

**Wen Ling Gao v Mehran Enters. Ltd.**

2018 NY Slip Op 31553(U)

February 6, 2018

Supreme Court, New York County

Docket Number: 159168/2013

Judge: Kelly A. O'Neill Levy

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, IAS PART 19

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WEN LING GAO,

Plaintiff,

Index No. 159168/2013

-against-

MEHRAN ENTERPRISES LTD., FUTURE QUEENS  
REALTY, INC. SEAPORT RESTAURANT, INC., TIAN  
MING ZHENG, ZHI GANG WANG, QIN-ZHOU CHEN,  
and JIN-PING ZHOU,

Defendants.

**DECISION/ORDER**  
**Mot. Seq. 005**

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MEHRAN ENTERPRISES LTD.,

Third Party Plaintiff,

-against-

OCEANICA CHINESE RESTAURANT, INC., SEAPORT  
RESTAURANT, INC., TIN CHENG, WANG ZHI GANG,  
QIN ZHOW CHEN, JIN PING ZHO,

Third Party Defendants.

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**Kelly O'Neill Levy, J.S.C.:**

In this personal injury action brought by plaintiff, who was injured at a construction site, third-party defendant Oceanica Chinese Restaurant, Inc. (Oceanica) moves for summary judgment dismissing the third-party complaint as against it on the ground that it is barred by the Workers Compensation Law, and defendant/third-party plaintiff Mehran Enterprises, Ltd. (Mehran) cross-moves for summary judgment in the main action, dismissing plaintiff's claims for damages pursuant Labor Law § 241 (6) and § 200, OSHA violations and common law negligence, and also cross-moves for summary judgment against all defendants in the third-party action, on its claim for contractual and common law indemnification, and to enforce a personal guarantee against

defendants Tin Cheng, Wang Zhi Gang, Qin Zhou Chen (Chen), and Jin Ping Zhou (Zhu).<sup>1</sup>

### **Factual and Procedural Background**

Plaintiff, a construction worker, was injured on September 7, 2012, when, while standing on a ladder fixing a hole in the ceiling, the ladder began to shake and then pitch to one side, causing him to fall and sustain injuries. At the time of the accident, plaintiff was working at 37-02 Main Street, Flushing, New York, a building owned by defendant/third-party plaintiff Mehran. Mehran leased the building to defendant Future Queens Realty, Inc. who, on May 30, 2012, sublet the second floor of the building to Tin Cheng, Wang Zhi Gang, Chen, and Zhu. On June 29, 2012, Tin Cheng, Wang Zhi Gang, Chen, and Zhu assigned the sublease to third-party defendant Oceanica. Plaintiff was an employee of Oceanica.

According to plaintiff's deposition testimony, while he was working on this construction project, the construction and renovation of a Chinese restaurant, he received all his direction from a construction contractor known as Tian Ming Zheng and from a Cantonese man, who wore glasses and had previously worked at a car dealer. Plaintiff did not know the Cantonese man's name. On the day of the accident, Tian Ming Zheng instructed plaintiff to fix a hole in the ceiling in the kitchen area of the restaurant. A ladder was available for plaintiff's use. Plaintiff described the four-rung ladder as constructed of old wood, and stated that the screw holding the third rung in place (the second to the top rung), was loose. In order to reach the hole in the ceiling, plaintiff leaned the ladder against a large kitchen freezer. As plaintiff climbed up the ladder, while also

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<sup>1</sup> Defendant/third-party defendant Qin Zhou Chen is referred to as Qin Zhou Chen in the third-party complaint. Defendant/third-party defendant Jin Ping Zhou is referred to as Jin Ping Zho in the third-party complaint, however, in his papers, he refers to himself as Jin Ping Zhu. Therefore, the court will refer to him as he refers to himself, and, for the purposes of this motion, will refer to him as Zhu.

holding an electric drill, he felt the ladder move to one side, causing him to fall to the ground. Plaintiff states that, prior to the accident, he did not know that there was a loose screw on the ladder.

On September 30, 2013, plaintiff commenced this personal injury action. In mid-2015, plaintiff served a supplemental amended complaint. On July 28, 2015, Mehran and Future Queens Realty, Inc. served an amended answer. Defendants Seaport Restaurant, Inc., Tian Ming Zheng, and Zhi Wang Gang, although served, have not appeared in the main action.

In late 2014, Mehran commenced a third-party action against the third-party defendants. In its third-party complaint Mehran asserts causes of action sounding in common-law indemnification, contractual indemnification, and breach of contract for third-party defendants' failure to procure insurance, as provided in the sublease. On February 4, 2015, Oceanica filed a third-party answer which did not raise a Workers Compensation Law defense. On September 2, 2015, Chen and Zhu filed an amended third-party answer. Third-party defendants Seaport Restaurant, Inc., Tin Cheng, and Wang Zhi Gang have not appeared in the third-party action.

On July 16, 2014, the court (Anil C. Singh, J.) issued a preliminary conference order directing, among other things, that dispositive motions, if any, shall be made within 60 days of the filing of the note of issue. In mid-2015, this case was transferred to the undersigned. On August 31, 2016, the undersigned signed a compliance conference order which states that, pursuant to this part's rules, all dispositive motions shall be filed within 120 days of the filing of the note of issue.

On March 1, 2016, the court granted plaintiff's motion for the entry of a default judgment against defendants Seaport Restaurant, Inc., Tian Ming Zheng, and Zhi Gang Wang.

On February 23, 2017, plaintiff filed his note of issue.

On March 29, 2017, Oceanica made this motion for summary judgment dismissing the third-party complaint as against it on the ground that, since plaintiff was its employee, and he applied for, and received, worker compensation benefits, and did not suffer a grave injury as defined by the Workers Compensation Law, Mehran has no right to seek indemnification or contribution from it. After, Oceanica moved to amend its answer to assert a Workers Compensation defense, which the court granted without opposition pursuant to Decision and Order of June 28, 2017.

On May 1, 2017, Mehran filed a cross motion for summary judgment seeking dismissal of plaintiff's common law negligence Labor Law § 200 claim and his Labor Law § 241(6) claim. Although plaintiff initially opposed this cross motion, at the August 23, 2017 oral argument on these motions before this court, plaintiff, on the record, withdrew his opposition, and stated that he intended to proceed solely on his Labor Law § 240(1) claim.

Mehran also cross-moves for summary judgement on its third-party complaint against all third-party defendants on its claim for contractual and common law indemnification, and to enforce a personal guarantee against defendants Tin Cheng, Wang Zhi Gang, Chen, and Zhu. In support of its motion, Mehran argues that it is entitled to contractual indemnification because pursuant to Article VII, paragraphs 19-21, of the sublease between Future Queens Realty, Inc. and Tin Cheng, Wang Zhi Gang, Chen, and Zhu (the subtenants), the subtenants agreed to indemnify and hold the tenant (Future Queens Realty, Inc.) and landlord (Mehran) harmless from any and all liabilities, loss, damages, claims, demands, and cause of action of any nature, whatsoever, including attorney's fees and costs. Mehran also argues that the sublease requires the subtenant to obtain insurance, including liability insurance in the amount of \$4 million per occurrence and \$4

million in the aggregate. Mehran contends that the sublease was signed by Tin Cheng, Wang Zhi Gang, Chen, and Zhu individually, and as guarantors. Mehran argues that these provisions of the lease are enforceable. Mehran also argues that it is entitled to common law indemnification because it is not at fault for plaintiff's injury, but may be held liable pursuant to the Labor Law. Therefore, since Mehran may be held vicariously liable for the third-party defendants' negligence, it is entitled to seek common law indemnification from them.

Third-party defendant Oceanica opposes Mehran's cross motion arguing that it is untimely. Oceanica notes that, pursuant to the July 16, 2014 preliminary conference order, all dispositive motions must be filed within 60 days of the filing of the note of issue. Oceanica notes that plaintiff filed the note of issue on February 23, 2017, however Mehran did not file its motion until May 1, 2017, 8 days after the 60-day period had expired. Further, according to Oceanica, Mehran has not offered good cause for why this court should consider this untimely motion.

Defendants/third-party defendants Chen and Zhu also oppose Mehran's cross motion on the ground that it is untimely. Chen and Zhu also argue that Mehran is not entitled to summary judgment on its claims of contractual and common law indemnification, and enforcement of a personal guarantee. Chen and Zhu note that on June 29, 2012, Oceanica assumed the sublease between Queens Future Realty, Inc. and Tin Cheng, Wang Zhi Gang, Chen, and Zhu, and there is no language in the sublease that states that, if the sublease is assigned, Chen and Zhu were to remain liable for the assignee's obligations. Chen and Zhu also argue that, while Mehran claims they personally guaranteed the sublease, a copy of the sublease was not submitted with Mehran's cross motion. Based on these facts, Chen and Zhu argue that Mehran has not established prima facie entitlement to summary judgment on its contractual indemnification claim. Chen and Zhu

also note that Mehran did not assert a cause of action for breach of a personal guarantee in its third-party complaint. Chen and Zhu argue further that they did not intend, or agree, to become personal guarantors of Oceanica's performance under the sublease.

In reply, Mehran argues that its motion was timely because, pursuant to this court's part rules, the parties have 120 days after the filing of the note of issue to file dispositive motions, the preliminary conference order notwithstanding. Further, even if the period within which to file its motion was 60 days, since the note of issue was mailed on February 23, 2017, it had 60 days plus five additional days due to plaintiff mailing the note of issue. Therefore, dispositive motions were due on April 29, 2017, but since that day was a Saturday, dispositive motions were to be filed on Monday May 1, 2017. Therefore, its cross motion was timely.

On November 6, 2017, this court granted plaintiff's motion for partial summary judgment on the issue of liability against Mehran, finding that plaintiff established his claim pursuant to Labor Law § 240(1), as a matter of law, and that Mehran failed to raise an issue of fact precluding summary judgment in plaintiff's favor on that claim.

### **Discussion**

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor [CPLR 3212, subd. (b)], and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must show facts sufficient to require a trial of any issue of fact [CPLR 3212, subd. (b)]" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980][internal quotation marks omitted], quoting *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 [1979]). If the movant fails to establish

entitlement to summary judgment as a matter of law, summary judgment must be denied, regardless of the sufficiency of the opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

#### **Oceanica's Motion for Summary Judgment Dismissing the Third-Party Complaint**

Upon Oceanica's amending its third-party answer to assert a defense of Workers Compensation, Mehran withdrew its opposition to this motion. Accordingly, Oceanica's unopposed motion for summary judgment dismissing the third-party complaint as against it should be granted.

#### **Mehran's Cross Motion for Summary Judgment**

At the outset, the court notes that plaintiff does not oppose the dismissal of its Labor Law § 241 (6) and § 200 claims asserted against Mehran. Accordingly, Mehran's cross motion to dismiss those claims should be granted.

Further, contrary to Oceanica's and Chen and Zhu's arguments, Mehran's cross motion for summary judgment in its favor on its contractual indemnification, common law indemnification, and enforcement of personal guarantee claims, is timely. Although the July 16, 2014 preliminary conference order signed by Justice Singh states that all dispositive motions shall be made within 60 days of the filing of the note of issue, on August 31, 2016 the undersigned signed a compliance conference order which states that, pursuant to this part's rules, all dispositive motions shall be filed within 120 days of the filing of the note of issue. Notably, preliminary conference orders do not fall under the law of the case doctrine (*see Allstate Ins. Co. v Buziashvili*, 71 AD3d 571 [1st Dep't 2010]). Therefore, the parties had 120 days from February 23, 2017, the date of the filing of the note of issue, to file their dispositive motions.

Nevertheless, Mehran's cross motion for summary judgment must be denied because Mehran has failed to sustain its burden of establishing prima facie entitlement to summary judgment as a matter of law (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853).

Although Mehran claims it is entitled to contractual indemnification from the third-party defendants Tin Cheng, Wang Zhi Gang, Chen, and Zhu, and to enforce their personal guarantees, it failed to submit a copy of the sublease upon which it relies to make these claims. In its cross motion, Mehran refers to Exhibit M as containing the sublease and the personal guarantees, but Exhibit M merely contains the "First Amendment to Agreement of the Sub-lease," a "Corporate Guarantee," and the "Assignment and Assumption of Sub-Lease" (*see Terrasi aff*, exhibit M). Exhibit M does not contain a copy of the May 30, 2012 sublease signed by Tin Cheng, Wang Zhi Gang, Chen, and Zhu. Accordingly, Mehran has not established the terms of the sublease, or that the sublease was personally guaranteed by Tin Cheng, Wang Zhi Gang, Chen, and Zhu. Moreover, Mehran has not addressed how the assignment of the sublease to Oceanica affects Tin Cheng, Wang Zhi Gang, Chen, and Zhu's obligations under the sublease. It is also important to note that Mehran's third-party complaint does not assert a claim seeking enforcement of a personal guarantee against Tin Cheng, Wang Zhi Gang, Chen, and Zhu.

Further, with respect to Mehran's claim for common law indemnification, the doctrine of implied indemnity permits one who is held vicariously liable solely on the count of the negligence of another to shift the entire burden of the loss to the actual wrongdoer (*see Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449,452 [1st Dep't 1985]). Here, Mehran is seeking common law indemnity from Tin Cheng<sup>2</sup> and Wang Zhi Gang (non-appearing third-party

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<sup>2</sup> Mehran alleges that non-appearing third-party defendant Tin Cheng is also known as

defendants), and Chen, and Zhu (appearing third-party defendants), however, Mehran has not presented any evidence that these third-party defendants were personally involved in the work being performed by plaintiff, or that they are in any way responsible for plaintiff's accident. It is worth noting that there is no dispute that plaintiff was an employee of Oceanica at the time of the accident, and that his work was supervised by Tian Ming Zheng. Further, at each of their depositions, Chen and Zhu testified that they had no authority to supervise the work being performed by plaintiff, and that they had never met plaintiff. Accordingly, Mehran failed to establish, as a matter of law, that Tin Cheng, Wang Zhi Gang, Chen, and Zhu were responsible for plaintiff's accident, and, thus is not entitled to summary judgment on its common law indemnification claim.

In view of Mehran's failure to establish prima facie entitlement to summary judgment as a matter of law, its cross motion seeking summary judgment on its common law and contractual indemnity, and enforcement of guarantee claims, must be denied. *See Jackson v Manhattan Mall Eat LLC*, 111 AD3d 519, 520 [1st Dep't 2013].

Accordingly, it is hereby

ORDERED that third-party defendant Oceanica Chinese Restaurant, Inc.'s motion for summary judgment dismissing the third-party complaint as against it is granted; and it is further

ORDERED that defendant/third-party plaintiff Mehran Enterprises Ltd.'s cross motion for summary judgment is granted to the extent that plaintiff's Labor Law § 241(6) and § 200 claims are dismissed, and is otherwise denied.

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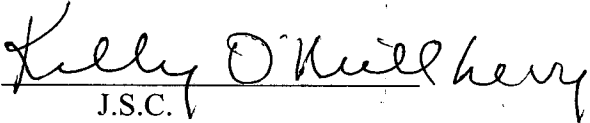
Tian Ming Zheng, plaintiff's supervisor on the day of the accident, but offers no evidence to support that claim.

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: February 6, 2018

ENTER

  
J.S.C.

HON. KELLY O'NEILL LEVY  
J.S.C.