

**GFE E Fordham Rd. LLC v 361 E. Realty Assoc.,
LLC**

2025 NY Slip Op 31352(U)

April 10, 2025

Supreme Court, New York County

Docket Number: Index No. 653299/2024

Judge: Arthur F. Engoron

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ARTHUR F. ENGORON PART **37**

Justice

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GFE E FORDHAM ROAD LLC,	INDEX NO. <u>653299/2024</u>
Plaintiff,	MOTION DATE <u>09/05/2024</u>
- v -	MOTION SEQ. NO. <u>001</u>

361 EAST REALTY ASSOCIATES, LLC, STARR
INDEMNITY & LIABILITY COMPANY, JEM REALTY
MANAGEMENT, INC., KELVIN PERDOMO, AND JFZ
CONSTRUCTION, INC.,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 33,

were read on this motion to

DISMISS

Upon the foregoing documents, and for the reasons stated hereinbelow, defendants' motion to dismiss, pursuant to CPLR 3211(a)(7), is granted in part and denied in part.

Background

On December 18, 2023, defendant Kelvin Perdomo commenced a sidewalk trip-and-fall lawsuit in this Court, Kelvin Perdomo v 361 E. Realty Assocs., LLC, et al., Index No. 161139/2022, against 361 East Realty Associates, LLC ("361 East"), Jem Realty Management, Inc. ("Jem"), G.F. Enterprise, LLC, GFE E Fordham Road LLC ("GFE") and JFZ Construction, Inc. ("JFZ") (the "Underlying Action"). NYSCEF Doc. No. 3.

The Lease

On March 6, 2019, 361 East, as landlord, and GFE, as tenant, entered into a lease (the "Lease") for the ground floor of 363 East Fordham Road, the Bronx, NY (the "Premises"). NYSCEF Doc. No. 14. Section 40 of the Lease, titled "Rider Controls," incorporates a rider of sections numbered above 40 into the Lease, the provision of which control. Id.

Pursuant to Section 30 of the Lease, "if the premises are situated on the street floor, Tenant shall, at Tenant's sole cost and expense, make all repairs and replacements to the sidewalks and curbs adjacent thereto..." Id.

Pursuant to Section 111 (p), Article 30, of the Lease, "Landlord is obligated to repair and replace the sidewalks at Landlord's sole cost and expense, unless such repairs or replacements are necessary as a result of Tenant or Tenant's Parties, neglect, omission or misuse." Id.

Pursuant to Section 46(a) of the Lease, GFE agreed to defend, pay, indemnify and hold harmless 361 East for incidents occurring within the Premises. Id. Pursuant to Section 46(f), 361 East agreed to defend, pay, indemnify, and hold harmless GFE for incidents occurring “in, upon,, at or from the Building or its appurtenances.” Id.

Pursuant to Section 8 of Lease, GFE agreed to maintain commercial general liability insurance and to “indemnify and save harmless Landlord from and against any and all liabilities, obligations, damages, penalties, claims, costs and expenses for which Landlord shall not be reimbursed by insurance, including reasonable attorneys' fees and disbursements, paid, suffered or incurred as a result of any breach by Tenant.” Id.

On July 15, 2022, defendant Starr Indemnity & Liability Company (“Starr”) issued a commercial general liability policy, effective from July 1, 2022 to July 1, 2023, to non-party ComJem Associates, Inc., and its subsidiaries, as “Named Insureds,” Policy No. 100305215221 (the “Starr Policy”). NYSCEF Doc. No. 15.

The Underlying Action

In the Underlying Action, Perdomo alleges that on August 13, 2022, he was seriously injured while walking on the sidewalk abutting the Premises, then operating as a Taco Bell. NYSCEF Doc. No. 12. The incident was allegedly due to a defect in the sidewalk that Perdomo said “caused [him] to fall and sustain multiple injuries by reason [of] the negligence, carelessness and want of proper care of the [underlying] defendants, their agents, servants and/or employees.” NYSCEF Doc. No. 3 ¶ 49.

On January 16, 2024, GFE asserted the following crossclaims in the Underlying Action against 361 East only: (1) contribution; (2) common-law indemnification; (3) contractual indemnification; (4) failure to procure insurance; and (5) breach of lease. NYSCEF Doc. No. 13.

The Instant Action

On June 28, 2024, GFE commenced the instant action against defendants, seeking a declaration that: (1) the Underlying Action is covered by the Starr Policy; (2) 361 East was obligated, pursuant to the Lease, to repair and replace the subject sidewalk; (3) 361 East is required to defend and indemnify GFE in the Underlying Action; and (4) essentially, pursuant to the Lease, GFE has no financial responsibility in the Underlying Action. NYSCEF Doc. No. 2.

GFE alleges, inter alia, that defendant Starr has not issued a timely disclaimer to GFE in the Underlying Action as required by Insurance Law § 3420(d), that Starr’s alleged failure to comply with Insurance Law § 3420(d) precludes it from denying coverage to GFE based upon a policy exclusion, and that Starr’s failure to give timely notice of disclaimer of coverage makes Starr an insurer of GFE for claims arising out of the alleged accident. Id.

On September 5, 2024, defendants, 361 East and Starr, moved: (1) pursuant to 3211(a)(7), to dismiss GFE’s claims against moving defendants with prejudice; and (2) pursuant to CPLR 3001, for a declaration that Starr has no duty to defend or indemnify GFE. NYSCEF Doc. No. 8.

Movants argue, inter alia, that: GFE is not a named insured or an additional insured under the Starr Policy and, therefore Starr has no duty to defend or indemnify it; any alleged obligation that 361 East may have under the Lease does not confer coverage to GFE under the Starr Policy; Starr was not required to issue a disclaimer to GFE as Insurance Law § 3420(d) does not apply here, on the grounds that when no insurance exists, there is no obligation to disclaim coverage; and that the claims asserted by GFE against 361 East in this action are the same as the crossclaims asserted by GFE against 361 East in the Underlying Action. NYSCEF Doc. No. 16.

In opposition, GFE argues, inter alia, that: it has standing as a “purported additional insured”; pursuant to the Lease, 361 East, is obligated to make repairs to the sidewalk abutting the Premises; and that whether 361 East was obligated to make repairs to the sidewalk or to indemnify GFE are real and justiciable controversies. NYSCEF Doc. No. 26. GFE also denies that the crossclaims in the Underlying Action will resolve its claims in this action, contending that “the coverage issues to be decided in this action will not be determined” in the Underlying Action and arguing GFE’s claims against 361 East here are not identical to its crossclaims in the Underlying Action. Id.

In reply, movants argue, inter alia, that as GFE’s claim for coverage is based on the contractual obligations of 361 East to GFE, GFE does not have standing to assert a cause of action against Starr. NYSCEF Doc. No. 33. Movants do not dispute 361 East’s contractual indemnity obligations to GFE, but underscore that “in analyzing coverage, courts recognize [that] additional insured status is completely separate and distinct from contractual indemnity. See Inner City Redevelopment Corp. v Thyssenkrupp El. Corp., 78 AD3d 613 (1st Dept 2010) (party’s contractual obligation is separate and distinct from the insurer’s obligations under the policy).” Id.

Discussion

“The party claiming insurance coverage has the burden of proving entitlement. A party that is not named an insured or additional insured on the face of the policy is not entitled to coverage.” Moleon v Kreisler Borg Florman Gen. Const. Co., Inc., 304 AD2d 337, 339 (1st Dept 2003). “On a motion to dismiss a declaratory judgment action for failure to state a cause of action, the only question is whether a proper case is presented for invoking the jurisdiction of the court to make a declaratory judgment, and not whether the plaintiff is entitled to a declaration favorable to him.” Gen. Ins. v Piquion, 211 AD3d 634, 634-35 (1st Dept 2022) (internal quotation marks omitted). A declaratory judgment complaint need only demonstrate “an actual controversy between genuine disputants with a stake in the outcome.” Long Is. Light. Co. v Allianz Underwriters Ins. Co., 35 AD3d 253, 253 (1st Dept 2006).

Dismissal pursuant to CPLR 3211(a)(7) is warranted when, “afford[ing] the pleadings a liberal construction, tak[ing] the allegations of the complaint as true and provid[ing] plaintiff the benefit of every possible inference,” the complaint fails to assert facts that would make out a cause of action. EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005).

Here, GFE has demonstrated that controversies exist between it and 361 East, as to liability, pursuant to the Lease, for the subject sidewalk, and as to whether 361 East is obligated to indemnify and/or defend GFE in the Underlying Action. Thus, dismissal as to 361 is not

warranted. Whether or not 361 East’s liability might be resolved in the Underlying Action does not preclude GFE from bringing a claim here.


However, GFE has not established that it is an additional insured under the Starr Policy. As movants have demonstrated, whether Starr will cover 361 East under the Starr Policy in the Underlying Action is independent of 361 East’s contractual obligations to GFE under the Lease. Accordingly, GFE does not have a cause of action against Starr.

Therefore, the instant action should be dismissed as to Starr only. The instant action should proceed against 361 East, as well as the non-moving defendants (Jem, Perdomo, and JFZ).

This Court has considered the parties other arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

Thus, defendants’ motion to dismiss is granted as to Starr Indemnity & Liability Company, only, and the motion is denied as to 361 East Realty Associates, LLC, and the Clerk is hereby directed to enter judgment accordingly.

<u>4/10/2025</u>						
DATE			HON. ARTHUR F. ENGORON			
			ARTHUR F. ENGORON, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE