

**CMS Packaging v Kaufman Mgt. Co., L.L.C.**

2007 NY Slip Op 33687(U)

November 8, 2007

Supreme Court, New York County

Docket Number: 0111627/2003

Judge: Shirley W. Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. SHIRLEY WERNER KORNREICH,  
Index Number : 111627/2003

PART 54

BERZAK-GOLD ARCHITECTURE

vs

KALTECH INDUSTRIES GROUP

Sequence Number : ~~002~~ 001

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE 8/9/07

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 4 were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1-2

Answering Affidavits — Exhibits \_\_\_\_\_

3

Replying Affidavits \_\_\_\_\_

4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION AND ORDER.**

**FILED**  
NOV 16 2007  
CLERK OF SUPREME COURT  
COMMUNITY SERVICE OFFICE

HON. SHIRLEY WERNER KORNREICH

Dated: 11/8/07

*[Signature]*  
\_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION  DO NOT POST  NON FINAL DISPOSITION  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
CMS PACKAGING, ROSEMARY LOIS and  
AVATAR FILMS, LTD.,

Plaintiffs,

-against-

KAUFMAN MANAGEMENT COMPANY, L.L.C.,  
19<sup>th</sup> STREET ASSOCIATES, L.L.C. and KALTECH  
INDUSTRIES GROUP, INC.,

Defendants.  
-----X

CHARLES R. GRACIE & SONS, INC.,

Plaintiff,

-against-

KALTECH INDUSTRIES GROUP, INC., KAUFMAN  
MANAGEMENT COMPANY, L.L.C. and 19<sup>th</sup>  
STREET ASSOCIATES, L.L.C.,

Defendants.  
-----X

RUVOLO & DiMARIA, INC. and VITO RUVOLO,  
Individually,

Plaintiffs,

-against-

19<sup>th</sup> STREET ASSOCIATES, LLC, KALTECH  
INDUSTRIES GROUP, INC., BIG APPLE SIGN,  
MUSTAK A. KHALFAN and KAUFMAN  
MANAGEMENT COMPANY, LLC,

Defendants.  
-----X

Litigation Coordinating  
Panel Case No.  
No. 0005/2002

Index No. 117183/02

Action No. 4

Index No. 120096/03

Action No. 25  
(companion case to  
Action No. 39)

Index No. 603558/03

Action No. 26

**FILED**  
NOV 15 2002

-----X  
BEZRAK-GOLD ARCHITECTURE & DESIGN, P.C.,

Index No. 111627/03

Plaintiff,

Action No. 35

-against-

KALTECH INDUSTRIES GROUP, INC., KALTECH  
DIGITAL GRAPHICS INC., and MUSTAK A. KHALFAN,

Defendants.

-----X  
KALTECH INDUSTRIES GROUP, INC., KALTECH  
DIGITAL GRAPHICS INC. and MUSTAK KHALFAN,

Third-Party

Index No. 591331/04

Third-Party Plaintiffs,

Action No. 35

-against-

19<sup>th</sup> STREET ASSOCIATES LLC, and KAUFMAN  
MANAGEMENT COMPANY, LLC,

Third-Party Defendants.

-----X  
CHARLES R. GRACIE & SONS, INC.,

Index No. 601339/05

Plaintiff,

Action No. 39

(companion case to

Action No. 25)

-against-

KALTECH INDUSTRIES GROUP, INC., KAUFMAN  
MANAGEMENT COMPANY, L.L.C. and 19<sup>th</sup>  
STREET ASSOCIATES, L.L.C.,

Defendants.

-----X  
SHIRLEY WERNER KORNREICH, J.

These consolidated actions for property damage arise out of an explosion in the basement of the building located at 121 West 19<sup>th</sup> St., New York, New York ("Building"), which occurred

on April 25, 2002.<sup>1</sup> The Building was owned by 19<sup>th</sup> Street Associates LLC (“Owner”) and managed by Kaufman Management Company LLC (“Kaufman”) (collectively “defendants”). Steven Kaufman was the principal of both Owner and Kaufman. On the date of the accident, Kaltech Industries Group, Inc. (“Kaltech”), a sign-making business, was the tenant under a lease, dated May 26, 1992, for the basement and first floor of the Building, for a term commencing June 1, 1992 and ending July 31, 2002 (“Lease”). Kaltech at one time also leased the mezzanine above the first floor, but relinquished the space prior to the explosion.

#### *Motions Before the Court*

The following motions are consolidated for disposition.

In Action 4 (brought by CMS Packaging et al.) defendants move for summary judgment dismissing the complaint, conditional summary against Kaltech for common law and contractual indemnification, and to amend their answer to assert a cross-claim against Kaltech for failure to procure insurance and for summary judgment thereon. Plaintiffs in Action 4 move for summary judgment on liability against Kaltech.

In Action 25 (brought by Charles R. Gracie & Sons, Inc., hereinafter “Gracie”), plaintiff moves for summary judgment on liability on its causes of action for negligence and strict liability against Kaltech. Defendants move for summary judgment dismissing the complaint and on their cross-claims against Kaltech for common law indemnification, contractual indemnification and failure to procure insurance.

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<sup>1</sup> These actions and related personal injury actions were consolidated for pretrial purposes under the caption *Pavon et al. v. 19<sup>th</sup> Street Associates et al.*, Index No. 0005/2002. In addition to the papers submitted on these motions, the court takes judicial notice of all of the papers submitted on the summary judgment motions in the personal injury actions, which were submitted on August 9, 2007.

In Action 26 (brought by Ruvolo & DiMaria, Inc. et ano., hereinafter “Ruvolo”), defendants move for summary judgment dismissing the complaint, and for summary judgment on their cross-claims for contribution, contractual indemnification and failure to procure insurance against Kaltech, Big Apple Sign (“Big Apple”) and Khalfan.

In Action 35 (brought by Bezrak-Gold Architecture & Design, P.C., hereinafter, “Bezrak”), Bezrak moves for summary judgment on liability against Kaltech, Kaltech Digital Graphics, Inc. (“Kaltech Digital”) and Mustak Khalfan (“Khalfan”). Defendants move for summary judgment dismissing the third-party claims against them by Kaltech for common law indemnification, contractual indemnification and contribution.

In Action 39 (brought by Gracie), plaintiff moves for summary judgment against Kaltech on its causes of action for negligence and strict liability. Defendants move for summary judgment dismissing the complaint and on their cross-claims against Kaltech for common law indemnification, contractual indemnification and failure to procure insurance.

#### *Parties*

Plaintiffs Gracie, Rosemary Lois and Avatar Films, Ltd. (“Avatar Films”) were tenants in the Building on the day of the explosion. Plaintiff Bezrak was a subtenant in the Building on the day of the accident. CMS was a business located in a building across the street from the Building on the day of the accident.

#### *Factual Background*

The facts relating to these actions are set forth at length in this court’s decision on the summary judgment motions in the consolidated personal injury actions (“Companion Opinion”), which is being issued simultaneously with this opinion. The facts and legal reasoning of the

Companion Opinion will not be repeated here except as necessary to determine these motions.

*Discussion*

The motions for summary judgment on liability based on negligence against Kaltech by plaintiffs Bezrak (Action 35) and Gracie (Actions 25 and 39) are granted. Kaltech admitted in its guilty plea to Second Degree Reckless Endangerment, on March 24, 2004, that because its workers mixed incompatible chemicals, including nitric acid and volatile compounds, there was an explosion that damaged the Building. The admission is sufficient to establish that Kaltech's activities were a proximate cause of the explosion. In addition, as noted in the Companion Opinion, Kaltech's employees admitted in EBTs that the explosion occurred when they were combining chemicals. Gracie and Bezrak have submitted uncontradicted evidence that they suffered damages and Gracie's lease was terminated due to the explosion. The motion by Berzak against Kaltech Digital and Khalfan is denied. The guilty plea was made exclusively on behalf of Kaltech. The motions by Gracie for summary judgment against Kaltech on the basis of strict liability are denied as moot in light of the disposition of their negligence claims. In the interest of judicial economy, the court *sua sponte* consolidates Actions 25 and 39 by Gracie under Index No. 120096/03, as they are identical except for the damages sought.

Kaltech's settlement of OSIIA violations is not a basis for granting summary judgment. OSIIA violations are some evidence of negligence, but they are not dispositive and they govern only employer/employee relationships. *Khan v. Bangla Motor and Body Shop, Inc.*, 27 A.D.3d 526, 528-529 (2<sup>nd</sup> Dept. 2006); *Jemmott v. Rockwell Mfg. Co.*, 216 A.D.2d 444 (2<sup>nd</sup> Dept. 1995).

The motion for summary judgment against Kaltech by plaintiffs CMS, Rosemary Lois, and Avatar Films (Action 4) is denied because there is no proof in admissible form to establish

that these plaintiffs suffered damages. *Zuckerman v. City of N.Y.*, 49 NY2d 557 (1980). These plaintiffs rely solely upon the affidavit of their attorney without attachments. *Id.* The complaint and bill of particulars attached to the motion papers are not verified by a person with knowledge of the facts. Damages are an essential element of a cause of action for negligence. *IGEN, Inc. v. White*, 250 A.D.2d 463 (1<sup>st</sup> Dept. 1998), *appeal den.*, 92 N.Y.2d 818 (1998). Summary judgment cannot be granted in the absence of evidence in the record on these motions (or in the personal injury action summary judgment motions) that CMS, Rosemary Louis and Avatar Films suffered damages as a result of Kaltech's negligence.

Defendants' motions for summary judgment dismissing the complaints are denied due to issues of fact as to whether defendants were negligent, as set forth in the Companion Opinion. Although some of the plaintiffs, CMS, Rosemary Lois, Avatar Films and Ruvolo, did not submit proof of damages, the burden is upon defendants, the moving parties, to make a *prima facie* showing that they are entitled to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the summary judgment motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). Defendants' motions for summary judgment directed to the complaints are denied because defendants did not meet their *prima facie* burden of proof.

Defendants' motions for summary judgment against Kaltech on their claims for common law and contractual indemnification are denied due to issues of fact as to whether defendants' were negligent, as set forth in the Companion Opinion. Defendants' motions for summary judgment on their contribution claims are denied as it is a question of fact for the jury to

determine whether defendants were negligent and, if so, the relative culpability of Kaltech and defendants.

Defendants' motions for summary judgment against Kaltech on their claims for failure to procure insurance in Actions 25, 26 and 39 are granted on liability only for the reasons stated in the Companion Opinion, with damages to be determined at trial.

Defendants' motion in Action 35 dismissing the third-party claims against them by Kaltech is granted solely to the extent that Kaltech's third-party claims for contractual indemnification and common law indemnification are dismissed, and the motion is denied with respect to Kaltech's third-party claim for contribution. Common law indemnification is predicated on the vicarious liability of one who has not participated in the wrongdoing. *Trustees of Columbia University, Plaintiff, v. Mitchell/Giurgola Associates*, 109 A.D.2d 449 (1st Dept. 1985). Similarly, contractual indemnification requires a showing that the indemnitee was free from negligence. *De La Rosa v. Philip Morris Mgmt. Corp.*, 303 A.D.2d 190, 192-193 (1st Dept. 2003). Where the indemnitee's negligence remains unresolved, summary judgment in favor of the indemnitee on a claim for contractual indemnification is inappropriate. *Pardo v. Bialystoker Ctr. & Bikur Cholim, Inc.*, 10 A.D.3d 298, 302 (1st Dept. 2004), citing *Crespo v Triad, Inc.*, 294 A.D.2d 145, 147 (1st Dept. 2002) and *Correia v Professional Data Mgt., Inc.*, 259 A.D.2d 60, 65 (1999). Kaltech's guilty plea establishes that it was guilty of some negligence and, therefore, it is not entitled to common law or contractual indemnification. However, if the jury finds defendants' were partially responsible for the accident, Kaltech will be entitled to contribution.

Defendants' motion in Action 4 to amend their answer to add a claim for failure to procure insurance is denied with leave to renew upon proper papers. A motion to amend should

be supported by a proposed amended pleading. *Bank of New York v. Irwin Int'l. Imports*, 197 A.D.2d 462 (1<sup>st</sup> Dept. 1993); *Goldner Trucking Corp. v Stoll Packing Corp.*, 12 A.D.2d 639 (2d Dept. 1960); 5-30 Weinstein-Korn-Miller, *New York Civil Practice*, C'PLR P 3025.22.

Defendants did not submit a proposed amended pleading. Defendants' motion for summary judgment on that claim in Action 4 is denied, as the time to move for summary judgment has expired.

In Action 26, in searching the record, the court dismisses defendants' claims against Big Apple and Khalfan for contractual indemnification and failure to procure insurance, as neither Big Apple nor Khalfan were parties to the Lease containing the indemnification and insurance clauses. Accordingly, it is

ORDERED that the motions for summary judgment on liability based on negligence by plaintiffs Bezrak (Action 35) and Gracie (Actions 25 and 39) are granted as to Kaltech, but denied as to Kaltech Digital and Khalfan in Action 35; and it is further

ORDERED that the motions for summary judgment on liability based on strict liability by Gracie (Actions 25 and 39) against Kaltech are denied as moot; and it is further

ORDERED that the motions for summary judgment on liability based on negligence by plaintiffs CMS, Rosemary Louis and Avatar Films (Action 4) against Kaltech are denied; and it is further

ORDERED that defendants' motions for summary judgment on their claims against Kaltech for common law indemnification in Actions 4, 25, 35 and 39, and for contractual indemnification in Actions 4, 25, 26, 35 and 39, and for contribution in Actions 26 and 35, are denied; and it is further

ORDERED that defendants' motion in Action 35 dismissing the third-party claims against them by Kaltech is granted solely to the extent that Kaltech's third-party claims for contractual indemnification and common law indemnification are dismissed, and the motion is denied with respect to Kaltech's third-party claim for contribution; and it is further

ORDERED that defendants' motions for summary judgment against Kaltech for failure to procure insurance are granted on liability only in Actions 25, 26 and 39, with damages to be determined at trial; and it is further

ORDERED that defendants' motion in Action 4 to amend its answer to add a claim for failure to procure insurance against Kaltech is denied with leave to renew upon proper papers and its motion for summary judgment on that claim in Action 4 is denied without leave to renew; and it is further

ORDERED that in Action 26, in searching the record, the court dismisses defendants' claims against Big Apple and Khalfan for contractual indemnification and failure to procure insurance; and it is further

ORDERED that the court *sua sponte* consolidates Action 25, Index No. 120096/03, with *Charles R. Gracie & Sons, Inc. v. Kaltech Industries Group, Inc.* et al., Action 39, Index No. 601339/05, under Index No. 120096/03 (Action 25), and the consolidated action shall bear the following caption:

CHARLES R. GRACIE & SONS, INC.,

Plaintiff,

-against-

Action No. 25

KALTECH INDUSTRIES GROUP, INC., KAUFMAN

MANAGEMENT COMPANY, L.L.C. and 19<sup>th</sup>  
STREET ASSOCIATES, L.L.C.,

Defendants.

and it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that upon service on the Clerk of this Court of a copy of this order with notice of entry, the Clerk shall consolidate the papers in the actions hereby consolidated and shall mark his records to reflect the consolidation, and it is further

ORDERED that a copy of this order with notice of entry shall also be served upon the Clerk of the Trial Support Office (Room 158), who is hereby directed to mark the court's records to reflect the consolidation.

Dated: November 8, 2007

ENTER:

A handwritten signature in black ink is written over a horizontal line. Below the line, the letters 'J.S.C.' are printed. To the right of the signature, there is a rectangular stamp with the word 'FILED' in large, bold, capital letters. Below 'FILED', the date 'NOV 16 2007' is stamped.