case are distinguishable from those in the case at bar. In that federal case, the court found that the indemnification provision in question provided for indemnification for *both* liability and loss. By contrast, the clear words of the instant contractual provisions quoted above state that UAD is to indemnify LRT for any losses incurred, which does not encompass liability without loss.

For all of the foregoing reasons, it is hereby

ORDERED that Little Rest Twelve, Inc.'s motion for summary judgment is denied.

The foregoing is this court's decision and order. Courtesy copies of this decision and order have been sent to counsel for the parties.

Dated: New York, New York
September 14, 2011

HON. MARTIN SHULMAN, J.S.C.