

Ameng Gao v Zee-Jay Realty Co

2025 NY Slip Op 32530(U)

July 3, 2025

Supreme Court, Kings County

Docket Number: Index No. 530724/2021

Judge: Devin P. Cohen

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Supreme Court of the State of New York
County of Kings

Index Number 530724/2021
Seq. 004

Part LL1M

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

AMENG GAO,

Plaintiff,

against

ZEE-JAY REALTY CO, JOEL BERGER, ZVI BERGER,
GUAN LI, YU HUA CONSTRUCTION CORP., YOUSHEN
YE, EZ FRESH SUPERMARKET INC.,

Defendants.

Papers Numbered

Notice of Motion and Affidavits Annexed	<u>1</u>
Order to Show Cause and Affidavits Annexed	<u> </u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u>3</u>
Exhibits	<u>Var.</u>
Other	<u> </u>

Upon the foregoing papers, Zee-Jay Realty Co., Joel Berger, and Zvi Berger (Zee-Jay or Zee-Jay defendants)'s motion for summary judgment (Seq. 004) is decided as follows:

Procedural Posture & Factual Background

Plaintiff commenced this action to recover for damages he claims he sustained on September 20, 2021, while working at a construction site located at 857 & 863 65th Street, Brooklyn, NY. Plaintiff's complaint alleges that he fell from a height while working at the premises. In its answer, Zee-Jay asserted the following cross-claim: "Defendant, by way of cross claims for contribution and indemnification, hereby demands contribution and indemnification pursuant to CPLR Article 14, as well as the applicable common law, from all current and future defendants and third-party defendants."

Zee-Jay owns the premises; defendants Joel Berger and Zvi Berger are the partners of Zee-Jay. Zee-Jay leased the premises to E-Z Fresh Supermarket Co. (EZ Fresh) on April 4, 2021. EZ Fresh, through its owner Xiu Ying Zheng, hired a contractor, Yu Hua Construction

(Yu Hua) to renovate the premises into a supermarket (Zheng EBT at 28–30). There was no written contract between the two entities (*id.* at 29). Guan Yu Li was the owner of Yu Hua (Li EBT at 18). A series of invoices detailing the cost of work completed by Yu Hua are in the record (*id.* at 76).

The Lease agreement contained a “hold harmless” provision in favor of Zee-Jay for all conditions except those caused by or due the negligence of Zee-Jay (lease at ¶ 12). The lease also contained a rider which obliged the tenant to procure a \$5,000,000 insurance policy which covers the landlord (*id.* at rider 1 ¶ 3). The rider also contain an indemnification provision in favor of the landlord for any and all losses by any person at the premises (*id.* at rider 1 ¶ 21). Finally, the lease required EZ Fresh to procure general liability insurance for all alterations to the premises and to name Zee-Jay as an additional insured (*id.* at rider 2 ¶ [d]; [h]). EZ Fresh is obligated to pay Zee-Jay’s attorney fees incurred as a result of a breach of the lease (*id.* at rider 1 ¶ 16). Although there were multiple leases between the parties for different premises, the leases contain substantially identical indemnification and coverage obligations.

Zee-Jay tendered its defense to EZ Fresh via tender demand letter on December 7, 2023. United States Liability Insurance Company (United), EZ Fresh’s insurance provider, issued a tender denial dated June 24, 2022. Given the date of the tender demand, it is most likely that the tender denial was actually sent on June 24, 2024.

On September 1, 2021, Yu Hua entered into a “General Contractors Agreement” which contained an indemnification provision in favor of Zee-Jay. Yu Hua agreed to indemnify Zee-Jay for damages “arising out of or resulting from the performance” of Yu Hua’s work. Yu Hua was also obligated to purchase insurance naming Zee-Jay as an additional insured. Yu Hua provided a certificate of liability insurance dated August 30, 2021, naming Yu Hua as the insured

and Zee-Jay as the certificate holder. On December 7, 2023, Zee-Jay served a tender demand on Yu Hua. Zee-Jay contends it has not received a response to that tender demand letter.

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

As an initial matter, Zee-Jay seeks summary judgment on two unpleaded causes of action: contractual indemnification and breach of contract. Generally, a party is not entitled to summary judgment on an unpleaded claim (*Mendoza v Manila Bar & Restaurant Corp.*, 140 AD3d 934 [2d Dept 2016] [denying summary judgment on unpleaded contractual indemnification and breach of contract claims]).¹ Zee-Jay argues, first, that the language of its cross-claim covers both contractual indemnification and common-law indemnification and, second, that the breach of contract for failure to procure insurance claim should be considered as conforming to the proof. Here, it is disputed whether the required insurance was procured (*see Zvi Berger*, representative of EZ Fresh, EBT at 12). Therefore, Zee-Jay's motion is denied with respect to its breach of contract claim.

With respect to Zee-Jay's contractual indemnification claim, CPLR 3014 requires "separate causes of action or defenses [to be] separately stated and numbered." CPLR 3026

¹ The rare exceptions are where the facts underlying the claims are essentially stipulated (*Matter of Deborah Intern. Beauty, Ltd. v Quality King Distributors, Inc.*, 175 AD2d 791, 793 [2d Dept 1991] ["the grant of partial summary judgment did not in any way involve the contested issue of the actual profitability of the corporation so as to constitute improper interim relief"]).

states that “pleadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced.” Here, Zee-Jay pleaded a cross-claim for “indemnification,” without specification as to the basis, in its answer. This pleading is insufficient to give notice to EZ Fresh of the basis of Zee-Jay’s claim. Therefore, summary judgment is improper with respect to Zee-Jay’s claim for contractual indemnification.

Conclusion

Zee Jay’s motion for summary judgment (Seq. 004) is denied.

This constitutes the decision and order of the court.

July 3, 2025

DATE



DEVIN P. COHEN
Justice of the Supreme Court