

New York Mar. & Gen. Ins. Co. v NY Firetech Inc.

2026 NY Slip Op 30143(U)

January 14, 2026

Supreme Court, New York County

Docket Number: Index No. 151657/2020

Judge: David B. Cohen

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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. DAVID B. COHEN PART 58

Justice

-----X

NEW YORK MARINE AND GENERAL INSURANCE
COMPANY AND CERTAIN UNDERWRITERS AT LLOYD'S
A/S/O 2133 3RD AVENUE CORP.,

Plaintiffs,

- v -

NY FIRETECH INC, NY FIRE SERVICE & INSTALLATION
INC, GLOBAL LUXURY SERVICES INC.,

Defendants.

-----X

GLOBAL LUXURY SERVICES INC.

Plaintiff,

-against-

WOK EXPRESS 2133 INC., DEJIN LIN, DE JIN LIN D/B/A
NEW WOK EXPRESS

Defendants.

-----X

NY FIRE SERVICE & INSTALLATION INC

Plaintiff,

-against-

DE JIN LIN D/B/A NEW WOK EXPRESS, WOK EXPRESS
2133 INC., DE LIN

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 009) 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 315, 316, 317, 318, 319

were read on this motion to/for DISMISSAL.

In this subrogation action, moving second-third party defendants De Jin Lin d/b/a New Wok Express, Wok Express 2133 Inc., and De Jin Lin (collectively, moving defendants) move

under CPLR 3211(a)(7) to dismiss the second third-party complaint filed by NY Fire Service & Installation Inc (NY Fire Service).

NY Fire Service opposes (NYSCEF 315), and plaintiff opposes insofar as it seeks dismissal of the contribution claim but agrees that the common-law indemnification claim should be dismissed (NYSCEF 307).

I. BACKGROUND

This action arises from a September 2019 fire at the New Wok Express restaurant located at 2133 Third Avenue in New York, New York (the premises). Plaintiff, as subrogee of the building owner, commenced this action seeking to recover for property damage allegedly sustained as a result of the fire. The complaint alleges that the fire originated in the restaurant's cooking area and that the damage was exacerbated by failures in the kitchen fire-suppression system. Plaintiff asserts claims against, among others, NY Fire Service and NY Firetech based on allegations that they negligently inspected, maintained, and serviced the fire-suppression system prior to the incident.

NY Fire Service, which is named as a defendant in the main action, thereafter, commenced a Second Third-Party Action against the moving defendants seeking common-law indemnification and contribution. The Second Third-Party Complaint alleges that New Wok's conduct contributed to the fire and that any liability imposed on NY Fire Service would entitle it to indemnification or contribution from New Wok. The contribution claim implicates a waiver-of-subrogation provision contained in the commercial lease between New Wok and the building owner. Moving defendants now move to dismiss.

II. DISCUSSION

Party Contentions

Moving defendants contend that the common-law indemnification claim fails because the complaint alleges that NY Fire Service was directly negligent in inspecting, maintaining, and servicing the fire-suppression system at the premises and does not allege any basis for vicarious liability. They further argue that NY Fire Service's contribution claim is barred by a waiver-of-subrogation provision contained in the commercial lease between New Wok and the building owner, plaintiff's subrogor, releasing the landlord and tenant from liability for property damage caused by fire, including damage caused by negligence. They maintain that this waiver operates as a covenant not to sue, precluding contribution claims arising from the fire. Moving defendants also assert that rent payments constitute consideration for the lease provisions, including the waiver of subrogation, and that plaintiff, as subrogee, is bound by its insured's contractual waiver.

NY Fire Service opposes dismissal of both the indemnification and contribution claims and, in the alternative, seeks a reduction of any judgment by New Wok's equitable share of fault if dismissal is granted. It contends that the fire was caused by New Wok's negligent cooking practices and not by any act or omission on its part. NY Fire Service argues that if it is found liable to plaintiff, such liability would be derivative of New Wok's conduct, entitling it to indemnification. With respect to contribution, NY Fire Service argues that the waiver-of-subrogation clause does not operate as a release or covenant not to sue because it was executed before any loss occurred and was intended only to allocate insurance risk between landlord and tenant.

Plaintiff agrees that the common-law indemnification claim should be dismissed, asserting that indemnification is unavailable because NY Fire Service is alleged to have been at least partially negligent. Plaintiff further opposes dismissal of the contribution claim, contending that the waiver-of-subrogation provision does not bar contribution and does not function as a covenant not to sue arguing that the waiver was not supported by monetary consideration, did not resolve or terminate any dispute, and was executed before any tort claim existed. Plaintiff also argues that the inability to assert a direct claim against New Wok should not foreclose contribution.

In reply, moving defendants argue that NY Fire Service fails to address the allegations of its own negligence or identify any basis for vicarious liability, and that focusing on New Wok's alleged conduct does not cure the pleading defects in the indemnification claim. They reiterate that the lease contains a clear and mutual waiver of liability for fire-related property damage that should be treated as a covenant not to sue, that consideration exists because rent payments preserved the lease and its provisions, and that plaintiff, as subrogee, is bound by its insured's contractual waiver.

A. Common-law Indemnification

“Indemnity involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another party who should more properly bear responsibility for that loss because it was the actual wrongdoer” (*Trump Vil. Section 3, Inc. v New York State Hous. Fin. Agency*, 307 AD2d 891, 895 [1st Dept 2003], quoting *Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 451 [1985]). “[S]ince 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.*). Accordingly, “where, as here, ‘[a] party [is] sued solely for its own alleged wrongdoing, rather than on a theory of vicarious liability, [it] cannot assert a claim for common law indemnification’ ” (*63rd & 3rd NYC LLC v Advanced Contr. Sols., LLC*, 223 AD3d 447 [1st Dept 2024], quoting *Mathis v Central Park Conservancy*, 251 AD2d 171, 172 [1st Dept 1998]).

Here, the common-law indemnification claim fails as a matter of law because the pleadings allege that NY Fire Service was directly negligent and do not allege any basis for vicarious liability. In the main complaint, plaintiff alleges that NY Fire Service negligently inspected, maintained, and serviced the fire-suppression system at the premises prior to the September 2019 fire, including failures relating to the CO2 cartridge and the system’s overall functionality, and that these failures contributed to the spread of the fire and the resulting property damage. These allegations charge NY Fire Service with its own active wrongdoing, not liability imposed solely by operation of law.

The second third-party complaint does not cure this defect. It does not plead facts supporting any theory under which NY Fire Service’s liability would be purely vicarious or imposed without fault. To the contrary, the indemnification claim is premised on the same incident and seeks to shift liability despite allegations that NY Fire Service itself participated in the conduct giving rise to the loss. Indemnification is unavailable under such circumstances, even where another tortfeasor may also have been negligent.

NY Fire Service’s opposition does not alter this conclusion. In opposing dismissal, NY Fire Service argues that the fire originated as a result of New Wok’s negligent cooking practices and asserts that it bears no responsibility for causing the ignition. However, NY Fire Service does not address the allegations that it negligently maintained and serviced the fire-suppression

system or explain how its potential liability would be purely vicarious. Focusing on New Wok's alleged conduct does not eliminate the pleaded allegations of NY Fire Service's own negligence, nor does it supply a basis for indemnification.

Because the pleadings, accepted as true, allege active negligence by NY Fire Service and do not allege any basis for vicarious liability, the common-law indemnification claim fails to state a cognizable cause of action and must be dismissed.

B. Contribution and General Obligations Law § 15-108

Contribution permits apportionment of liability among tortfeasors who are subject to liability for the same injury. A tortfeasor may be relieved from contribution only where a release or covenant not to sue qualifies under General Obligations Law § 15-108. A release or covenant not to sue is deemed effective for purposes of section 15-108 only if it satisfies the statutory requirements set forth in subdivision (d), including that "the plaintiff or claimant receives, as part of the agreement, monetary consideration greater than one dollar" (General Obligations Law § 15-108[d][1]). Where these threshold requirements are not met, the agreement does not operate as a statutory release barring contribution (*see* General Obligations Law § 15-108[b], [d]).

Waiver-of-subrogation clauses contained in commercial leases are construed as insurance-allocation provisions and do not operate as general waivers of tort liability outside the insurance context (*see Duane Reade v Reva Holding Corp.*, 30 AD3d 229 [1st Dept 2006]).

NY Fire Service asserts a contribution claim against the moving defendants. Moving defendants argue that this claim is barred under General Obligations Law § 15-108 based on a waiver-of-subrogation provision contained in the commercial lease between New Wok and plaintiff's subrogor.

As a threshold matter, the lease waiver does not satisfy General Obligations Law § 15-108(d)(1), which requires that the “plaintiff or claimant receives, as part of the agreement, monetary consideration greater than one dollar.” The waiver appears in a lease rider executed before the loss, and moving defendants identify no monetary payment made to plaintiff or its subrogor as part of any agreement releasing tort liability for this fire. Moving defendants’ reliance on monthly rent payments under the lease does not demonstrate the payment of monetary consideration in exchange for a release of tort liability within the meaning of § 15-108(d)(1). Because this statutory prerequisite is not satisfied, the waiver does not qualify as a “release” or “covenant not to sue” within the meaning of § 15-108, and § 15-108(b)’s bar on contribution does not apply.

This failure to satisfy the statute’s threshold requirement is dispositive, and it is therefore unnecessary to reach the parties’ remaining arguments concerning whether the waiver constitutes a release, whether it terminates a dispute under § 15-108(d)(2), or whether it binds plaintiff as subrogee. In any event, waiver-of-subrogation provisions are construed as mechanisms for allocating insured risk between contracting parties, not as general releases of tort liability (*see Duane Reade*, 30 AD3d at 229), and no party presents any New York authority that has treated a prospective lease-based waiver as a § 15-108 release.

Accordingly, the contribution claim is not barred by General Obligations Law § 15-108, and dismissal of that claim is not warranted.

III. CONCLUSION

The branch of the motion seeking dismissal of the common-law indemnification claim is granted, as the pleadings allege NY Fire Service’s own negligence and do not allege any basis for vicarious liability. The branch of the motion seeking dismissal of the contribution claim is

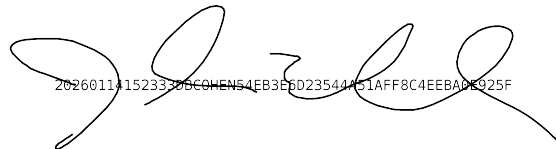
denied, as the waiver-of-subrogation provision relied upon by moving defendants does not satisfy the threshold requirements of General Obligations Law § 15-108 and therefore does not bar contribution as a matter of law.

Accordingly, it is hereby

ORDERED that the motion by defendants De Jin Lin d/b/a New Wok Express, Wok Express 2133 Inc., and De Jin Lin to dismiss the Second Third-Party Complaint is granted to the extent that the common-law indemnification claim is dismissed; and it is further

ORDERED that the parties shall appear for the scheduled settlement conference on January 28, 2026, at 9:30 a.m. in Room 305, 71 Thomas, New York, New York, 10002; and it is further

ORDERED that the motion is otherwise denied.



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1/14/2026

DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE