

**Deck Jamaica - 43, LLC v Janata Food Corp.**

2021 NY Slip Op 31722(U)

May 14, 2021

Supreme Court, Kings County

Docket Number: 509135/17

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 73

Index No.: 509135/17  
Motion Date: 2-22-21  
Mot. Seq. No.: 6-7

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DECK JAMAICA - 43, LLC,

Plaintiff,

-against-

DECISION/ORDER

JANATA FOOD CORP. and  
ASMATULLAH TOHKIE,

Defendants.

-----X

The following papers were read on this motion:

<b>Papers:</b>	<b>NYSCEF Nos:</b>
Notice of Motion/Cross Motion	
Affirmations/Affidavits/Exhibits/Memo of Law.....	116-133
Answering Affirmations/Affidavits/Exhibits/Memo of Law.....	137-143

Upon the foregoing papers, the motions are decided as follows:

In this action for indemnification, plaintiff (buyer) DECK JAMAICA - 43, LLC moves in mot. seq. #6 under CPLR 3212 for summary judgment and a hearing to determine an award of reasonable legal fees. In mot. seq. #7, the defendants (sellers) JANATA FOOD CORP. (“Janata”) and ASMATULLAH TOHKIE (“AT”) cross-move under CPLR 3212 for summary judgment dismissing every cause of action in the complaint.

The cross-motion (mot. seq. #7) will be addressed first. The instant action arises out of the November 2015 sale of the assets of a Dunkin' Donuts/Baskin Robbins retail store located at 43 Jamaica Avenue, Brooklyn, NY pursuant to an Asset Purchase Agreement (“APA”). In connection with the APA, on or about March 31, 2016, defendant Janata assigned the lease for the premises to plaintiff. On or about April 28, 2016, Anthony John Fox brought a Federal lawsuit against the owner of the property, who is not a party to this action, pursuant to the Americans With Disabilities Act (“ADA”) alleging that the parking lot was defectively paved and did not comply with the Act. Pursuant to the lease, the lessee was obligated to defend and indemnify the owner of the property in the Fox action. The plaintiff acknowledged this obligation and paid \$5,000.00 to settle the action. The plaintiff is now seeking to have Janata and Asmatullah Tohkie indemnify it for the \$5,000 settlement amount and the \$42,673.56 it

spent in legal fees and costs pursuant to the indemnification provisions contained in the APA as well as pursuant to the assignment agreement.

Paragraph 9.1 of the APA states:

Seller shall indemnify, defend and hold harmless Buyer against and in respect of any and all losses, costs, expenses (including, without limitation, reasonable costs of investigation and defense and reasonable attorneys' fees), claims, damages, obligations, or liabilities, whether or not involving a third party claim (collectively, "Damages"), if and to the extent such Damages result from (a) any claim, lawsuit, judgment liability or obligation, known or unknown, contingent or otherwise of or against Seller, including liability relating to the Network, Franchise Agreements, Leases, Assets, Assumed Equipment Leases, if any, and Seller's business arising on or before the Closing Date, including, without limitation, liability arising from unpaid vendor invoices, utility invoices, and DCP invoices; (b) any inaccuracy in or breach of any representation or warranty of Seller made in this Agreement; (c) any breach or non-fulfillment of any covenant or obligation of Seller contained in this Agreement; (d) Seller Disputes, and (e) successor liability incurred as a result of any liability of Seller, including, but not limited to, unpaid wages and unpaid taxes, including payroll taxes and sales & use taxes ("Successor Liability Damages"). Seller shall indemnify Buyer from any Damages arising from or in connection with any Seller Disputes and any Successor Liability Damages.

However, paragraph 9(b) of the APA provides:

Any claim(s) brought by either Party under this Section 9 must be brought within one (1) year from the Closing Date and shall be limited, in the aggregate, to the value of the Purchase Price.

The closing on the sale of the franchise restaurant took place on April 1, 2016. The within action for indemnification was commenced on May 9, 2017.

On a motion for summary judgment, the moving party must make "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Where the moving party fails to meet this burden, summary judgment cannot be granted, and the non-moving party bears no burden to otherwise persuade the court against summary judgment. Indeed, the moving party's failure to make a

prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh*, 22 N.Y.3d 470, 47 [citation and internal quotation marks omitted]; *see Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503).

Here, the defendants have made a prima facie showing of entitlement to judgment as a matter of law dismissing plaintiff’s claim for indemnification under the APA by demonstrating that this action was commenced more than a year after the closing and was therefore untimely pursuant to the terms of the APA. In opposition, the plaintiffs failed to raise an issue of fact.

The defendants also made a prima facie showing of entitlement to judgment as a matter of law dismissing plaintiff’s claim for indemnification under the assignment agreement and/or lease with the owner of the property. As stated, the lease was assigned to the plaintiff pursuant to written agreement on March 31, 2016. The assignment agreement, in relevant part, provides:

Commencing on the date hereof, Assignee (plaintiff ) for itself, its successors and assigns, hereby accepts and assumes all of the rights, duties and obligations of Assignor (defendants) under the Lease, and covenants and agrees to fully and completely perform all obligations under the Lease. As and between Assignor and Assignee, in no event shall Assignee or its successors and assigns be deemed to have accepted or assumed any duties and/or obligations of Assignor under the Lease which arose prior to the date of this Agreement.

Assignor agrees and acknowledges that Assignor shall remain liable for all monetary and non-monetary duties, liabilities and obligations of the tenant under the Lease except that after the date hereof, Assignor shall not be responsible for the repairs to or replacement of the parking lot blacktop, the sidewalk and the storm drain located in the parking lot.

Assignor and Assignee hereby agree to defend, indemnify and hold harmless Landlord, or its successors, from and against any and all loss, liability, damage, cost or expense (including, without limitation, brokerage commissions, reasonable attorneys' fees and disbursements) incurred or sustained by Assignor and Assigns now or hereafter which arise out of or relate to the Lease or its assignment.

It is well settled that a cause of action for indemnification accrues when the injured party (in this Fox) been paid (*see, McDermott v. City of New York*, 50 N.Y.2d 211, 219, 428 N.Y.S.2d

643, 406 N.E.2d 460, *Loscalzo v. Lupinacci*, 275 A.D.2d 349, 350, 712 N.Y.S.2d 175, 176).

Since Fox was paid after the effective date of the assignment, the owner's right to indemnity under the lease accrued after the plaintiff assumed the obligations of the lease. Thus, the duty to indemnify the owner for the amount paid to settle the Fox action as well as the litigations costs that were incurred in defending the Fox action lied with the plaintiff, not the defendants.

Accordingly, it is hereby

**ORDERED**, that the defendants' cross motion for summary judgment dismissing the complaint is **GRANTED** in its entirety; and it is further

**ORDERED**, that the plaintiffs' motion is **DENIED** as moot.

This constitutes the decision and order of the Court.

Dated: May 14, 2021



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**PETER P. SWEENEY, J.S.C.**

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020