

**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

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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. NANCY M. BANNON PART 61M**

*Justice*

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**INDEX NO.** 159274/2017

16 WEST 12 HOLDING, LLC,  
Petitioner,

**MOTION DATE** 05/31/2024

- v -

**MOTION SEQ. NO.** 006 007

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

**DECISION + ORDER ON  
MOTION**

-----X

16 WEST 12 HOLDING, LLC  
Plaintiff,

Third-Party  
Index No. 595563/2018

-against-

XHEMA OF N.Y., INC.  
Defendant.

-----X

XHEMA OF N.Y., INC.  
Plaintiff,

Second Third-Party  
Index No. 595666/2024

-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.

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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.

## I. BACKGROUND

This matter was commenced in 2017 by the petitioner and third-party plaintiff 16 West 12 Holding, LLC (“16 West”) as a petition pursuant to RPAPL § 881 for a license to gain access to an adjacent property to complete “gut renovations” on a Manhattan townhouse which commenced in 2014. The adjacent townhouse is owned by respondent 18 West 12<sup>th</sup> Street Apt. Corp. (“18 West”), which answered the petition and asserted five counterclaims sounding in breach of contract and seeking monetary relief for property damage caused by the construction project. 16 West’s initial petition was withdrawn by an order dated June 20, 2018, upon the parties’ representations that 16 West’s RPAPL § 881 proceeding settled.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-party plaintiff Xhema of N.Y., Inc. (“Xhema”), the general contractor on the 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 court severed Xhema’s second third-party action (MOT SEQ 005).

18 West moved pursuant to CPLR 3212 for partial summary judgment as to 16 West’s liability on 18 West’s first, second, and fourth counterclaims for breach of the contract executed between 16 West and 18 West (the “Construction Agreement”), 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-party complaint and to dismiss Xhema’s 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. Thus, only Xhema’s 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.

On October 17, 2023, following oral argument on MOT SEQ 006 and 007, the court granted 18 West's motion (MOT SEQ 006) to the extent of directing the release of escrowed funds to 18 West, and otherwise adjourned the motions for decision. Several more adjournments 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 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) 18 West's Motion for Partial Summary Judgment 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, (2) the party's performance under the contract; (3) the opposing party's breach of the contract, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1<sup>st</sup> Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1<sup>st</sup> Dept. 2010).

18 West submits an affidavit of Susan Brown, president of 18 West and a resident of a unit in the premises.<sup>1</sup> 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 own cost, any damage done to 18 West's building as a result of 16 West's on-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.

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<sup>1</sup> 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 error is a "mere irregularity". See Nat'l Auditing Servs. & Consulting, LLC v 511 Prop., LLC, 186 AD3d 1160 (1<sup>st</sup> 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<sup>st</sup> Dept. 2012).

To establish that 16 West's construction 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 building common areas (the "Property Damage List"). Brown's affidavit references various documents 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 Tectonic Monitoring Co. ("Tectonic"), which performed a pre-construction survey of 18 West and 16 West's buildings. 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 16 West need to be cautious in its construction project so as not to cause further damages to 18 West. Also submitted is Brown's deposition testimony, at which she testified about the building issues and represented that she reported these problems to Karen Thomas, 16 West's project manager, but 16 West refused to make the repairs as required by the CA. Brown avers that 16 West also refused to pay legal, professional, and administrative fees incurred by 18 West in connection with 16 West's construction. 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.

Brown's 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, professional, and administrative fees incurred in connection with 16 West's construction, in violation of paragraphs 1, 2, 6, 12, and 42 of the CA. Thus, 18 West's submissions establish its *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

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 that renovations were undertaken at 18 West's building during the 1980s or 1990s. However, this testimony is far too vague to counter 18 West's submissions showing that the construction at 16 West caused the subject damage to 18 West. Stegman recalled that after he received some complaints from Brown, he observed some "pre-existing conditions" at 18 West that "could have caused some of her complaints" but that he did not and could not have observed those or 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 the exterior facades, and 16 West's submissions 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<sup>st</sup> Dept. 2012); Thelen LLP v Omni Contracting Co. Inc., 79 AD3d 605 (1<sup>st</sup> Dept. 2010).

Therefore, 18 West's motion for partial summary judgment is granted as to 16 West's liability on the first, second, and fourth counterclaims sounding in breach of the CA. Summary judgment is likewise granted as to 16 West's liability for contractual attorneys' fees. It is well settled that attorneys' fees 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.

18 West's motion does not seek relief upon or 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 address 16 West's RPAPL § 881 petition, and that proceeding was discontinued in 2018.

(2) 16 West's Motion for Summary Judgment Against Xhema - MOT SEQ 007

While 16 West's notice of motion 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. 16 West's 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 indemnify and hold 16 West "harmless from and against all claims, actions, damages, losses, and expenses...including attorney's fees and disbursements, arising out of" Xhema's work at 16 West, provided that the subject claim, damage, loss or expense is attributable to, *inter alia*, "injury to or destruction of tangible property" resulting from the acts or omissions of Xhema, its employees, or "anyone for whose acts [Xhema] may be liable." 16 West also submits the deposition testimony of John Stegman, Xhema's 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.

Xhema's submissions 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 16 West's sixth cause of action, in which it claims that Xhema "failed to procure such insurance policies". Xhema also submits a "2016 work permit document" 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 Stegman's sworn deposition testimony that only Xhema and its subcontractors did the subject construction work at 16 West.

Therefore, 16 West's motion is granted to the extent it seeks summary judgment on the first and fifth causes of action for contractual indemnification from Xhema should 18 West obtain any judgment against 16 West.

16 West's motion is also granted to the extent it seeks dismissal of Xhema's counterclaims. Xhema's first counterclaim for negligence, contribution, and/or common law indemnification is dismissed for reasons stated above. Xhema's second counterclaim against 16 West for contractual indemnification and/or failure to procure insurance is withdrawn upon the affirmation of Xhema's counsel, Todd M. Lewis, seeking permission to withdraw the claim.

### III. CONCLUSION

In light of the court's rulings herein, remaining 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<sup>th</sup> Street Apt. Corp. for partial summary judgment against the petitioner/third-party plaintiff 16 West 12 Holdings, LLC (MOT SEQ 006) on the issue of liability on the respondent's first, second, and fourth counterclaims is granted; and it is further

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<sup>th</sup> 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](mailto: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 on the website of this court at [www.nycourts.gov/suptctmanh](http://www.nycourts.gov/suptctmanh) at the "References" link), shall assign this



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<sup>th</sup> Street Apt. Corp. shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212- 401-9186) or e-mail an Information Sheet (accessible at the “References” link on the court’s website) containing all the information called for therein and that, 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<sup>th</sup> 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<sup>th</sup> Street Apt. Corp.’s 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<sup>th</sup> Street Apt. Corp.’s third and fifth counterclaims are deemed withdrawn; and it is further

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 SEQ 007) is granted as to 16 West 12 Holdings, LLC's first and fifth causes of action for contractual 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.



NANCY M. BANNON, J.S.C.  
**HON. NANCY M. BANNON**

10/31/2024  
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input checked="" type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: