

**Greenway Mews Realty, L.L.C. v Liberty Ins.
Underwriters, Inc.**

2021 NY Slip Op 30118(U)

January 11, 2021

Supreme Court, New York County

Docket Number: 652364/2018

Judge: Arthur F. Engoron

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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. ARTHUR F. ENGORON PART IAS MOTION 37EFM

Justice

-----X

GREENWAY MEWS REALTY, L.L.C. (INTERPLEADER
DEFENDANT),

Plaintiff,

INDEX NO. 652364/2018

MOTION DATE N/A

MOTION SEQ. NO. 004

- v -

LIBERTY INSURANCE UNDERWRITERS, INC. AND,
ILLINOIS NATIONAL INSURANCE COMPANY
(INTERPLEADER PLAINTIFF), SENECA INSURANCE
COMPANY, FEDERAL INSURANCE COMPANY, LITTLE
REST TWELVE, INC.

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372

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

Upon the foregoing documents, it is hereby ordered that the instant motion is denied and the instant cross-motion is stayed.

BACKGROUND

The Long, Over-Complicated Version

In October 2005, an accident took place at a property owned by plaintiff/interpleader defendant Greenway Mews Realty, LLC (“Greenway”). Greenway had leased the property to Little Rest Twelve, Inc. (“LRT”), which operated a restaurant and which had contracted with United Aluminum Door Group (“UAD”) for the latter to renovate the property. During the renovations a UAD employee, Jian-Guo Yu, was seriously injured while working on a skylight. As a result, he and his wife commenced, pursuant to Labor Law § 240(1), a personal injury action against Greenway and LRT to recover for his personal injuries (“the Yu Action”).

By Decision and Order dated November 24, 2008, Greenway was granted summary judgment on its cross-claim against LRT for contractual indemnity. By Decision and Order dated December 8, 2009, the plaintiffs in the Yu Action were granted summary judgment against Greenway and LRT.

On or about July 28, 2010, Greenway and LRT commenced a third-party action against UAD (“the Third-Party Action”), asserting claims for common law indemnity and/or contribution, and LRT also asserting a claim against UAD for contractual indemnity, pursuant to the subject construction contract. By Decision and Order entered September 19, 2011, the trial court denied LRT’s motion for summary judgment on its contractual indemnity claim against UAD. Subsequently, LRT moved to reargue; upon reargument the court adhered to its original decision. LRT appealed, and by Order dated October 25, 2012, the Appellate Division, First Department reversed and granted LRT summary judgment on its contractual indemnity claim against UAD.

Subsequently, LRT, Greenway, and Greenway’s primary insurance carrier, Seneca Insurance Company (“Seneca”), entered into an agreement effective June 13, 2013 (“the Assignment Agreement”) whereby LRT assigned to Greenway and Seneca any and all claims it had against UAD and/or its insurers arising out of the Yu Action and/or the Third-Party Action. (NYSCEF Doc. No. 330).

On or about August 2, 2013, the Yu Action was settled on Greenway’s behalf for \$3,300,000.00 (“the Greenway Settlement”). Greenway’s liability insurers, Seneca and excess insurer Federal Insurance Company (“Federal”), funded the Greenway Settlement, with Seneca contributing \$1,000,000.00 and Federal contributing the remaining \$2,300,000.00. In the Greenway Settlement, Greenway and LRT reserved their rights against UAD.

On January 8, 2014, the Yu court entered a judgment in favor of Greenway and against LRT on Greenway’s contractual indemnity claim in the amount of \$3,424,495.89, consisting of the Greenway Settlement amount plus interest and attorney’s fees.

By Decision and Order dated January 14, 2015, in the Third-Party Action, Greenway, as assignee of LRT, was granted summary judgment for contractual indemnity against UAD. Eventually, on August 15, 2017, the court entered a judgment in favor of Greenway and against UAD in the amount of \$4,639,504.82 (“the UAD Judgment”).

On December 5, 2017, Greenway served the UAD Judgment on UAD and its insurers, Liberty Insurance Underwriters, Inc. (“Liberty”) (primary) and Illinois National Insurance Company (“Illinois”) (excess). UAD, Liberty, and Illinois have failed to satisfy any portion of the UAD Judgment, and the thirty days within which Insurance Law § 3420(a)(2) provides to do so has long since passed.

On May 14, 2018, pursuant to this statute, Greenway commenced the instant action (“the Direct Action”), to enforce the UAD Judgment, by moving, pursuant to CPLR 3213, for summary judgment in lieu of complaint against Liberty and Illinois. On September 21, 2018, Illinois, alone, filed an interpleader complaint against Seneca, Federal, and LRT (“the Illinois Interpleader Action”). On October 1, 2018, Liberty, alone, filed its own interpleader complaint against Seneca, Federal, LRT, and Greenway (“the Liberty Interpleader Action”; collectively with the Illinois Interpleader Action, “the Interpleader Actions”). Both of the Interpleader Actions contend that Liberty and Illinois are “stakeholders subject to multiple liabilities” because Seneca and Federal both funded the Greenway Settlement, thereby giving Federal, as well as Seneca, a claim to part of the sum that Liberty and Illinois must pay on UAD’s behalf.

In its answer to the Interpleader Actions, Federal asserted cross-claims against Seneca for constructive trust, based on rights of equitable and contractual subrogation, and for unjust enrichment. In turn, Seneca asserted a cross-claim against Federal, essentially contending that Federal is not entitled to receive any portion of the funds recovered from Liberty and Illinois, on the ground that Federal waived its subrogation rights when it declined to participate in the Third-Party Action.

In the Direct Action and Interpleader Actions, the parties participated in motion practice, with Liberty cross-moving to enforce a purported settlement agreement that would have capped Liberty's liability at \$1,350,000.00; Greenway and LRT moving to dismiss the Interpleader Actions; and Illinois cross-moving to amend the UAD Judgment to substitute Seneca and Federal, in place of Greenway, as the judgment creditors.

Following oral argument on July 2, 2019, the court (M. Shulman, J.) issued Decisions and Orders dated July 3, 2019, on the record, granting Greenway's CPLR 3213 motion against Liberty and Illinois; granting Liberty's cross-motion to enforce the purported settlement; denying the motions to dismiss the Interpleader Actions; and denying Illinois's cross-motion to amend the UAD Judgment.

Subsequently, Greenway, Seneca, and LRT appealed the July 3, 2019 Decisions and Orders. On February 4, 2020, the Appellate Division, First Department issued a Decision and Order modifying the lower court's decision by denying Liberty's cross-motion to enforce the purported settlement agreement and otherwise affirming the lower court's decision.

Greenway now moves: (1) in the Direct Action, pursuant to CPLR 5012 and 5016, to compel entry of a judgment in Greenway's favor against Liberty and Illinois, collectively, for the principal sum of \$4,963,253.28 (consisting of \$4,639,504.82, representing the total amount of the unsatisfied UAD Judgment, plus post-judgment interest on the UAD Judgment from August 15, 2017 to May 25, 2018 in the amount of \$323,748.46); plus pre-judgment statutory interest, pursuant to CPLR 5001 and 5004, from January 4, 2018 (the date on which Liberty and Illinois became collectively obligated under Insurance Law § 3420(a)(2) to satisfy the UAD Judgment) on \$4,801,951.04 (consisting of the total amount of the UAD Judgment plus \$162,446.22 in post-judgment interest on the UAD Judgment from August 15, 2017 to January 4, 2018); and, pursuant to CPLR 603, to sever, and refer to a special referee to hear and report on the calculation of reimbursement due for attorney's fees and expenses incurred in obtaining and enforcing the UAD Judgment in the Third-Party Action and by reason of the Direct Action; (2) in the Interpleader Actions, pursuant to CPLR 603, to sever the cross-claims asserted by Seneca and Federal; and (3) in the Interpleader Actions, pursuant to CPLR 3212, for summary judgment dismissing as moot the claims asserted by Liberty and Illinois as purported "stakeholders subject to multiple liabilities."

Illinois opposes Greenway's motion, arguing that the Interpleader Actions are not moot, based upon the February 4, 2020 Appellate Division Decision, which upheld the denial of Seneca, Greenway, and LRT's motion to dismiss the Interpleader Actions, finding that "[t]he record establishes that interpleader defendant Federal ... has a colorable claim to the funds at issue...

The record does not establish as a matter of law that Federal waived its subrogation rights by failing to join Seneca in the lawsuit seeking to recover settlement funds. Each party's entitlement, if any, to the funds paid by [Liberty] and [Illinois] may be properly determined in the context of the [Interpleader Actions]." (NYSCEF Doc. No. 311).

Liberty also opposes the motion and has filed a cross-motion seeking to deposit \$1,500,344.69 with the Court and for an order and judgment discharging it from all further obligations arising out of the UAD Judgment. Liberty essentially argues that Greenway is not entitled to a judgment against it and Illinois, and that Liberty and Illinois do not have a collective obligation to satisfy the UAD Judgment. Liberty further argues that Greenway is not entitled to additional attorney's fees and that the Interpleader Actions are not moot.

Federal also opposes Greenway's motion, arguing that granting the motion will not fully resolve the cross-claims asserted by Federal against Seneca in the Interpleader Actions.

The Short, Over-Simplified Version

Greenway owned a building. LRT rented space in it and operated a restaurant. LRT hired UAD to renovate the premises. UAD's employee Yu was injured due to UAD's negligence. Yu sued Greenway and LRT, obtained summary judgment, and settled with Greenway for \$3.3 million. Seneca, Greenway's primary insurer, paid \$1 million; Federal, Greenway's excess insurer, paid \$2.3 million. Seneca and Federal were thus subrogated to Greenway's claims against UAD. Greenway obtained the \$4+ million UAD Judgment. Neither UAD nor its primary insurer, Liberty, nor its excess insurer, Illinois (collectively "UAD's Insurers"), paid any part of that judgment. Greenway commenced the Direct Action against UAD's Insurers by moving for summary judgment in lieu of complaint (CPLR 3213). UAD's Insurers commenced the Interpleader Actions to determine whether to pay the UAD Judgment to Greenway, LRT, Seneca, and/or Federal, and in what amounts. Seneca and Federal cross-claimed against each other, hoping to recoup what they had each paid to Yu. Judge Shulman and the Appellate Division granted Greenway's 3213 motion and sustained the Interpleader Actions.

Greenway now moves to compel entry of a \$4+ million judgment against Liberty and Illinois, for a determination of its attorney's fees, to sever the cross-claims between Seneca and Federal; and for summary judgment dismissing UAD's Insurer's interpleader claims. Liberty now cross-moves to be allowed to deposit money into court to satisfy and end its obligations in this whole mess.

DISCUSSION

Greenway wants a \$4+ million judgment against UAD's Insurers, and "law of the case" entitles it to a judgment, but there are at least three flies in the ointment (in increasing order of significance). First, Greenway has not paid a penny, although this fly is probably overcome by the CPLR 3213 judgment. Second, common sense says that Greenway, or even Seneca, is not entitled to recover what Seneca and Federal paid to Yu, with Federal having paid the lion's share. Third, the interpleader claims are alive and well, having survived the rigors of both Judge

Shulman and the Appellate Division. Awarding Greenway and/or Seneca all the subrogation money would run counter to that fact.

CONCLUSION

Thus, Greenway’s request for entry of judgment in the amount it is claiming is denied. Greenway’s request for a determination of its attorney’s fees is denied without prejudice as premature. Greenway’s request to sever the cross-claims between Seneca and Federal is denied because they are integral to the interpleader claims. Greenway’s request to dismiss the interpleader claims is denied based on law of the case. Liberty’s cross-motion to deposit money into court is stayed until further Court order.

This case is ripe, perhaps over-ripe, for settlement, which was almost achieved years ago. The Court hereby requests that counsel confer among themselves and notify the Court (at AENGORON@NYCOURTS.GOV and/or 646-386-4375) of a day and time when all counsel are available for an all-morning, all-afternoon, or all-day settlement conference via Microsoft Teams. Of course, all counsel should be familiar with the background of this case, including the prior settlement attempts, and should have full settlement authority, with the ability to obtain more, or accept less, with just a telephone call, text, or email away.

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1/11/2021

DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: