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

PRESENT: HON. CAROL EDMEAD PART 35
Justice

Index Number : 116156/2007
YENEM
vs.
281 BROADWAY HOLDINGS
SEQUENCE NUMBER : 010
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 4/4/12
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by 281 Broadway Holdings, LLC and The John Buck Company to renew their cross-motion for summary judgment against co-defendant Hunter-Atlantic, Inc., and against plaintiff Yenem Corp. pursuant to CPLR § 3212, is denied; and it is further

ORDERED that 281 Broadway Holdings, LLC and The John Buck Company shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

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

Dated: 5/9/12

J.S.C.
HON. CAROL EDMEAD

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 35

----------X

YENEM CORP., LUIS GUAMAN d/b/a FAST SHOES REPAIR and LUIS GUAMAN, Individually,

Index No.: 116156/2007

Motion #010

Plaintiffs,

-against-

281 BROADWAY HOLDINGS, LLC, JOHN BUCK COMPANY and HUNTER-ATLANTIC, INC.,

Defendants.

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HUNTER-ATLANTIC, INC.,

Third-Party Plaintiff,

-against-

Index No.: 590343/2008

GEOTECHNICAL SERVICES CORP., LANGAN ENGINEERING AND ENVIRONMENTAL SERVICES, INC., PAVARINI McGOVERN, LLC and BRONZINO ENGINEERING and SEASONS DEMOLITION,

Third-Party Defendants.

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HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

In this negligence, property damage action, defendants 281 Broadway Holdings, LLC ("281") and The John Buck Company ("John Buck") (collectively, "defendants") move to renew their cross-motion for summary judgment against co-defendant Hunter-Atlantic, Inc. ("Hunter-Atlantic"), and against plaintiff Yenem Corp. ("Yenem") pursuant to CPLR § 3212.

*Factual Background*

Yenem, a commercial tenant of 287 Broadway, which is owned by Randall, Co. ("Randall"), was operating a pizza food when it was forced to vacate its premises due to the

excavation work upon a neighboring property, which caused the the New York City Department of Buildings ("DOB") to issue a vacate order to all 287 Broadway tenants on or about November 28, 2007. Consequently, plaintiff asserted a general negligence claim, claiming that defendants were absolutely liable under New York City Adm. Code § 27-1031(b)(1) ("§27-1031"). Yenem also claimed that it lost the use of a valuable lease which it had the right to sublet. In Yenem's recent expert exchange, Yenem claims that it has an offer from a restaurant owner and consultant to lease Yenem's space for $250,000 per year for the ground floor subject to a 12-year lease.

Yenem moved for summary judgment on liability under §27-1031, contending that the section imposed absolute liability. 281 and John Buck cross-moved for summary judgment against Hunter-Atlantic as the excavator and for leave to amend its answer to assert, *inter alia*, cross-claims against Hunter-Atlantic. Yenem and Hunter-Atlantic both opposed the cross-motion, and 281 and John Buck submitted a reply. By order dated September 16, 2008, this Court denied Yenem's motion for summary judgment and granted 281 and John Buck's cross-motion for leave to amend its answer. However, the Court denied the portion of 281 and John Buck's cross-motion seeking summary judgment on its cross-claims against Hunter-Atlantic.

In a related action by Randall against 281 and John Buck, a similar motion for summary judgment on liability had been made. However, Judge Charles Ramos granted Randall's motion.

Yenem, and 281 Broadway and John Buck appealed such Court's orders to the Appellate Division, First Department. The First Department affirmed this Court's denial of summary judgment to Yenem and reversed Justice Ramos' award of summary judgment to Randall, agreeing that a violation of §27-1031 did not result in an imposition of absolute liability.

However, on further appeal, by decision dated February 14, 2012, the Court of Appeals reversed the Appellate Division, First Department's decision and determined that a violation of §27-1031 resulted in an imposition of absolute liability. The court further imposed absolute liability on the ground that the record before it supported the finding that the excavation caused 287 Broadway to shift.

In support of their instant motion to renew, 281 Broadway and John Buck argue that they are now entitled to summary judgment against Hunter-Atlantic because of the Court of Appeals decision. The motion to renew this Court's order denying 281 and John Buck's cross-motion for summary judgment should be granted because there has been a change in the law pursuant to the Court of Appeals decision.

At the time the cross-motion for summary judgment against Hunter-Atlantic was made, this Court determined that a breach of the relevant code provision, §27-1031 was some evidence of negligence rather than absolute liability. This Court denied both Yenem's motion for summary judgment on liability, and 281 and John Buck's cross-motion for summary judgment against Hunter-Atlantic on that basis.

Subsequent to this Court's decision, the Court of Appeals has held that a breach of §27-1031 results in an imposition of absolute liability. As such, 281 Broadway and John Buck's cross-motion for summary judgment against Hunter-Atlantic should be renewed.

As stated in the prior motion, and by the affidavit of Greg Merdinger, the trade contract details the work to be conducted by Hunter-Atlantic which included the excavation and foundation work at 287 Broadway. It has been determined by the Court of Appeals and 281 and John Buck's experts that the foundation and excavation work caused 287 Broadway to be

undermined and to subsequently shift an additional three and one half inches.

As established in the underlying cross-motion, Hunter-Atlantic was the foundation and excavation contractor and the work that was determined to have resulted in the undermining and shifting of 287 Broadway was within the scope of the duties to be carried out by Hunter-Atlantic pursuant to the trade contract. The trade contract also explicitly provided that Hunter-Atlantic agreed to indemnify defendants from and against all liability, damage, loss, claims, demands and actions that arise out of the performance of its work.

Thus, 281 and John Buck's motion to renew its cross-motion for summary judgment against Hunter-Atlantic should be granted.

Further, Yenem's claim regarding the inability to sublet its space should be dismissed. Pursuant to a November 13, 2011 so-ordered stipulation in the Housing Court (the "Stipulation"), Randall, the owner of 287 Broadway is required to have the vacate order lifted and the tenants restored to possession on or before November 13, 2012. There is no issue of fact as to Yenem's ability to currently sign a lease to sublet its space starting after November 13, 2012. In Yenem's recent expert exchange, Yenem claims that it has an offer from a restaurant owner and consultant to lease Yenem's space for $250,000 per year for the ground floor subject to a 12-year lease. Yenem has been provided with the date in which it will be restored to possession. Thus, Yenem's claim for damages alleging that it is unable to sublet its space should be dismissed.

Hunter-Atlantic joins in 281 and John Buck's application to dismiss Yenem's subletting claim. By Stipulation, Yenem is entitled to be restored to possession by November 13, 2012. Thus, Yenem's purported loss as a result of an alleged offer to sublet is not actionable, as Yenem can reoccupy the space or commence a sublet on November 13, 2012.

However, Hunter-Atlantic opposes the balance of the motion to renew, arguing that the Court of Appeals decision which granted summary judgment in favor of Yenem (and Randall), was decided against 281 and John Buck, as well as Hunter-Atlantic. Under General Obligations Law §5-322.1, payment of damages must be according to fault. And, Hunter-Atlantic contends, the Court of Appeals did not allocate fault among the defendants or differentiate among them.

Hunter-Atlantic argues that the Court of Appeals' focus was on whether a violation of §27-1031 resulted in absolute liability. The claim that Hunter-Atlantic was off the job for four months before 287 Broadway was shut down by the DOB was not addressed by the Court of Appeals. It was when 281 Broadway was actively engaged in the project, and when Hunter-Atlantic was long gone from that part of the project, that 287 Broadway was shut down.

There is no evidence to show that the undermining and movement of 287 Broadway was not caused by any of the other third-party defendants, or not caused by 281 and John Buck. The DOB vacate order did not identify which of these parties were at fault.

Further, when the Court of Appeals referenced 281's expert engineer report, it did so as grounds to impose liability against all defendants, and did not differentiate among them. And, such report indicates that the sand began to "run out" after Hunter-Atlantic began excavation, such movement could be attributable to 281, John Buck, or any one of the third-party defendants. Also, the expert report found other causes for the building becoming unsound that were not the result of Hunter-Atlantic's work. Therefore, the Court of Appeals decision does not establish liability against Hunter-Atlantic and in favor of 281 and John Buck.

Also in opposition, plaintiff claims that the Court of Appeals made it clear that 281, John Buck, and Hunter-Atlantic are responsible for undermining the building at 287 Broadway, and

the only remaining issue is damages. Hunter-Atlantic's frivolous motion was made solely to confuse the issues and to seek to delay, and perhaps generate legal fees for moving counsel, warranting sanctions pursuant to Rule 130 and costs.

The Stipulation from Housing Court permits the landlord therein from obtaining extensions of time to comply with restoring residential tenants to occupancy in the event of any delays. With the tremendous amount of work that needs to be done, no one knows if the landlord will apply for an extension in the event of any delay. Based upon the fact that five years have expired, obviously no one knows when the residential tenant will be permitted to re-enter her apartment.

In any event, the order is irrelevant to Yenem's commercial retail space. According to Yenem, the landlord believes that the casualty clause in Yenem's lease will apply so that the lease will terminate, that the space will not be returned to Yenem in the same configuration because of construction and design needs, and that it is unlikely that Yenem will return to its space, or it if were, when that would be. Even if Yenem is permitted to re-enter its space, it will take six months to a year to reconstruct the space after obtaining the necessary permits, and if the space is to be sublet, plaintiff will have to seek a new tenant. The offer Yenem received to lease the space for $250,000 a year is subject to a twelve-year lease, and after November 13, 2012, plaintiff's lease will have only eight years left and not the requisite twelve years. The landlord has not offered to extend Yenem's lease and it is highly unlikely that even if the landlord should extend the lease that in 2012 it will be for the same favorable rent that plaintiff obtained in 2005 shortly after 9-11 when there was empty retail space on lower Broadway. Additionally, the offer is subject to the potential tenants being able to move into the space within one year after March

6, 2012 (the date of the offer), which may not occur. There is nothing from the landlord, the Buildings Department, or anyone else stating that Yenem's retail space will be available at all, much less in March 2013, and clearly there are no twelve years left on the lease. Yenem was not a party to the Stipulation in Housing Court and is therefore not bound by it. Even assuming that Yenem can re-enter its space after November 13, 2012, there is nothing showing the pace at which the landlord is proceeding and no affidavit from the landlord that any space, much less Yenem' s space, will be available on November 13, 2012, and/or that the landlord will not seek an extension pursuant to the Stipulation. Yenem has still lost five years of rent when the Buildings Department issued its vacate order, and whatever date Yenem can ultimately find a tenant for a sublet lease for the short period remaining on its lease. And, plaintiff's expert sets forth how plaintiff's sublet damages are calculated.

In reply to plaintiff's opposition, Hunter-Atlantic argues that there is no issue of fact as to plaintiff's ability to currently sign a lease to sublet its space starting after November 13, 2012. While plaintiff may not be a party to that action, the Stipulation requires that the landlord Randall have the vacate order lifted and the tenants restored to possession by a definite date. The lifting of the vacate order would affect all tenants including Yenem. Once the vacate order is lifted it is lifted as to all tenants and all can renter the building.

Yenem cannot circumvent its obligation to mitigate its damages. With an affirmative date upon which the vacate order is to be lifted, Yenem could attempt to seek a new tenant if it wishes to sub-let its space and Yenem could begin negotiations with the landlord as to the term of its lease and regarding an extension of its lease. Rather Yenem claims that the landlord has not offered to extend the lease and merely speculates that it would be unlikely that the landlord

would extend for the "same favorable rent" that plaintiff obtained in 2005. Yenem has done nothing since the vacate order other than "try to reopen the store." Accordingly, there can be no question of fact as to whether plaintiff's attempt to sublet the premises were reasonable as by plaintiff's own admission, no discussions have been held with the landlord.

Further, Yenem's belief that the casualty clause of its lease will apply and that the landlord will terminate its lease is inaccurate. As Yenem's lease provides that the "owner may elect to terminate this lease by written notice to tenant giving within 90 days after such fire or casualty or 30 days after adjustment of the insurance claim for such fire or casualty, plaintiff should not be permitted to speculate as to whether its lease is terminated since the lease indicates that it is not.

In reply to Hunter-Atlantic, 281 Broadway and John Buck argue that their motion need not be supported with any new facts as they moved on the basis of a change in law which held Hunter-Atlantic liable. The Court of Appeals determined that the excavation undermined the foundation of 287 Broadway and caused it to lean southward, and there is no question that Hunter-Atlantic was the contractor that performed the excavation work at 287 Broadway, caused the undermining and movement of 287 Broadway, and was at fault.

Further, Hunter-Atlantic cannot raise General Obligations Law § 5-322.1 for the first time in its opposition to defendants' motion to renew, when it never raised the provision in opposition to the underlying cross-motion. Hunter-Atlantic is merely trying to avoid a finding that it is obligated to indemnify 281 Broadway and John Buck pursuant to its contract. And, while Hunter-Atlantic claims that 281 Broadway and John Buck must be free from negligence, Hunter-Atlantic has failed to demonstrate by any evidence in admissible form that 281 Broadway

and John Buck were negligent. There were no affidavits, expert reports, or references to deposition testimony submitted with Hunter-Atlantic's opposition.

However, in the underlying cross-motion against Hunter-Atlantic, 281 Broadway and John Buck established through affidavits and an expert report from an engineer that Hunter-Atlantic was the actual entity that performed the excavation work at 287 Broadway and that it was during Hunter-Atlantic's work that 287 Broadway shifted.

Furthermore, the indemnification agreement contained in the contract with Hunter-Atlantic does not violate General Obligations Law § 5-322.1. The General Obligations Law prohibition against indemnifying a party for its own negligence is not implicated where liability is solely statutory based on absolute liability. Liability as against 281 Broadway as the owner and John Buck as the developing agent was determined by the Court of Appeals on the basis of absolute liability imposed by the applicable administrative code provision. It was Hunter-Atlantic that was contracted to actually perform the excavation work on behalf of the owner. The Court of Appeals never mentioned 281 Broadway and John Buck as actually undertaking the work that resulted in the undermining of 287 Broadway. And, Hunter-Atlantic does not dispute that it was responsible for the excavation work and was the party that directed and controlled excavation at the site. Based upon Hunter-Atlantic's own testimony it is conceded that Hunter-Atlantic supervised its own work on the project. It was not 281 Broadway or John Buck that supervised the excavation. Thus, the liability of 281 Broadway and John Buck is based upon statutory liability similar to that imposed under Labor Law 240 and the indemnification agreement contained in the contract with Hunter-Atlantic does not violate General Obligations Law § 5-322.1.

*Discussion*

The motion to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" (CPLR 2221(e)(2)).

In the Yenem action, this Court denied Yenem's summary judgment motion, finding, *inter alia*, that a violation of §27–1031(b)(1) "did not result in strict liability but constituted some evidence of negligence" (*Yenem Corp. v 281 Broadway Holdings*, 18 N.Y.3d 481, 964 N.E.2d 391 [2012]). In the Randall action, Justice Ramos granted Randall's motion for partial summary judgment, holding "that defendants were strictly liable under section 27–1031 (b)(1)." (*Id.*).

The Court of Appeals agreed with Justice Ramos, holding that 281, John Buck, and Hunter-Atlantic's violation rendered them strictly liable for damages sustained by both plaintiffs. The Court of Appeals stated that "Defendants' affidavits and the report of defendants' engineers expressly state that the excavation, carried to a depth exceeding the regulatory threshold, undermined the foundation of 287 Broadway and caused it to lean southward" (*id.*, 18 N.Y.3d at 491). Thus, the Court of Appeal agreed "with the dissent below that plaintiffs are entitled to summary judgment" against defendants.

As relevant herein, 281 and John Buck's motion is premised on the Court of Appeals decision, finding that Hunter-Atlantic is strictly liable for plaintiffs' damages, which is in direct contrast with this Court's earlier determination. Therefore, renewal is warranted. However, upon renewal, the Court declines, again, to grant summary judgment in favor of 281 and John Buck and against Hunter-Atlantic.

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 (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], *quoting Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). 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]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In the underlying cross-motion, 281 and John Buck sought summary judgment on their contractual indemnification claim against Hunter-Atlantic. Such cross-motion was premised on that fact that Hunter-Atlantic was the foundation and excavation contractor and that the work that was determined to have resulted in the undermining and shifting of 287 Broadway was within the scope of the duties to be carried out by Hunter-Atlantic pursuant to the trade contract. Further, 281 and John Buck argued, the trade contract required that Hunter-Atlantic indemnify defendants from and against all liability, damage, loss, claims, demands and actions that arise out of the performance of its work.

A party is entitled to contractual indemnification provided that the intention to indemnify can clearly be implied from the language and purpose of the entire agreement and the surrounding facts and circumstances (*Drzewinski v Atlantic Scaffold & Ladder Co Inc.*, 70 NY2d 774,777 521 NYS 2d 216 [1987]; *Masciotta v Morse Diesel International, Inc.*, 303 AD2d 309, 758 NYS2d 286 [1st Dept 2003]).

The indemnification clause of the trade contract states:

> To the greatest extent permitted by law, each Trade Contractor shall indemnify . . . the Owner . . . harmless from and against all liability, damage, loss, claims, demands and actions of any nature whatsoever which arise out of or are connected with, or are claimed

to arise out of or be connected with:

1. The performance of work by the Trade Contractor, or any act or omission of Trade Contractor;

A party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor (*Cava Const. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 871 NYS2d 654 [2d Dept 2009], citing GOL§ 5-322.1; *Reynolds v County of Westchester*, 270 AD2d 473, 704 NYS2d 651 [2d Dept 2000]; *see also Giangarra v Pav-Lak Contr., Inc.*, 55 AD3d 869, 871 [2008] ("an indemnification clause is enforceable where the party to be indemnified is found to be free of any negligence"); *Cuevas v City of New York*, 32 AD3d 372, 821 NYS2d 37 [1st Dept 2006]).[1]

While the record establishes that plaintiffs damages resulted from the work performed by Hunter-Atlantic, as movants for summary judgment, 281 and John Buck bear the burden of establishing their freedom from liability. The Court of Appeals decision, in and of itself, which is the basis of renewal, does not establish 281 and John Buck's freedom from fault. The Court of Appeals did not make any findings as to whether 281 and John Buck were free from fault, and instead held that "defendants'" violation of the section §27–1031(b)(1) imposed strict liability. Thus, while it is established that Hunter-Atlantic is strictly liable to Yenem for damages, it also established that 281 and John Buck are also strictly liable, and their strict liability stems from a violation of §27–1031(b)(1).

Indeed, the Court of Appeal stated that it

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[1] Whether Hunter-Atlantic raised General Obligations Law for the first time herein is inconsequential, as this Court is required to assess whether the movants 281 and John Buck satisfied their burden under the law governing contractual indemnification claims as this Court's independent research reveals is applicable to the case.

> "agree[d] with the dissent below [in the First Department, Appellate Division decision] that plaintiffs are entitled to summary judgment. Defendants' affidavits and the report of defendants' engineers expressly state that that the excavation, carried to a depth exceeding the regulatory threshold, undermined the foundation of 287 Broadway and caused it to lean southward. The majority below erred in finding that the building's allegedly poor condition poor condition raised an issue of fact as to causation; . . . consideration of the building's prior condition does not factor into a proximate cause analysis under section 27-103(b)(1)."

The "dissent below" referred to defendants collectively, and even reasoned that "Well-settled law hold that the owner of the property upon which the excavation is being conducted is liable whether it is the owner actually making the excavation or whether another party is involved" (76 AD3d 225, at 241-242). The dissent further opined that both Randall and Yenem "established, to the extent required for summary judgment, that the *defendants* violated section 27-1031 *by not preserving and protecting the building*, and that *defendants' actions were the proximate cause of the damage to the building*." (*Id.* at 243).

Thus, the Court of Appeals concluded, *inter alia*, that "plaintiff's motion for summary judgment on the issue of liability [is] granted, in *Randall Co., LLC v. 281 Broadway Holdings* . . . " Neither the dissent in the First Department, Appellate Divison decision, nor the Court of Appeals, expressly stated that the defendant which performed the excavation was the sole party strictly liable.

To assess whether 281 and John Buck's violation of §27–1031(b)(1) impairs their ability to seek contractual indemnification from Hunter-Atlantic, and whether such violation is akin to a violation of Labor Law 240, a review of the section is needed.

Section §27–1031(b)(1), which, in pertinent part, states:

> "When an excavation is carried to a depth more than ten feet below the legally established curb level *the person who causes such excavation* to be made shall, at all times and at his

> or her own expense, preserve and protect from injury any adjoining structures, the safety of which may be affected by such part of the excavation as exceeds ten feet below the legally established curb level ..." (Emphasis added).

281 and John Buck failed to establish, through caselaw or otherwise, that their liability under this section is vicarious and that they should be treated like Labor Law 240 owners, who are found vicariously liable for the work of their contractors. There is no indication that §27–1031(b)(1) was intended to hold a premises owner, such as 281 and John Buck, vicariously liable for the acts of its excavation contractor. It is well settled that a statute's plain meaning must be discerned "without resort to forced or unnatural interpretations" (*Guasco v Adekoya*, 4 Misc. 3d 1028(A), 798 N.Y.S.2d 344 (Table) [Supreme Court, Bronx County 2004] *citing Castro v. United Container Mach. Group*, 96 N.Y.2d 398, 401 [2001], citing McKinney's Cons Laws of NY, Book 1, Statutes § 232)). Here, it cannot be said that the "plain reading of the statute leaves little doubt as to its intended purpose," namely to hold the owner owners responsible for the excavation work and hold the owner equally accountable "for compliance with all regulatory requirements" (*id.*). Further, research by the Court failed to uncover any caselaw imposing vicarious liability upon an owner based on a contractor's violation of this particular section. Therefore, the Court declines the suggestion that §27–1031(b)(1) is akin to Labor Law 240.

Furthermore, by finding that 281 and John Buck violated this section, one may conclude that they therefore "cause[d]" such excavation to be made," in failing, as the dissent stated, to preserve and protect the subject building.

As it cannot be said that 281 and John Buck are free from negligence, as a matter of law, and there is no showing that 281 and John Buck are vicariously liable to plaintiff, indemnification in favor of 281 and John Buck and against Hunter-Atlantic is unwarranted, at

this juncture. And, that Hunter-Atlantic failed to submit any affidavits, expert reports, or deposition testimony in opposition is inconsequential, as summary judgment must be denied, regardless of the sufficiency of the opposition papers (*O'Halloran v. City of New York*, 78 A.D.3d 536, 911 N.Y.S.2d 333 [1st Dept 2010]).

As to dismissal of Yenem's sublet claim, such request is denied. The Stipulation from the Housing Court order expressly provides that "Nothing in this order shall preclude respondents from timely applying for an extension in the event of delays . . ." Contrary to 281, John Buck and Hunter-Atlantic's contention, there is an issue of fact as to Yenem's ability to sublet its space after November 13, 2012. Although Yenem has an offer to lease its space for $250,000 per year subject to a 12-year lease, Yenem the date of Yenem's restoration to the premises is not firm. It cannot be said, as a matter of law, that Yenem will be restored to occupancy or that Yenem will be placed in a position to sublet its space. Moreover, 281, John Buck and Hunter-Atlantic failed to establish their non-liability for Yenem's alleged inability to sublet the space since November 2007. Thus, dismissal of Yenem's sublet claim is unwarranted.

*Conclusion*

Based on the foregoing, it is hereby

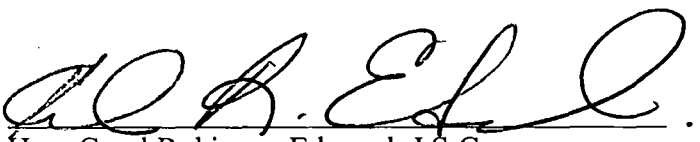
ORDERED that the motion by 281 Broadway Holdings, LLC and The John Buck Company to renew their cross-motion for summary judgment against co-defendant Hunter-Atlantic, Inc., and against plaintiff Yenem Corp. pursuant to CPLR § 3212, is denied; and it is further

ORDERED that 281 Broadway Holdings, LLC and The John Buck Company shall serve

a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: May 9, 2012



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD