

**Molly's Milk Truck Sweet & Savory LLC v 214  
Knickerbocker LLC**

2023 NY Slip Op 33512(U)

October 6, 2023

Supreme Court, Kings County

Docket Number: Index No. 509119/18

Judge: Debra Silber

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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 6<sup>th</sup> day of October, 2023.

P R E S E N T:

HON. DEBRA SILBER,

Justice.

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MOLLY’S MILK TRUCK SWEET & SAVORY LLC and HODA MAHMOODZADEGAN,

Plaintiffs,

**DECISION / ORDER**

- against -

Index No. 509119/18  
Mot. Seq. # 13, 14, 15, 16

214 KNICKERBOCKER LLC, SHER MANAGEMENT INC., SHULEM HERMAN, SURY HERMAN, MOSES POLLACK, SHLOME BREUER, JOHN DOE 1-8, JANE DOE 1-8 and XYZ CORP.,

Defendants.

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214 KNICKERBOCKER LLC,

Third-Party Plaintiff,

- against -

CINERGY CONTRACTING, INC.,

Third-Party Defendant.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Cross-Motion, Affidavits (Affirmations) and Exhibits \_\_\_\_\_

413-430, 454 432-452 455-463  
468-500

Opposing Affidavits (Affirmations) and Exhibits\_\_\_\_  
Reply Affidavits (Affirmations) and Exhibits \_\_\_\_\_

469-500, 557-587, 589, 605 506-554  
591-593, 600 595-599

Upon the foregoing papers in this landlord/tenant dispute regarding the first-floor commercial unit of the mixed-use property at 214 Knickerbocker Avenue in Brooklyn (Block 3174, Lot 34) (Building), defendants Suri Herman (s/h/a “Sury Herman”) (Suri), Moses Pollack (Pollack) and Shlome Breuer (Breuer) move (in motion sequence [mot. seq.] 13) for an order: (1) granting them summary judgment dismissing the third amended complaint as against each of the three of them, with prejudice, pursuant to CPLR 3212, and (2) all of the defendants move for summary judgment dismissing the fifth, sixth, seventh, eighth, ninth, tenth, eleventh, seventeenth and eighteenth causes of action with prejudice (NYSCEF Doc No. 413).

Third-Party Defendant Cinergy Contracting, Inc. (Cinergy) moves (in mot. seq. 14) for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the third-party complaint (*see* NYSCEF Doc No. 432).

Defendant/Third-Party plaintiff 214 Knickerbocker LLC (Landlord or Knickerbocker) and defendants Sher Management, Inc., Shulem Herman, Suri Herman, Pollack, and Breuer collectively move (in mot. seq. 15) for an order, pursuant to CPLR 4102, vacating plaintiffs’ jury trial demand and directing that the trial in this action shall be a bench trial (*see* NYSCEF Doc No. 455).

Plaintiffs Molly’s Milk Truck Sweet & Savory LLC (Molly’s or Tenant) and Hoda Mahmoodzadegan (Hoda), the owner and operator of Molly’s, cross-move (in mot. seq. 16) for an order, pursuant to CPLR 3212, granting them partial summary judgment on the first, second, third, fourth, fifth, sixth, seventh, twelfth, fourteenth and fifteenth causes of action

asserted against defendants Knickerbocker, Shulem, and Sher Management *only* (NYSCEF Doc No. 468).

### **Background**

On May 9, 2022, after leave to amend was granted, in part, by this court's April 21, 2022 decision and order (*see* NYSCEF Doc No. 369), plaintiffs timely e-filed their third amended complaint, *verified by counsel*, alleging that “[t]his Action is based, in part, upon the gross negligence and/or the intentional infliction of harm caused to plaintiffs by co-defendant Shulem Herman, a corporate officer of co-defendant . . . Knickerbocker . . . and Sher Management . . .” (NYSCEF Doc No. 375 at ¶ 1).

The third amended complaint alleges that “[o]n June 4, 2016, MOLLY’S entered into a written lease agreement with the Landlord [Knickerbocker]” to operate a restaurant/café on the first floor of the Building (*id.* at ¶¶ 33-34).<sup>1</sup> There were two commercial spaces at the Building. Defendant Shulem allegedly executed the lease on behalf of Knickerbocker and Hoda allegedly executed the lease on behalf of Molly’s (*id.* at ¶¶ 35-36). “The Lease was for a term of five years commencing February 1, 2017 and expiring on January 31, 2022” (*id.* at ¶ 37). Molly’s allegedly “expended upwards of \$300,000 to prepare the premises for occupancy” including “the purchase of fixtures, food items, advertising materials, menus, interior decorations, packaging items” and the lease of kitchen equipment (*id.* at ¶¶ 44-46). Molly’s was allegedly opened for business in May 2017 and was allegedly successful through November 2017 (*id.* at ¶ 51). Plaintiff’s principal testified that she was “forced to close” in December of 2017 [Doc 440 Page 41]. It is noted here that defendant

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<sup>1</sup> The court notes that this appears to be a typo. The lease is dated January 30, 2017.

Shulem Herman avers in an affidavit that Molly's had already leased the premises from the prior owner, but had not yet moved in, and that after Knickerbocker took title, it entered into this five-year lease described [Doc 582 ¶3].

In 2017, the Landlord allegedly "hired Cinergy to perform demolition work, reconstruction work, construction work, and renovation work to the Building and the residential premises in the Building over MOLLY's Premises" (*id.* at ¶ 54). Cinergy allegedly recommended that a structural engineering survey of the Building be performed, and a report was subsequently issued on July 12, 2017, which concluded that the Building was "unsafe" and that a gut renovation was needed (*id.* at ¶¶ 56, 58-64). The third amended complaint alleges that "[d]uring the months leading up until and through November 2017, the defendants moved the residential tenants and did not renew any residential leases for the apartments located in the Building" (*id.* at ¶ 68). "On about November 10, 2017, the defendants began to perform construction and demolition work on the floors above the Premises" and allegedly failed to provide Molly's leased premises with adequate protection from damage (*id.* at ¶¶ 70-72).

The third amended complaint alleges that on November 16, 2017, Hoda reported to Shulem that the roof of the restaurant was caving in, and that Molly's had been denied access to the basement where the gas meter was located (*id.* at ¶¶ 74-77). Allegedly, "from December 6, 2017 through April 16, 2018, the defendants were performing work to the gas, electric, and water systems at the Building without any permits . . ." and "[t]he work of the defendants caused substantial damage to, and substantially interfered with MOLLY'S

business operations[,]” including gas, electric, mold, dust, water and structural damage, until Molly’s had to close on December 6, 2018<sup>2</sup> (*id.* at ¶¶ 81-82 and 83-97).

The third amended complaint asserts the following 18 causes of action labeled as: (1) constructive eviction; (2) actual eviction; (3) statutory eviction under RPAPL § 853; (4) conversion of personal property; (5) breach of the covenant of quiet enjoyment; (6) liability against Landlord; (7) liability against Shulem; (8) liability against Sher Management; (9) liability against Suri; (10) liability against Pollack; (11) liability against Breuer; (12) negligence against Knickerbocker; (13) gross negligence against Shulem; (14) negligence against Shulem; (15) intentional tort of wrongful eviction against Shulem; (16) mental suffering; (17) punitive damages; and (18) attorneys’ fees and costs (*see* NYSCEF Doc No. 375).

On June 7, 2022, defendants jointly answered the third amended complaint, denied the allegations therein and asserted 55 affirmative defenses (NYSCEF Doc No. 376). Defendant Knickerbocker had previously filed a third-party complaint against Cinergy for contractual and common law indemnification, contribution, and breach of contract for failing to obtain insurance (*see* NYSCEF Doc No. 427). Third-party defendant Cinergy answered the third-party complaint on March 20, 2020 [Doc 166].

On September 22, 2022, plaintiffs e-filed a note of issue and certificate of readiness for trial and included a demand for a trial by jury (*see* NYSCEF Doc No. 380). Pursuant to the joint trial order, this action is joined for trial with two related actions, 505612/20 and 525545/21.

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<sup>2</sup> This is another typo. Hoda testified that the restaurant closed in December 2017.

### *Defendants' Summary Judgment Motion*

On November 21, 2022, defendants collectively moved for summary judgment dismissing the third amended complaint against the individual defendants Suri, Pollack, and Breuer, with prejudice, and for an order dismissing the fifth, sixth, seventh, eighth, ninth, tenth, eleventh, seventeenth and eighteenth causes of action against all defendants, with prejudice (NYSCEF Doc No. 413).

Individual defendant Breuer has submitted an affirmation which asserts that he was employed by Sher Management from 2017-2018 and that his “job duties were to work ‘in the field’ addressing residential tenant complaints” (NYSCEF Doc No. 414 at ¶¶ 3-4). Breuer affirms that he had some contact with plaintiffs regarding the Building, but that he had no involvement or control over the construction at the Building, specifically:

“During the brief time that I worked there, I do recall being told to go to the commercial space that was rented by the Plaintiffs’ business at 214 Knickerbocker Avenue, Brooklyn, several times. I recall that the individual plaintiff complained that her business had no hot water on one occasion, and I am aware that she complained of water leakage into her space while her business was operating there. I am also aware that at some point her business stopped operating there, while construction renovation work was occurring at residential parts of the building upstairs. During that period, I was periodically asked by the office at Sher to go to the premises to report on the progress of construction upstairs, or, more specifically, where and what the contractor was doing and had appeared to have done up to that point.

“My only specific recollection of working with Plaintiff was on the occasion that she complained that her business had no hot water. On that date, I went there, and I saw that the pilot light on her hot water heater was out, so I re-lit the light, and thereby corrected the situation. I also recall meeting the individual plaintiff there once concerning some repair or work that she

wanted done to her premises after her business was no longer operating at the premises, but I don't recall the details.

“Most importantly, I did not direct or control any construction or renovation work at the premises, including but not limited to with regard to obtaining or not obtaining any permits, and I did not make any decisions in those regards. I also had nothing to do with any decision concerning any alleged eviction or lock out of Plaintiffs from the premises. I was employed as a field person for a property management company. Decisions about evicting tenants or excluding them from a premises were not within the realm of my authority, and I made no decisions in that regard, nor did I direct or control any activities in that regard. As far as the changing of locks there, I do recall that locks and/or keys were changed at some point, but I did not make any decisions in that regard, and I had no authority in that regard. Similarly, I made no decisions concerning any alleged removal of any mailbox at the premises, and I had no authority to make such a decision in any event. Additionally, I have no knowledge concerning any alleged loss of personal property from Plaintiffs’ space, and it was not part of my duties or responsibilities to secure Plaintiffs’ space at the premises while they were not operating there, and I made no decisions in that regard. Finally, I recall that the individual Plaintiff did make complaints of water leaks into her premises, but nothing more. My job duties included addressing leak complaints of residential tenants. Dealing with complaints of a business tenant such as the plaintiffs’ business was not my usual work at Sher [Management], so, if I did anything in that regard, I believe it would have been at the specific request of one of my supervisors, but again, I have no recollection of what, if anything, I was directed to do concerning any alleged water leak into Plaintiffs’ commercial space” (*id.* at ¶¶ 4-6).

Individual defendant Suri, the Chief Executive Officer (CEO) of Sher Management, has submitted an affirmation which avers that she never made any decisions for Sher Management:

“[a]lthough I formerly was an owner or part owner of Sher Management in terms of being so listed on corporate documents, and I was formerly paid small amounts of wages by it for clerical work that I did for it at the request of my husband, the defendant

Shulem Herman, I have never made any executive decisions concerning its business, and my knowledge of its business is limited to that it is a real estate management company. . . .” (NYSCEF Doc No. 415 at ¶ 3).

Suri affirms that she is a housewife who has never been to the Building and that “I did not direct or control and indeed I have no knowledge of any construction or renovation activities that went on there . . .” (*id.* at ¶ 4). Suri denies knowledge that Sher Management’s public filing identifies her as its CEO (*id.* at ¶ 5).

Individual defendant Pollack, a self-described “office employee” of Sher Management from 2016-2021, has also submitted an affirmation in support of the motion. Therein, he states that “[m]y job was to take care of issues that arose in the course of its property management business within its office, although on rare occasions, I would also go outside the office to visit a premises” and “I would do whatever I was asked to do by my employer” (NYSCEF Doc No. 416 at ¶ 4). Regarding the construction at the Building, Pollack affirms:

“I recall that I was there three to five times, after the Plaintiffs’ business on the first floor there stopped operating, in order to check on the progress of renovations going on in the upstairs floors, and report back to Sher [Management] as to what I saw, and what the contractor told me about the progress and stage of construction that they were at. I never directed or controlled any renovation or construction work there, and I had no authority to do so. I was there simply to observe and relay messages between Sher’s office and the contractor working there. . . . Finally, I am aware that while Plaintiffs’ business was operating at the premises, the individual Plaintiff did make complaints of water leaks into her premises, but I have no recollection of anything more than that. In any event, I was not responsible for taking care of her complaints of water leaks into her space. At most, if asked to do so by Sher [Management], I would have contacted a plumber or other contractor or repair person to address any issue

that plaintiffs claimed that they were having, but I have no recollection of doing so” (*id.* at ¶ 4).

Defendants also submitted an attorney’s affirmation in support, which asserts that the third amended complaint only references individual defendants Suri, Pollack and Breuer in the ninth, tenth and eleventh causes of action, which simply allege that those three individuals either “directed and controlled” or were “aware” of certain decisions regarding the construction at the Building, including the decision not to obtain permits, the changing of the locks and the alleged removal of plaintiffs’ mailbox (NYSCEF Doc No. 417 at ¶ 8). Defendants’ counsel argues that the factual allegations in support of the ninth, tenth and eleventh causes of action do not state a claim for negligence, wrongful eviction, conversion and/or trespass, and should be dismissed because the individual defendants each affirm that they “had nothing to do with the ‘decisions’ complained of . . .” (*id.* at ¶¶ 10-13).

Defendants’ counsel contends that the sixth, seventh, eighth, seventeenth and eighteenth causes of action should also be dismissed. Counsel asserts that a claim for punitive damages and an award of attorneys’ fees are not cognizable causes of action in New York (*id.* at ¶¶ 15-16). Defendants’ counsel further asserts that the fifth cause of action for breach of the covenant of quiet enjoyment is subject to dismissal because it “is encompassed within the tenant’s claim of wrongful eviction” (*id.* at ¶ 17).

### ***Plaintiffs’ Partial Summary Judgment Cross Motion***

On January 14, 2023, plaintiffs opposed defendants’ summary judgment motion without actually addressing any of the arguments made therein, and cross-move for partial summary judgment against *only* defendants Knickerbocker, Shulem, and Sher Management

on the first through seventh, twelfth, fourteenth and fifteenth causes of action (*see* NYSCEF Doc No. 468).

Hoda, the principal of Molly's, submits an affidavit, (*see* NYSCEF Doc No. 499) and plaintiffs' counsel similarly submits an affirmation, both of which merely annex exhibits and reference the accompanying memorandum of law (NYSCEF Doc No. 469). Plaintiffs' memorandum of law argues that there are "no triable issues of fact" and that Molly's is entitled to summary judgment on each of its causes of action arising from its eviction "from November 2017 through the expiration of the Lease on January 31, 2022" (NYSCEF Doc No. 501).

### ***Third-Party Defendant Cinergy's Summary Judgment Motion***

On November 21, 2022, third-party defendant Cinergy moved for summary judgment dismissing Knickerbocker's third-party complaint (*see* NYSCEF Doc No. 432). Cinergy submits an affidavit in support from its owner, Patricia Delgado (Delgado), who attests that "[a]s Cinergy's owner, I have been the one to sign contracts into which Cinergy entered with its customers through the years[,] " "[n]obody else signed contracts on behalf of Cinergy" and "I did not give anyone permission or authorization to sign my name onto contracts on Cinergy's behalf" (*see* NYSCEF Doc No. 451 at ¶ 1). Delgado denies Knickerbocker's claim that Cinergy executed a two-page contract on October 11, 2017, with Knickerbocker (*id.* at ¶ 2). Delgado references the purported contract (shown to her at her deposition) and specifically denies that she signed that document (*id.* at ¶ 3). Delgado further attests that "[t]he restaurant on the first floor was closed throughout all of Cinergy's work" and "Cinergy's demolition work . . . took about two weeks and *all of it was performed after the*

*restaurant on the first floor closed*” (*id.* at ¶ 6 [emphasis added]). Delgado asserts that “Cinergy’s work did not cause water to leak or soot, debris, concrete or stones to fall down to the first-floor space” and “[n]obody ever complained to or told Cinergy about its work causing damage, water leaks or soot, debris, concrete or stones to fall down to the first-floor space” (*id.* at ¶ 10).

Cinergy also submits an attorney’s affirmation which asserts that:

“defendants/third-party plaintiffs’ third-party complaint should be dismissed as a whole and as a matter of law because there is neither a factual nor legal basis for any of the third-party claims asserted against Cinergy. There simply was no written, executed, enforceable contract between Cinergy and any defendant/third-party plaintiff pertaining to the subject premises at any time relevant to the events which form the basis of plaintiffs’ claims against defendants/third-party plaintiffs. Consequently, there is no basis for defendants’/ third-party plaintiffs’ breach of contract, failure to procure insurance or reimbursement of defense costs (attorneys’ fees or expenses) claims against Cinergy.

“Similarly, there is no basis for defendants’/third-party plaintiffs’ common law indemnity claim. If plaintiffs prevail on their claims against defendants/third-party plaintiffs, then defendants/third-party plaintiffs will be found liable to plaintiffs for negligence and/or intentional torts, which will extinguish defendants’/third-party plaintiffs’ entitlement to common law indemnification by operation of law . . .

“Finally, there is no basis for defendants’/third-party plaintiffs’ contribution claim against Cinergy because Cinergy’s work at the subject premises did not cause or contribute to the conditions which form the basis of plaintiffs’ claims against defendants/third-party plaintiffs. The record evidence clearly shows that those conditions either pre-existed and/or had nothing whatsoever to do with Cinergy’s work at the subject premises” (NYSCEF Doc No. 434 at ¶¶ 2-4).

Cinergy also submits a memorandum of law which argues that Knickerbocker's third-party claims for contractual and common law indemnification and contribution should be dismissed because: (1) "no written, executed, enforceable contract existed at any time relevant to plaintiffs' claims"; (2) "there is no circumstance under which defendants would be entitled to common law indemnification" for Knickerbocker's alleged torts; and (3) "Cinergy did not cause or contribute to the conditions upon which plaintiffs blame their damages in this case" (NYSCEF Doc No. 453 at page 2).

Cinergy further argues that "the document upon which 214 Knickerbocker relies" is not a binding contract because it "is a two-page writing containing absolutely nothing but bare indemnification and insurance procurement provisions" and "says nothing about scope, pricing or schedule of work" (*id.* at pages 5-6; *see also* NYSCEF Doc No. 452). While the two-page document entitled "Standard Form of Agreement Between Contractor and Subcontractor" appears to have Delgado's signature on behalf of Cinergy on the second page (*see* NYSCEF Doc No. 452 at page 2), Delgado attests that she never executed that document and that she is the only person authorized to sign on behalf of Cinergy.

### ***Knickerbocker's Opposition to Cinergy's Motion***

Knickerbocker, in opposition, submits an expert's affidavit and a memorandum of law, which claim that the two-page contract between Cinergy and Knickerbocker was submitted to a forensic handwriting expert who confirmed Delgado's testimony that it *was not executed* by Delgado, but opined that it *may* have been executed by Angel Guambana (Delgado's husband) (*see* NYSCEF Doc No. 588 at page 2; *see also* NYSCEF Doc No. 571). Knickerbocker argues that "there is an issue of fact as to whether the written

indemnity/insurance procurement agreement was signed by [Guambana], using his wife's name, and there is an issue of fact as to that agreement's execution . . ." (NYSCEF Doc No. 588 at page 6).

Knickerbocker further argues that Cinergy may be held liable for common law indemnification because "the finder of fact could find [Landlord] vicariously liable to plaintiffs as a result of its status as the owner and landlord of the premises, but that all negligence resulting in such a liability was the result of Cinergy's conduct" [*id.* at 5]. Knickerbocker similarly argues that its third-party claim against Cinergy for contribution should not be dismissed because it [Cinergy] admitted that during demolition it did nothing to protect Molly's' downstairs space (*id.*).

### **Discussion**

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "The proponent of a motion for summary judgment 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" (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the

existence of material issues of fact which require a trial of the action” (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]).

***Plaintiffs’ Partial Summary Judgment Cross Motion***

Plaintiffs cross-move (in mot. seq. 16) for partial summary judgment against defendants Knickerbocker, Shulem, and Sher Management (only) on their first, second, third, fourth, fifth, sixth, seventh, twelfth, fourteenth and fifteenth causes of action in the third amended complaint. “To obtain summary judgment it is necessary that the movant establish his cause of action . . . ‘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*” (*Zuckerman v City of New York*, 49 NY2d 557 at 562 [emphasis added]).

Plaintiffs’ partial summary judgment cross motion is based entirely on: (1) the third amended complaint verified by counsel; (2) an attorney affirmation, which has no probative value (*see Zuckerman*, 49 NY2d at 563 [holding that “the bare affirmation of Royfost’s attorney who demonstrated no personal knowledge of the manner in which the accident occurred . . . is without evidentiary value”]); (3) Hoda’s affidavit, which identifies exhibits without laying any foundation for their admission and fails to substantiate any of the factual allegations in the third amended complaint; and (4) a memorandum of law consisting of conclusory legal assertions (NYSCEF Doc Nos. 470, 469, 499 and 501). Plaintiffs’ memorandum of law does not establish a prima facie case for any of the causes of action.

Plaintiffs' cross motion for partial summary judgment is denied in its entirety because plaintiffs have failed to tender admissible evidence to establish plaintiffs' prima facie right to judgment on any of the causes of action set forth in the third amended complaint.

### ***Defendants' Summary Judgment Motion***

Defendants move (in mot. seq. 13) for summary judgment dismissing the third amended complaint as against individual defendants Suri, Pollack and Breuer and dismissing the fifth, sixth, seventh, eighth, ninth, tenth, eleventh, seventeenth and eighteenth causes of action in the third amended complaint against all defendants, with prejudice.

### ***The Fifth Cause of Action***

Defendants argue that the fifth cause of action for breach of the Covenant of Quiet Enjoyment is subject to dismissal because that claim is "encompassed within the tenant's claim of wrongful eviction[,]" citing a non-binding appellate decision (*see* NYSCEF Doc No. 417 at ¶ 17). However, the Appellate Division, Second Department, has held that "[t]o establish a breach of the covenant of quiet enjoyment, a tenant must show actual or constructive eviction" and the alleged "[f]ailure to repair the building can constitute an actual or constructive eviction" (*34-35th Corp. v 1-10 Indus. Assocs., LLC*, 16 AD3d 579, 580 [2005]; *see also Grammer v Turits*, 271 AD2d 644, 645 [2000]).

Here, the fifth cause of action in the third amended complaint is labeled "Liability and Damages against Defendants: Breach of Covenant of Quiet Enjoyment" and alleges that "[t]he Lease provides a provision whereby the Landlord covenants that the Tenant shall peacefully and quietly have, hold and enjoy the premises[,]" "defendants[ ] breached the Lease provision of Quiet Enjoyment" and "Plaintiff has been damaged . . ." (NYSCEF Doc

No. 425 at ¶¶ 207-208). Paragraph 206, however, repeats and realleges the prior factual allegations in the third amended complaint, including the allegations of both constructive and actual eviction of Molly's based on the construction at the Building directed and controlled by Knickerbocker, the Landlord, and/or its principal, Shulem, and/or Sher Management. Thus, under controlling precedent, the fifth cause of action for breach of the covenant of quiet enjoyment is not in fact subject to dismissal as redundant or as being "encompassed" within the other claims.

### ***The Sixth, Seventh and Eighth Causes of Action***

Defendants contend that the sixth, seventh and eighth causes of action asserted against Knickerbocker, Shulem and Sher Management, respectively, are subject to dismissal because "assertions that a defendant 'made decisions' or was 'aware' of alleged changing of locks at the premises or a purported removal of mailboxes . . . do not state any claim of any kind" "because there is no allegation of negligence or other tortious conduct, and because plaintiffs do not have standing to assert private causes of action against a building owner because of purported violations of municipal law" (NYSCEF Doc No. 417 at ¶ 14).

The sixth cause of action seeks to assert liability upon Knickerbocker, the Landlord, by alleging that "Landlord directed, controlled, and otherwise made the decision that construction work, renovations, and repairs be performed to the Building *without first obtaining property [sic] permits* from the City of New York" (NYSCEF Doc No. 425 at ¶¶ 210-217 [emphasis added]). The sixth cause of action further alleges that Knickerbocker also decided to change the locks and remove the mailbox (*id.* at ¶¶ 218-221). The seventh cause of action alleges that defendant Shulem "dominated and controlled Landlord[,]" "used

his domination of Landlord to . . . misuse the corporate form in order to commit a fraud or wrong against the Plaintiffs” and made the forgoing decisions on behalf of Knickerbocker (*id.* at ¶¶ 223-234). The eighth cause of action alleges that defendant Sher Management similarly made the foregoing decisions on behalf of Knickerbocker (*id.* at ¶¶ 236-247).

The sixth, seventh and eighth causes of action are dismissed to the extent that they are predicated upon the allegations that defendants Knickerbocker, Shulem and Sher Management are liable to plaintiffs because they directed construction work at the Building without obtaining the requisite municipal permits. There is no authority cited which holds that failure to comply with Administrative Code § 27-147, which prohibits the commencement of construction work without a permit, creates a private cause of action (*see Bello v Santiago*, 23 Misc 3d 1127 (A), \*21 [Sup. Ct. Kings County 2009]). Thus, plaintiffs lack standing to assert such a claim because there is no private right of action for failure to obtain municipal permits for construction work.

The sixth, seventh and eighth causes of action otherwise allege that defendants Knickerbocker, Shulem, and Sher Management constructively evicted Molly’s by changing the locks and removing the mailbox, a claim which is already asserted in the first cause of action in the third amended complaint. In addition, the seventh and eighth causes of action allege that both Shulem and Sher Management controlled Knickerbocker, and that Shulem disregarded the corporate form when doing so. This is insufficient to make a claim for “piercing the corporate veil” as it is established that Sher Management was the property manager, and Shulem was a principal of Knickerbocker. Consequently, the sixth, seventh

and eighth causes of action are dismissed as they fail to state cognizable causes of action against Knickerbocker, Shulem, or Sher Management.

***The Ninth, Tenth and Eleventh Causes of Action***

The ninth, tenth and eleventh causes of action in the third amended complaint, each labeled as “Liability and Damages . . .” which contain nearly identical allegations, asserted against each individual defendant, that is, Suri (ninth), Pollack (tenth), and Breuer, (eleventh) respectively, are hereby dismissed. The third amended complaint alleges that these individual defendants were sued because they were all officers or employees of Sher Management at the time that Molly’s occupied the first floor of the Building, and were “aware” of “the decision” to perform construction and demolition work at the Building without the requisite permits, and directed and controlled that decision (NYSCEF Doc No. 425 at ¶¶ 11-13 and 249-289).

Plaintiffs’ counsel advised the court during the July 20, 2023 oral argument on the parties’ summary judgment motions and cross motions that plaintiffs’ claims asserted against the individual defendants in the ninth, tenth and eleventh causes of action are for “negligence.” However, the third amended complaint fails to allege any of the essential elements of a negligence cause of action (or any other cause of action),<sup>3</sup> and does not aver that the individual defendants Suri, Pollack and/or Breuer breached a duty that he/she owed to Molly’s or its principal, Hoda, which resulted in damages to Molly’s and/or Hoda. Consequently, the ninth, tenth and eleventh causes of action are dismissed as they fail to

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<sup>3</sup> “The elements of negligence are (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom” (*Abbott v Johnson*, 152 AD3d 730, 732 [2017] [internal quotation marks omitted]).

state a legally cognizable claim against the individual defendants Suri, Pollack, and Breuer under New York law.

***The Seventeenth and Eighteenth Causes of Action***

The seventeenth cause of action in the third amended complaint seeks punitive damages based on allegations that “[t]he defendants’ conduct demonstrates a high degree of moral culpability” and “a willful or wanton negligence or recklessness indicating a conscious disregard for the rights of the Plaintiff” (NYSCEF Doc No. 425 at ¶¶ 337-341). However, the Second Department has long held that “[a] demand for punitive damages does not itself constitute a separate legal theory upon which relief may be sought, nor can a claim for punitive damages be stated as a separate cause of action” (*Roldan v Allstate Ins. Co.*, 149 AD2d 20, 38 [1989]). Accordingly, the seventeenth cause of action in the third amended complaint for punitive damages is dismissed, as a matter of law.

The eighteenth cause of action in the third amended complaint seeks an award of attorneys’ fees and costs (NYSCEF Doc No. 425 at ¶¶ 343-344). The Court of Appeals has long held that attorneys’ fees and costs “are merely incidents of litigation and thus are not compensable in the absence of statutory authority providing for such” (*City of Buffalo v J. W. Clement Co.*, 28 NY2d 241, 262-263 [1971]). In the absence of such statutory authority, or any contractual provision in the parties’ lease [Doc 475], the eighteenth cause of action for attorneys’ fees and costs is dismissed.

## *Cinergy's Summary Judgment Motion*

### *Contractual Indemnification and Breach of Contract*

“A party’s right to contractual indemnification depends upon the specific language of the relevant contract” (*Sawicki v GameStop Corp.*, 106 AD3d 979, 981 [2013]). “In the absence of a legal duty to indemnify, a contractual indemnification provision ‘must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed’” (*Alfaro v 65 W. 13th Acquisition, LLC*, 74 AD3d 1255, 1255-1256 [2010] [quoting *Hooper Assocs. v AGS Computers*, 74 NY2d 481, 491 (1989)]). “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 facts and circumstances” (*Hooper Assocs v AGS Computers*, 74 NY2d at 491). Of course, a claim for contractual indemnification, like a breach of contract claim, cannot stand if there is no valid contract between the parties (*see Carter v Nouveau Indus., Inc.*, 187 AD3d 702, 704 [2020]).

Here, Cinergy has argued that the “contract” between Knickerbocker and Cinergy – which is separate from the invoices and work orders, so that it solely contains provisions requiring Cinergy to indemnify Knickerbocker and to procure liability insurance but does not define the work contracted for, is not enforceable. It claims that Delgado provided uncontroverted testimony that she did not execute the purported agreement although her name appears on the second page. Delgado also attested that nobody, including her husband, was authorized to sign her name on Cinergy’s behalf. Shulem, who executed the two-page document on behalf of Knickerbocker, had no independent recollection of the execution of the document when questioned at his deposition. Knickerbocker’s own forensic handwriting

expert witness confirmed Delgado's testimony by concluding that Delgado did not execute the two-page agreement on behalf of Cinergy but opines that perhaps her husband signed it.

When a term or clause in a contract is ambiguous, or when the parties' intent to execute the contract is ambiguous, and the determination of the parties' intent depends upon the credibility of extrinsic evidence or a choice among inferences which can be drawn from the extrinsic evidence, then the issue is one of fact. Thus, the court finds that this testimony from Delgado with regards to whether or not the contract, addressed to contractual indemnification and insurance, is enforceable, does not make a prima facie case for summary judgment. Delgado does not dispute that Cinergy performed construction work at the Building. This issue is not appropriate for summary judgment. (*see Skrok v Grand Loft Corp.*, 218 AD3d 702, 703 [2d Dept 2023]).

### ***Common Law Indemnification***

“The key element of a cause of action for common-law indemnification is not a duty running from the indemnitor to the injured party, but rather, is a separate duty owed the indemnitee by the indemnitor” (*Metadijia Atanasoki v Braha Indus., Inc.*, 124 AD3d 705, 706 [2015]). “Since the predicate of common-law indemnity is *vicarious* liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine” (*id.* at 706 [emphasis added]).

Here, Cinergy has not established its prima facie entitlement to judgment as a matter of law dismissing Knickerbocker's third-party claim for common-law indemnification. It cannot be determined from the record whether Knickerbocker's claimed liability to Molly's

for constructive and actual eviction, conversion, and negligence, was, if proven, caused solely by Knickerbocker, as Cinergy alleges. Knickerbocker claims its liability, if any, is solely vicarious, and that it was conduct by Cinergy which was negligent and caused the plaintiffs' damages.

### ***Contribution***

“To sustain a third-party cause of action for contribution, a third-party plaintiff is required to show that the third-party defendant owed it a duty of reasonable care independent of its contractual obligations [, if any], or that a duty was owed to the plaintiffs as injured parties and that a breach of that duty contributed to the alleged injuries” (*Santoro v Poughkeepsie Crossings, LLC*, 180 AD3d 12, 17 [2019]). “All that is required for contribution is that two people be held liable for the same . . . injury” (*id.* at 17).

Here, Cinergy argues that any demolition work it performed at the Building was performed *after* Molly's was already out of possession of the first floor of the Building. Knickerbocker, in opposition, provides some twenty-five or so exhibits which raise issues of fact which prevent the court from finding that Cinergy makes a prima facie case. Document 582 is an affidavit from Shulem Herman in which he avers that Molly's had complained about water leaks in May and June of 2017, which Sher Management addressed to Molly's satisfaction. However, Shulem then states [Doc 582 ¶6] that

“in November of 2017, Molly's first complained about an entirely different situation. This time, Hoda alleged that she heard a loud cracking noise coming from above Molly's leased space, and that she was concerned that the building might collapse. 214 Knickerbocker investigated the situation, and a decision was made to renovate the entire building to ensure that the building would be structurally sound. Molly's was made aware of that decision, and that it would have to eventually

vacate the premises temporarily so renovations could be completed, and 214 Knickerbocker and Molly's subsequently entered into an agreement whereby Molly's agreed to temporarily vacate the premises, in consideration for certain payments to it from 214 Knickerbocker. It is my understanding that in this action Molly's alleges, among other things, that its equipment and other property at the premises was damaged during the period that the premises had been vacated by it, while renovation was on-going at the premises, and shortly before then at the end of November of 2017, it incurred business interruption for a certain period because hot water and gas to Molly's space at the premises was shut off due to renovation work being done in the upper floor residential areas of the premises. The general contractor hired for renovations that began at the premises in late November of 2017, and continued through June of 2018, was the third-party defendant, Cinergy Contracting, Inc.”

As such, the portion of Cinergy’s motion seeking dismissal of the third-party claim for contribution is denied.

Accordingly, it is hereby

**ORDERED** that defendants’ summary judgment motion (mot. seq. 13) is only granted to the extent that the sixth, seventh and eighth causes of action are dismissed as against defendants Knickerbocker, Shulem Herman and Sher Management, the ninth, tenth and eleventh causes of action asserted against the individual defendants Suri, Pollack and Breuer, respectively, are dismissed, and the seventeenth (punitive damages) and eighteenth (attorneys’ fees and costs) causes of action asserted in the third amended complaint are dismissed with prejudice; defendants’ summary judgment motion is otherwise denied; and it is further

**ORDERED** that third-party defendant Cinergy’s summary judgment motion (mot. seq. 14) is denied in its entirety; and it is further

**ORDERED** that defendant/third-party plaintiff Knickerbocker's and defendants Sher, Shulem, Suri, Pollack, and Breuer's motion (mot. seq. 15) for an order, pursuant to CPLR 4102, vacating plaintiffs' jury trial demand is granted based on the plain terms of the lease between Molly's and Knickerbocker,<sup>4</sup> and this action shall proceed as a bench trial; and it is further

**ORDERED** that plaintiffs' cross motion (mot. seq. 16) for partial summary judgment is denied in its entirety; and it is further

**ORDERED** that this action, along with the two actions joined for trial, 505612/20 and 525545/21, shall appear on the NJTRP calendar on December 6, 2023.

This constitutes the decision and order of the court.

E N T E R,



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Hon. Debra Silber, J.S.C.

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<sup>4</sup> Paragraph 8 of the lease provides that "*Tenant waives and will waive all right to trial by jury in any summary proceedings hereafter instituted by Landlord against Tenant in respect to the demised premises or any action to recover rent or damages hereunder*" (NYSCEF Doc No. 419, lease at ¶ 8 [emphasis added]).