

**Fook Cheung Lung Realty Corp. v Yank Tze River
Realty Corp.**

2012 NY Slip Op 31402(U)

May 14, 2012

Supreme Court, New York County

Docket Number: 106519/06

Judge: Joan A. Madden

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Amended ORDER

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

PRESENT: JOAN A. MADDEN
Justice

PART 11

FOOK CHEUNG LUNG
REALTY CORP,
Plaintiff,

- v -

YANGTZE RIVER REALTY,
CORP, et al
Defendant.

INDEX NO. 106519/06
MOTION DATE _____
MOTION SEQ. NO. 004
MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that ~~this motion~~ *the court's order dated April 19, 2012 is hereby vacated, and motion sequence no. 004 is determined in accordance with the annexed decision and order.*

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

FILED

MAY 25 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated: May 14, 2012

[Signature]
HON. JOAN A. MADDEN
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
FOOK CHEUNG LUNG REALTY CORP.,

Plaintiff,

-against-

INDEX NO. 106519/06

YANG TZE RIVER REALTY CORP., YAM SANG KWAI,
SUN SUN CONSTRUCTION, INC., STANLEY LAU,
MICHAEL CHIANG, ANDY SIU, DANNY WU, CAPITAL
ONE CONSTRUCTION INCORPORATED, MASON CHAN
a/k/a JUNG L.CHEN, PIER TECH, INC., CORPORATIONS
XYZ NOS. 1-10, and JOHN DOES NOS. 1-10,

FILED

MAY 25 2012

Defendants.

-----X
JOAN A. MADDEN, J.:

NEW YORK
COUNTY CLERK'S OFFICE

In this action for property damages, third third-party defendant QBE Insurance Corporation ("QBE") moves for an order pursuant to CPLR 2221(e) granting leave to renew the decision of this Court dated April 21, 2010, which granted the motion by second third-party defendants/third third-party plaintiffs J&A Concrete Corp. and J&A Concrete Plumbing (collectively "J&A") for summary judgment, and declared that QBE is obligated to defend and indemnify J&A in this action.¹ J&A opposes the motion, and the other parties opposing the motion are plaintiff Fook Cheung Lung Realty Corp., defendants Yang Tze River Realty Corp.

¹On April 19, 2012, this court issued a short-form order denying the instant motion (motion sequence no. 004) as moot, in view of the First Department Appellate Division's decision entered April 17, 2012, affirming this court's April 21, 2010 decision. By letter dated May 3, 2012, counsel for third third-party defendant QBE requested that the court reconsider and vacate the April 19, 2012 order, explaining that the motion for leave to renew was based on new evidence that was not before the Appellate Division, and therefore the Appellate Division's decision did not render QBE's motion for leave to renew moot. As of the date of this decision, no other party has written to or contacted the court objecting to QBE's request. Accordingly, this court's order issued on April 17, 2012 is hereby vacated and the decision herein above determines motion sequence 004.

and Yam Sang Kwai, defendants/third-party plaintiffs/second third-party plaintiffs Sun Sun Construction Inc., Stanley Lau, Michael Chiang, Andy Sui and Danny Wu, and defendant/fourth third-party plaintiff Pier-Tech, Inc.

“An application for leave to renew must be based on additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore not made known to the court.” Foley v. Roche, 68 AD2d 558, 567-568 (1st Dept 1979); accord Elson v. Defren, 283 AD2d 109, 113 (1st Dept 2001). In accordance with CPLR 2221, a motion for leave to renew “shall be based upon new facts not offered on the prior motion that would change the prior determination . . . [and] shall contain reasonable justification for the failure to present such facts on the prior motion.” CPLR 2221(e)(2), (3); see Foley v. Roche, *supra* at 567.

Leave to renew is granted, and upon renewal the court adheres to its original determination that J&A established circumstances providing a reasonable excuse for the delay in notifying QBE of the occurrence based on J&A’s lack of knowledge of the damage to plaintiff’s property.

As stated in the court’s prior decision, plaintiff commenced this action in May 11, 2006, alleging that its building located at 146 Forsythe Street was severely damaged as a result of demolition, excavation, foundation and construction work carried out by defendants on the adjoining property at 38-40 Delancey Street. Plaintiff’s complaint did not name J&A as a defendant. In or about January 2008, defendant Sun Sun Construction commenced a second third-party action naming several third-party defendants, including J&A Concrete Corp. and J&A Concrete Pumping Corp.

The court's prior decision determined that it is undisputed that J&A Concrete Corp. did not commence any work at the construction site until February 16, 2005, and by that time, plaintiff's principal How Luan Lee and his son Bill Lee had already identified the damage to their building (first observed in September 2004) and complained to the Department of Buildings (DOB complaint filed December 27, 2004). Also, since J&A was hired to pour the concrete for the foundation of the new building, by the time J&A arrived at the site, the prior building was already demolished, the ground was excavated, and the piles had been driven into the ground.

In support of the prior motion, J&A submitted a affidavit from its Vice President Antonio Martins, that on or about May 20, 2007, J&A received a letter from the attorney for Pier Tech, Inc. dated May 17, 2007, enclosing plaintiff's complaint and advising that plaintiff had commenced an action claiming that its building at 146 Forsythe Street was damaged by the construction work at the adjoining property at 38-40 Delancey Street. On or about May 29, 2007, J&A advised QBE of an "occurrence" at 146 Forsythe Street on "12/1/2004." By letter dated February 14, 2008, QBE disclaimed coverage on the grounds of untimely notice.

Among the relief sought in the prior motion was a declaratory judgment that QBE improperly disclaimed coverage based on untimely notice, and that QBE was obligated to defend and indemnify J&A. In granting the motion, the court determined that under the circumstances presented, J&A provided QBE with notice of the occurrence as soon as practicable after first learning of the potential claim from Pier Tech, Inc.'s attorney in May 2007, and immediately notified QBE. The court also determined that the "record neither shows nor suggests that J&A knew or should have known about the damage to plaintiff's property at any earlier time."

Now QBE is moving for renewal based on the deposition testimony of Mason Lee Chen, a project manager employed by defendant Sun Sun Construction, the general contractor. Since Chen was not deposed until May and August 2011, his testimony was not available to QBE when it was originally opposing J&A's motion for summary judgment. QBE asserts that Chen's testimony shows that he made J&A "aware of the complaints by the owner of the building next door at the time that J&A was on the job" in or around February 2005, and that J&A "was also made aware that the Department of Buildings had become involved in this matter." QBE cites to the following portion of Chen's testimony regarding his conversation with an employee of J&A as to the settlement of plaintiff's building:

Q. Did there come a time when you discussed any degree of settlement of the building at 146 Forsyth with anyone at J&A?

A. Yes. I think I mentioned that one time to Anthony [J&A's employee] and Bobby.

Q. Okay. When approximately did this occur?

A. When I got the survey report.

Q. And did you show them the survey report?

A. I don't remember. I don't remember that part.

Q. Now you said that some from or Anthony from J&A wasn't surprised by the amount of settlement; is that correct?

A. Yes.

Q. What words did he use when he expressed that to you?

A. I believe he say [sic] the same words like me. "Natural settlement."

Q. And in that conversation, did you discuss the reason why the survey was being done?

A. Yes.

Q. And what did you tell him?

A. Tell who?

Q. Anthony from J&A.

A. I told [him] I got a report from survey so you should double check.

Q. But my question is, when you had the report from the surveyor and you spoke with Anthony from J&A about it, did you tell him the reason why the survey had been prepared?

A. Yes. He knows. He knows. We would double check his work.

Mr. Kaufman. Not what he knows. Did you tell him this is why the survey was prepared, for such a reason? Did you tell him that?

A. Yes.

Q. And what did you tell him?

A. Tell Anthony.

Q. What did you tell Anthony?

A. Recheck your job.

Q. And what did he say concerning the settlement that was reported in the survey?

A. He said it should be natural settlement.

Q. Now that conversation took place sometime before you resigned from Sun Sun?

A. Yes.

Q. So sometime before March 15 of 2005?

A. Yes.

QBE also cites to Chen's testimony regarding his conversation with the same J&A employee regarding the stop work order issued by the Department of Buildings on February 23, 2005:

Q. Did you ever have occasion to speak with Anthony from J&A about the stop work order that was issued February 23?

A. No

Q. And I think you said you met with him almost every day when you worked there?

A. Yes. But stop work order, nobody worked.

Q. So, if a stop work order was issued, was there someone at Sun Sun who had the job of telling the contractors not to come to work because of the stop work order?

A. Yes.

Q. Was that your job?

A. Yes.

Q. And so did you contact someone at Pier Tech to let them know there was a stop work order?

A. Yes.

Q. And who was that?

A. Bobby. And also Anthony of J&A.

Q. Did you speak with him on the telephone, meet with him, or something else?

A. Yes. Our company has the cell phone for us, so we use that to call them.

Q. You made a telephone conversation on a cell phone?

A. Yes.

Q. And what did you tell Anthony?

A. Don't come back because stop working order.

* * *

Q. Did you tell Anthony of J&A about the inspection from the person from the Department of Buildings?

A. I think so.

Q. You told him that?

A. I think so. I don't quite remember. I should have.

Q. You should have?

A. Yes.

Q. Okay. And what to the best of your recollection, did you tell him about that inspection by the Department of Buildings person?

A. Do the right job, otherwise they keep complaining.

Q. And what, if anything, did he tell you in response?

A. He will do the right job.

Q. He assured you he would do the right job?

A. I believed in him.

Q. Did you mention to him anything about the cracks that had been pointed out on that occasion?

A. I don't know he went outside to take a look or not. I don't know. But I said the owner kept complaining, so you better do a good job.

Q. And where did this happen? Was it in the trailer?

A. Trailer and also on site.

The court is not persuaded that the foregoing testimony demonstrates that J&A had knowledge of the alleged damage to plaintiff's property in or around February 2005. At best, Mr. Chen's testimony shows that he spoke to J&A's employee in general terms that the owner of the adjoining property had been "complaining" and cautioned that J&A should "do a good job" so as to avoid further complaints. Also, when Chen "mentioned one time" the natural settlement of the building at 146 Forsythe Street, he was again cautioning J&A's employee to "recheck your job." As to the stop work order, Mr. Chen testified that he never spoke to J&A's employee about the stop work order except to the extent of advising that J&A need not report to work. Notably, the record indicates that the stop work order was issued in connection with violations caused by the excavation work, and J&A was not hired to perform any excavation work. Moreover, QBE's reliance on statements purportedly made by J&A's representative, Antonio Martins, that he was "aware of the accident" and that "[t]here were apparently two foremen on the job," is once again misplaced. As determined in the court's prior decision, the instant action

[* 8]
does not involve an "accident," but an ongoing series of events that took place over a number of months.

The court, therefore, concludes that Mr. Chen's deposition testimony is insufficient to establish that J&A had knowledge of the damage to plaintiff's property prior to May 2007, and for that reason the court adheres to its prior determination that QBE is obligated to defend and indemnify J&A in this action.

Accordingly, it is

ORDERED that the order of this court dated April 19, 2012 denying motion sequence no. 004 as moot, is hereby vacated; and it is further

ORDERED that the motion (motion sequence 004) by third third-party defendant QBE Insurance Corporation for for leave to renew is granted, and upon renewal, the court adheres to its prior determination that QBE Insurance Corporation is obligated to defend and indemnify J&A Concrete Corp. and J&A Concrete Pumping Corp. in the instant action; and it is further

ORDERED that the parties are directed to appear for the pre-trial conference previously scheduled for June 14, 2012 at 9:30 a.m., in Part 11, Room 351, 60 Centre Street, New York, New York.

DATED: May *H*, 2012

ENTER:

FILED

MAY 25 2012

NEW YORK
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J.S.C.