

James v Star Creations Inc
2026 NY Slip Op 30739(U)
February 10, 2026
Supreme Court, Kings County
Docket Number: Index No. 504657/2021
Judge: Steven Z. Mostofsky
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At an IAS Part 9 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 10th day of February 2026.

PRESENT: HON. Steven Mostofsky, J.S.C.
SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF KINGS

-----X
SHARON JAMES

Index No: 504657/2021

Plaintiff(s)

-against-

STAR CREATIONS INC d/b/a AJ MADISON
AND FGO DELIVERS, LLC, ALL AROUND
DELIVERY SERVICES AND SONS, LLC, and
LARRY PENN, AND NICHOLAS BROWN,

Decision

Defendant(s)

-----X
STAR CREATIONS, INC. and
FGO DELIVERS, LLC,

Defendants and Third-Party Plaintiffs,

-against-

ALL AROUND DELIVERY SERVICES AND
SONS, LLC, LARRY PENN and
NICHOLAS BROWN,

Third-party Defendants.

-----X
The following e-filed papers read herein:

Second Amended Complaint/Notice of Motion Seq. 10.....
Affirmation in Support/Memorandum of Law/Exhibits.....
Affirmations in Opposition/Memorandum of Law in Opposition.....
Reply.....
Notice of Motion Seq. 11/Memorandum of Law.....
Affirmation in Opposition/Reply/Memorandum of Law in Reply

NYSCEF Nos.:
74; 206
208;212-224
278;293;299
312
225-226
306; 313-314

On February 25, 2021, Plaintiff Sharon James sued for personal injuries she sustained on January 20, 2021, at her home located at 24 Delrey Drive, Mount Vernon, New York. She claims that during a refrigerator delivery, the refrigerator fell down the basement steps of her home and

landed on her, causing injuries. James purchased the refrigerator from Sears. Sears arranged delivery through Defendant AJ Madison. AJ Madison contracted Defendant FGO to conduct the delivery. On January 12, 2023, AJ Madison and FGO filed a third-party complaint against All Around Delivery Services, Larry Penn, and Nicolas Brown, alleging that All Around was an independent contractor for FGO, and that Penn and Brown were direct employees of All Around.

All Around moves for summary judgment (Mot. Seq. 10) seeking dismissal of the James' second amended complaint and AJ Madison, and FGO's complaint and cross claims for contractual indemnification.

AJ Madison and FGO move for summary judgment (Mot. Seq. 11) dismissing James' second amended complaint, crossclaims asserted by All Around and granting their crossclaims for contractual indemnification against All Around.

Statement Of Facts

On October 20, 2020, AJ Madison and FGO entered into a subcontractor agreement where AJ Madison was the Principal and FGO was the subcontractor. The agreement provided that FGO would deliver and distribute appliances sold by AJ Madison to its customers. At the time AJ Madison and FGO entered into their agreement, FGO had a service agreement dated January 6, 2020, with All Around. All Around agreed to "accept, deliver, and if, applicable and/or install freight for FGO as part of FGO's service to its customers." The agreement stipulated a one-year term, after which it could be terminated with the consent of both parties. The agreement between FGO and All Around contained a contractual indemnification clause.

Before the accident occurred, FGO's compliance officer, Cynthia Daniels sent All Around, an email, stating that its insurance on file was outdated and request that All Around provide updated insurance information. FGO operation supervisor Thomas Ryan, via text, informed All Around's CEO Jameen Murphy that routes could not be assigned until updated insurance was provided. Murphy testified that the text, email, and a letter sent from FGO terminated the contract between the parties, and that he consented to the termination. Daniels testified, that she was simply asking that the insurance be updated, and no such termination occurred. James purchased a refrigerator from Sears, which arranged for delivery through AJ Madison. Despite the lack of proper insurance Ryan texted Murphy to put together a crew to deliver James' refrigerator and that he would pay All Around himself if necessary. Murphy

suggested that Ryan reach out to Larry Penn, a subcontractor All Around employed to make deliveries.

Penn testified that FGO required deliverymen to wear specific uniforms and IDs with FGO's logo. At the warehouse deliverymen had to report to a FGO manager who ensured they were properly dressed and groomed. FGO instructed Penn on whether to leave an appliance at the purchaser's door or install it inside their home. Ryan, also testified to the degree of control FGO exercised over deliveries. Ryan alleges that FGO handled accident reports and escalated issues to FGO supervisors when incidents occurred during deliveries. Deliverymen were to contact FGO directly during deliveries for guidance, such as when an appliance could not fit in a specific area. FGO also informed drivers whether the delivery was standard or white glove which required placing the appliance in any room of the purchaser's home. Penn testified white glove treatment granted the deliverer discretion whether to remove the doors of refrigerator to get it through the customer's home.

On January 20, 2023, Penn and Nicolas Brown, in a truck provided by All Around, drove to James' home to conduct a white glove delivery. For the delivery FGO paid All Around. After deducting one hundred dollars for use of the truck, All Around paid Penn and Brown as was customary. Upon arrival, they discovered the refrigerator could not fit in James' kitchen. Penn contacted FGO. FGO instructed Penn to leave the refrigerator outside either, on the porch or by garage. Penn testified that James offered to pay both men \$200 to bring the refrigerator into her basement. The two removed the refrigerator doors, the door to the basement, and the staircase railing. They attached straps used to help lift appliances to the refrigerator. As they carried the refrigerator down the stairs a strap broke. The refrigerator fell, landing on James.

Summary Judgment Standard

"The proponent of a summary judgment motion 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 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Absent prima facie proof the Court must deny the motion, regardless of the sufficiency of the opposing papers (*Alvarez*, at 324). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in

admissible form sufficient to establish the existence of material issues of fact which require a trial (*Alvarez*, at 324).

AJ Madison's motion for summary judgment.

AJ Madison's motion for summary judgment dismissing James' second amended complaint and All Around's cross claims is granted as there is no triable issue of fact regarding the existence of an independent contractor agreement between AJ Madison and FGO.

Usually, the party who retains an independent contractor, as distinguished from a mere employee, or servant, is not liable for the independent contractor's negligent acts (*Kleeman v Rheingold*, 81 NY2d 270, 273 [1993]; citing *Rosenberg v Equitable Life Assur. Socy.*, 79 NY2d 663, 668, [1992]). Exceptions to the general rule, most of which are derived from various public policy concerns, fall into three basic categories: negligence of the employer in selecting, instructing or supervising the contractor, employment for work that is especially or inherently dangerous and, finally instances which the employer is under a specific nondelegable duty (*Kleeman*, 81 NY2d at 274, citing *Wright v Tudor City Twelfth Unit*, 276 NY 303, 307 [1938]; see also, *Rosenberg v Equitable Life Assur Socy.*, 79 NY2d 663, 668 [1992]).

AJ Madison submitted the subcontractor agreement between it and FGO and has met its prima facie burden that FGO was an independent contractor of AJ Madison. The burden shifted to James and All Around to raise a triable issue of fact. The parties do not dispute that the agreement between AJ Madison and FGO existed on the day of the alleged accident. Neither James nor All Around provided any evidence illustrating that AJ Madison negligently hired FGO, that the work was inherently dangerous; and AJ Madison was under a specific nondelegable duty. Thus, AJ Madison's motion for summary judgment dismissing the James' second amended complaint and All Around's crossclaims is granted.

All Around's motion for summary judgment.

There remains a triable issue regarding whether All Around and FGO had an independent contractor agreement which provided that after one year the contract may be terminated with the consent of both parties. Murphy asserts that the Daniels' email and Ryan's text, and FGO's letter terminated the contract which he agreed to. Neither the email or text expressly states that the contract was terminated. Daniels testified that the email was a request for updated insurance. The letter mention in Murphy's testimony was not provided. All Around failed to meet its prima facie burden and its motion for summary judgment is denied.

Alternatively, All Around argues that, even if retained for delivery, Penn and Brown acted outside the scope of their employment and that All Around cannot be held vicariously liable for their conduct.

An employer is vicariously liable for its employees' torts when the employee's tortious actions were within the scope of their employment (see *Vega v Northland Mktg. Corp.*, 289 AD2d 565, 566 [2d Dept 2001]; *Riviello v Waldron*, 47 NY2d 297, 303 [1979]). However, there is no vicarious liability on the part of the employer for the torts committed by the employee solely for personal motives unrelated to the furtherance of the employer's business (*Vega*, 289 AD2d at 566, see also, *Riviello v Waldron*, 47 NY2d 297,303 [1979]; *Flowers v New York City Tr. Auth.*, 267 AD2d 132 [1st Dept 1999]). "Generally, 'a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligent acts'" (*Brothers v. New York State Elec. & Gas Corp.*, 11 NY3d 251, 257 [2008]; quoting *Kleeman v. Rheingold*, 81 NY2d 270, 273 [1993]). "Control of the method and means by which the work is to be done is the critical factor in determining whether one is an independent contractor or an employee for purposes of tort liability" (*Sanabria v. Agueró-Borges*, 117 A.D.3d 1024, 1025; see *Meehan v. County of Suffolk*, 144 A.D.3d 640, 641). "Whether an actor is an independent contractor or an employee for the purposes of tort liability is usually a factual issue for the jury (*Lombardi v. Alpine Overhead Doors, Inc.*, 92 A.D.3d 921, 921 [internal quotation marks omitted]).

All Around contends that Penn and Brown acted beyond the scope of their employment and for personal motives unrelated to the furtherance of the employer's business when they agreed, for \$200 each, to bring the refrigerator into James's basement after being told by FGO to leave it outside the house. In support of its argument, All Around cites *Danko v Forest Camp Lake*, 63 AD3d 1099 [2d Dept 2009]. The Court held that the assistant head counselor for a camp acted beyond the scope of his employment and for personal motives when he intentionally threw a flashlight at a counselor-in-training, fracturing his skull. Although Penn and Brown did not follow FGO's instructions, the attempt to bring the refrigerator into James's basement was in furtherance of FGO's business. The delivery method was similar to FGO's "white glove" delivery. Additionally, unlike *Danko*, All Around does not assert that Penn and Brown intentionally dropped the refrigerator. Therefore, All Around has failed to meet its prima facie

burden, entitling it to summary judgment because it is not vicariously liable for Penn and Brown's action.

FGO's motion for summary judgment

There remains a triable issue of fact regarding whether an independent contractor agreement existed between FGO and All Around at the time of the accident. And if so, whether FGO exercised control over the manner and means by which the delivery occurred.

FGO claims its agreement with All Around and has met its prima facie burden. But All Around asserts that the Daniels' email and Ryan's text terminated the contract, and that Murphy advised Ryan to hire Penn and Brown directly. The email and text raise a factual issue as to whether an agreement existed between All Around and FGO on the day of the accident.

Penn testified that on the date of the accident, he contacted FGO directly to obtain additional instructions regarding the delivery. Penn's testimony creates a triable issue of fact regarding FGO's control. Therefore, FGO's motion for summary judgment is denied.

FGO's Motion for Contractual Indemnification

FGO relies on Section 14 of its service Agreement with All Around to prove All Around was required hold FGO harmless from any liabilities, claims, or demands arising out of or relating to the performance of the Agreement by All Around, its employees, or independent contractors, including but not limited to claims for or related to personal injury.

"The right to contractual indemnification depends on the specific language of the contract (*Bellefleur v Newark Beth Israel Medical Center*, 66 AD3d 807, 808 [2d Dept 2009]; quoting *George v. Marshalls of MA, INC.*, 61 AD3d 925, 930 [2d Dept 2009]). "The promise to indemnify should not be found unless it can be clearly implied from the *language* and purpose of the entire agreement and the surrounding circumstances" (*Bellefleur*, 66 AD3d at 808). "A party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*Id.*, quoting *Cava Constr. Co., Inc. v Gealtec Realty Remodeling Corp.*, 58 AD3d 660 [2d Dept 2009]).

Because there is a triable issue of fact regarding the existence of a contract between FGO and All Around at the time of the accident, FGO's motion for contractual indemnification is denied.

The Court grants AJ Madison's motion for summary judgment dismissing the Plaintiff's second amended complaint and Third Party-Defendant's cross claims; All Around's motion for

summary judgment dismissing the second amended complaint, and denies the cross claims. FGO's motion for summary judgment dismissing the second amended complaint, All Around's crossclaims, and granting its crossclaims for contractual indemnification is denied.

Therefore, it is:

ORDERED that the Court grants Defendant AJ Madison's motion for summary judgment dismissing the second amended complaint and all crossclaims.

ORDERED that Defendant FGO's motion for summary judgment dismissing the second amended complaint, all crossclaims, and contractual indemnification is denied.

ORDERED that third-party defendant All Around's motion for summary judgment dismissing the second amended complaint, third-party complaint, and all crossclaims is denied.

This constitutes the decision of the Court.

A handwritten signature in black ink, consisting of several overlapping loops and a horizontal line, positioned above the printed name.

Hon., Steven Mostofsky. J.S.C.