



## 16 W. 12 Holding, LLC v 18 W. 12th St. Apt. Corp.

2024 NY Slip Op 34046(U) (2024) | Cited 0 times | New York Supreme Court | October 31, 2024

16 W. 12 Holding, LLC v 18 W. 12th St. Apt. Corp. 2024 NY Slip Op 34046(U) October 31, 2024 Supreme Court, New York County Docket Number: Index No. 159274/2017 Judge: Nancy M. Bannon Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service. This opinion is uncorrected and not selected for official publication.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 191, 192, 193, 253, 256, 264, 271, 288, 289, 290, 291, 299, 301, 303, 305, 328, 333, 334, 343, 353, 358 were read on this motion to/for PARTIAL SUMMARY JUDGMENT .

The following e-filed documents, listed by NYSCEF document number (Motion 007) 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 257, 258, 272, 273, 274, 275, 276, 300, 302, 304, 306, 329, 335, 336, 344, 357, 359, 363 were read on this motion to/for SUMMARY JUDGMENT . SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART 61M Justice

-----X INDEX NO. 159274/2017

MOTION DATE 05/31/2024 MOTION SEQ. NO. 006 007

DECISION + ORDER ON MOTION 16 WEST 12 HOLDING, LLC, Petitioner, - v

18 WEST 12TH STREET APT. CORP., Respondent.

-----X 16 WEST 12 HOLDING, LLC

Plaintiff, -against- XHEMA OF N.Y., INC. Defendant.

-----X Third-Party Index No.

595563/2018

XHEMA OF N.Y., INC. Plaintiff, -against- M&A PROJECTS RESTORATION, INC., WEST NEW YORK RESTORATION OF CT, INC., ROSE DEMOLITION & CARTING, INC., NY IRON, INC., EVEREST SCAFFOLDING INC., LOUGH CONN INC., PRECISE CONSTRUCTION CONTRACTING, INC. Defendants.

-----X Second Third-Party Index No.

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1 of 9 [\* 1] I. BACKGROUND This matter was commenced in 2017 by the petitioner and third-party plaintiff 16 West 12 adjacent property to complete on a Manhattan townhouse which commenced in

2014. The adjacent townhouse is owned by respondent 18 West 12 th which answered the petition and asserted five counterclaims sounding in breach of contract and

seeking monetary relief for property damage caused by the petition was withdrawn by an order dated June 20 roceeding settled. The counterclaims were effectively severed and continued.

The court granted leave to 16 West to file a third-party action against third-party defendant/second third- construction project (MOT SEQ 003). The third-party complaint was filed on July 11, 2018, and

includes causes of action for contractual indemnification, common law indemnification, contribution, and breach of contract for failure to procure insurance. Xhema answered and asserted two counterclaims against 16 West. 16 West answered the two counterclaims by stating they fail to state a cause of action. On November 2, 2022, Xhema filed a second third-party complaint against several of its subcontractors. By order dated March 6, 2023, the -party action (MOT SEQ 005).

18 West moved on 18 West's first, second, and fourth counterclaims for breach of the contract executed between 16

and for damages to be determined at a hearing. 18 West also sought an order directing Kane & Kessler, P.C. to release to 18 West the sum of \$50,000.00 held in escrow pursuant to the CA (MOT SEQ 006). 16 West opposed the motion. 16 West also separately moved for summary judgment on its third- two counterclaims (MOT SEQ 007). Xhema opposed that motion. In its opposition, Xhema withdrew its second counterclaim against 16 West for contractual indemnification and/or failure to procure insurance first counterclaim against 16 West remains, which is for negligence, contribution, and/or common law indemnification based on the allegation that the damage to 18 West was caused by 16 West. FILED: NEW YORK COUNTY CLERK 11/15/2024 04:44 PM INDEX NO. 159274/2017 NYSCEF DOC. NO. 378 RECEIVED NYSCEF: 11/15/2024

2 of 9 [\* 2] On October 17, 2023, following oral argument on MOT SEQ 006 and 007, the court granted 18 otherwise adjourned the motions for decision. Several more adjournmetns were granted to

accommodate settlement negotiations, which were ultimately unsuccessful.

II. DISCUSSION On a motion for summary judgment, the moving party must make a prima facie showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824 (2014); *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986); *Zuckerman v City of New York*, 49 NY2d 557 (1980). Once the movant



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meets this burden, it becomes incumbent upon the party opposing the motion to come forward with proof in admissible form sufficient to raise a triable issue of fact. See *Alvarez v Prospect Hospital*, supra; *Zuckerman v City of New York*, supra.

(1) on Liability - MOT SEQ 006 18 West seeks summary judgment on the issue of liability on its breach of contract counterclaims (first, second and fourth) against 16 West. To successfully prosecute a cause of action for breach of contract, the party making the claim is required to establish (1) the existence of a contract, ) resulting damages. See *Second Source Funding, LLC v Yellowstone Capital, LLC*, 144 AD3d 445 (1 st Dept. 2016); *Harris v Seward Park Housing Corp.*, 79 AD3d 425 (1 st Dept. 2010).

18 West submits an affidavit of Susan Brown, president of 18 West and a resident of a unit in the premises. 1 She testified that 16 West began construction work in 2013, and after this work caused damages to 18 West, the parties executed the CA. Under the CA, 16 West agreed to (1) repair, at its -going construction project; (2) indemnify 18 West from any and all damages with respect to the construction, (3) reimburse 18 West for expenses incurred by 18 West to repair damages caused by construction, and (4) reimburse 18 West for legal, professional, and administrative fees incurred by 18 West.

1 The court notes that 18 West fails to submit a copy of the pleadings in support of its motion, as required by CPLR 3212(b). However, as 16 West does not allege any resulting prejudice to its substantial rights, such an See *Nat'l Auditing Servs. & Consulting, LLC v 511 Prop., LLC*, 186 AD3d 1160 (1 st Dept. 2020). Furthermore, the pleadings were filed electronically and are available to the parties and the court. See *Studio A Showroom, LLC v Yoon*, 99 AD3d 632 (1 st Dept. 2012). FILED: NEW YORK COUNTY CLERK 11/15/2024 04:44 PM INDEX NO. 159274/2017 NYSCEF DOC. NO. 378 RECEIVED NYSCEF: 11/15/2024

3 of 9 [\* 3] damaged the 18 West property, Brown, in her affidavit, details her personal observations of the damages, including, among other things, shifting of the building, numerous cracks in the building's walls, the installation of hoarding on windows which prevented their use and blocked sunlight, vibrating of the floors, and bug infestation issues. These damages are listed in 7 categories: (1) the exterior facades; (2) the roof; (3) the cellar; (4) the ground floor apartment; (5) the second and third floor duplex; (6) the fourth and fifth floor duplex; and (7) the

that were submitted on NYSCEF for previous motions to establish the damages sustained by 18 West. The documents include invoices from several contractors 18 West hired to make repairs including asbestos abatement, scraping and removing loose and deteriorated paint on the walls, cleaning up debris, and pest control, among others. The referenced documents also include photographs taken by , which performed a pre-construction survey of 18 West and 16 In its report, Tectonic found the units in 18 West to be in excellent condition prior to the construction work at 16 West, but also observed numerous cracks throughout the 18 West building. Tectonic concluded that



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16 West need to be cautious in its construction project so as not to cause further damages to 18 West. at which she testified about the building issues and represented that she reported these problems to Karen Thomas, 16 Brown avers that 16 West also refused to pay legal, professional, and administrative fees incurred by 18 West in . 18 West also submits communications from Brown sent to Thomas, in which Brown attached reports by various architecture firms retained by 18 West detailing the damages to the property, including cracks, water damage, and shifting.

testimony and the documents she references demonstrate that 16 West failed to repair the damage to 18 West caused by the construction work or otherwise reimburse 18 West for the cost of repairs, in violation of paragraphs 17, 29, and 34 of the CA, and further failed to pay 18 West for legal, paragraphs 1, 2, 6, 12, and 42 of the CA prima facie

entitlement to summary judgment on its breach of contract counterclaims against 16 West.

16 West, in opposition, fails to submit proof sufficient to raise a triable issue of fact. 16 West also relies on the deposition testimony of Susan Brown, as well as that of John Stegman, a project manager for Xhema, to support its theory that the damage to 18 West could have existed before the  
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4 of 9 [\* 4] construction work commenced at 16 West, and thus that there is an issue of fact as to whether the damage to 18 West was caused by the subject construction work done at 16 West. Brown and Stegman both testified 1990s. However, this testimony is far too vague to counter

construction at 16 West caused the subject damage to 18 West. Stegman recalled that after he - any conditions prior to the construction at 16 West. 16 West likewise provides no proof to support its

suggestion that there were other construction projects occurring in the area during the same period that may have caused damage to 18 West. 16 West also relies on the same depositions to argue that some of the damages reflected in the Property Damage List have already been repaired. However, these repairs mainly were made to only vaguely address the balance of the extensive damages reflected in the Property Damage List.

Xhema also submits in opposition to this motion an affirmation from its attorney, Todd M. Lewis, but this affirmation likewise fails to raise a triable issue of fact. Since counsel claims no personal knowledge of the underlying facts, his affirmation is without probative value or evidentiary significance on this motion. See *Zuckerman v City of New York*, supra; *Trawally v East Clarke Realty Corp.*, 92 AD3d 471 (1 st Dept. 2012); *Thelen LLP v Omni Contracting Co. Inc.*, 79 AD3d 605 (1 st Dept. 2010).

the first, second, and fourth counterclaims sounding in breach of the CA. Summary judgment is



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likewise

are recoverable where, as here, there is a specific contractual provision for that relief. See *Flemming v Barnwell Nursing Home and Health Facilities, Inc.*, 15 NY3d 375 (2010). Under Paragraphs 1, 6, and 12 of the CA, 16 West is required to pay legal fees incurred by 18 West to enforce the agreement. The issues of the amount of contract damages and the amount of legal fees due to 18 West shall be determined by a Special Referee or Judicial Hearing Officer.

even address its third counterclaim to enjoin 16 West from performing any further construction work until it has made repairs to 18 West and installed certain safety measures required by the CA, or the fifth counterclaim for sanctions against 16 West for filing a frivolous petition. These counterclaims are deemed withdrawn as moot, since they specifically RPAPL § 881 petition, and that proceeding was discontinued in 2018. FILED: NEW YORK COUNTY CLERK 11/15/2024 04:44 PM INDEX NO. 159274/2017 NYSCEF DOC. NO. 378 RECEIVED NYSCEF: 11/15/2024

5 of 9 [\* 5] (2) Against Xhema - MOT SEQ 007 states that it seeks summary judgment on the entirety of its third-party complaint against Xhema, its motion papers center exclusively on its first and fifth causes of action for contractual indemnity against Xhema. remaining four causes of action, sounding in common law indemnification, contribution, apportionment, and failure to procure insurance, are not addressed in its papers. As such, MOT SEQ 007 is denied to the extent it seeks summary judgment on the second, third, fourth, and sixth causes of action in the third-party complaint.

With respect to its first and fifth causes of action for contractual indemnity, 16 West submits a contract signed by it and Xhema, whereby Xhema was hired to perform the construction at 16 West as a contractor. 16 West also submits a rider to this contract, by which Xhema agreed to contractually provided that the subject claim, damage, loss or expense is attributable to, inter alia 16 West also submits the deposition testimony of John

Stegman, Xhema representative, who testified that only Xhema performed the construction work, and that there were no other entities, other than subcontractors hired by Xhema, who performed construction work at the site. Thus, 16 West met its burden on its motion.

in opposition do not raise a triable issue of fact as to the first and fifth cause of action for contractual indemnity. Xhema submits certificates of insurance for 2013-2018, naming 16 West as an additional insured, seemingly in an attempt to counter action, in which it Xhema also submits a

to purportedly show that there was construction work at 20 West, a property on the opposite side of 18 West. This proof is insufficient to raise any factual issue as to sworn deposition testimony that only Xhema and its subcontractors did the subject construction work at 16 West.

and fifth causes of action for contractual indemnification from Xhema should 18 West obtain any



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judgment against 16 West. FILED: NEW YORK COUNTY CLERK 11/15/2024 04:44 PM INDEX NO. 159274/2017 NYSCEF DOC. NO. 378 RECEIVED NYSCEF: 11/15/2024

6 of 9 [\* 6] first counterclaim for negligence, contribution, and/or common law indemnification is dismissed for reasons stated above indemnification and/or failure to procure insurance is withdrawn counsel, Todd M. Lewis, seeking permission to withdraw the claim.

III. CONCLUSION ing for trial are the second, third, fourth, and sixth causes of action of petitioner/third-party plaintiff 16 West 12 Holdings, LLC against third-party defendant/second third-party plaintiff Xhema of N.Y., Inc.

Accordingly, upon the foregoing papers and after oral argument, it is

ORDERED that the motion of the respondent 18 West 12 th Street Apt. Corp. for partial summary judgment against the petitioner/third-party plaintiff 16 West 12 Holdings, LLC (MOT SEQ 006) on the

ORDERED that money damages shall be determined by a Judicial Hearing Officer (JHO) or Special Referee, who shall be designated to hear and report to this Court on the following issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

(1) The issue of the amount of damages recoverable by respondent 18 West 12 th Street Apt. Corp. from petitioner/third-party plaintiff 16 West 12 Holdings, LLC in connection with the property damage at respondent s property, including, but not limited to, costs incurred by the respondent to repair the damage and legal, professional, and administrative fees incurred by respondent, as well as the amount of attorneys fees incurred by respondent in enforcing the Construction Agreement;

and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646- 386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted FILED: NEW YORK COUNTY CLERK 11/15/2024 04:44 PM INDEX NO. 159274/2017 NYSCEF DOC. NO. 378 RECEIVED NYSCEF: 11/15/2024

7 of 9 [\* 7] matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for respondent 18 West 12 th Street Apt. Corp. shall, within 15 days from the date of this Order, submit to the Special Referee





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Clerk by fax (212- 401-9186) or e- hat, as soon as practical

thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that 18 West 12 th Street Apt. Corp. shall serve a proposed accounting within 24 days from the date of this order and the 16 West 12 Holdings, LLC shall serve objections to the proposed within 20 days from service of 18 West 12 th Street Apt. Corp. papers and the foregoing papers shall be filed with the Special Referee Clerk prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts (22 NYCRR 202.44); and it is further

ORDERED that the respondent 18 West 12 th Street Apt. Corp. deemed withdrawn; and it is further  
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8 of 9 [\* 8] ORDERED that the motion of petitioner/third-party plaintiff 16 West 12 Holdings, LLC for summary judgment against third-party defendant/second third-party plaintiff Xhema of NY, Inc. (MOT indemnification, and the motion is otherwise denied; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

10/31/2024 \$SIG\$ DATE CHECK ONE: CASE DISPOSED X NON-FINAL DISPOSITION  
GRANTED DENIED X GRANTED IN PART OTHER APPLICATION: SETTLE ORDER SUBMIT  
ORDER CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY



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