

**Ameng Gao v Zee-Jay Realty Co**

2026 NY Slip Op 31630(U)

March 31, 2026

Supreme Court, Kings County

Docket Number: Index No. 530724/2021

Judge: Devin P. Cohen

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**Supreme Court of the State of New York  
County of Kings**

**Index Number** 530724/2021  
**Seq.** 005-008

Part LL1A

---

AMENG GAO,

Plaintiff,

against

**DECISION/ORDER**

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

Defendants.

---

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of this motion, by reference to the New York State Courts Electronic Filing System docket numbers: 119-129, 132-142, 145-172, 177-221, 240-266.

Upon the foregoing papers, Zee-Jay Realty Co., Joel Berger, and Zvi Berger (Zee-Jay or Zee-Jay defendants)'s motion to amend (Seq. 004) and motion for summary judgment (Seq. 008), plaintiff's motion for summary judgment on his Labor Law § 240 (1) claim and to amend (Seq. 006), and Yu Hua's motion for summary judgment (Seq. 007) are 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 (the premises). The following is undisputed: Zee-Jay owns the premises; defendants Joel Berger and Zvi Berger are the managing 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). Yu Hua employed the plaintiff (*id.* at 13).

The plaintiff testified as follows: On the date of the incident, plaintiff was instructed to dismantle the motor for a steel roller gate (Gao EBT at 63). The motor was “a foot or two away from the top of the ceiling, and the ceiling was approximately twenty feet above the floor (*id.* at 63–64). To reach the motor, plaintiff and a co-worker stood on a four-foot-by-four-foot wooden pallet that was lifted by a forklift (*id.* at 78, 80–81). The forklift was operated by plaintiff’s co-worker, Youshen Ye (*id.*) While plaintiff was removing screws from the motor, “something” fell and hit the plaintiff, and he subsequently fell off of the lift (*id.* at 70).

Plaintiff testified that he was not provided with a safety belt or harness, and that “there was no harness at the site” (*id.* at 79). Mr. Li, Yu Hua’s owner, testified that he told plaintiff and the other workers to “wear [a] harness” when “they are going to a high ground” (Li EBT at 15). However, Mr. Li did not know if anyone had offered the plaintiff a safety harness (*id.* at 38). Mr. Li testified that the harnesses were kept in a closet located “behind 64th street” (*id.* at 40) but does not testify that plaintiff knew where the harnesses were located or that plaintiff refused to use a harness (*id.* at 128–129).

### Analysis

#### **Amendment**

CPLR 3025 (b) directs that “[a] party may amend his or her pleading or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court

or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.”

Zee-Jay’s Motion to Amend

The Lease between the Owners and EZ-Fresh contains 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) and 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.

These contractual provisions indicate that Zee-Jay’s claims are potentially meritorious. Additionally, Zee-Jay’s prior motion for summary judgment on unpleaded contractual claims was sufficient to give Yu Hua notice that Zee-Jay intended to pursue these claims; therefore, there is no surprise or prejudice (*see Kimso Apts., LLC v Gandhi*, 24 NY3d 403 [2014]). Zee-Jay’s motion to amend is granted.

Plaintiff’s Motion to Amend

The plaintiff seeks to amend his bill of particulars with respect to the alleged violations of the Industrial Code which serve as predicates for his Labor Law § 241 (6) claim. Specifically,

plaintiff requests to identify specific sub-sections of Rules 23-1.22 and 5.1, and to remove inapplicable provisions. Notably, plaintiff's proposed amendment seeks to narrow, rather than expand, the allegations in his bill of particulars. Therefore, it cannot be argued that the proposed amendment causes undue prejudice or surprise. Plaintiff's motion to amend is granted. The court also notes that plaintiff does not seek summary judgment on any claim impacted by amendment.

### Summary Judgment

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]).

### Labor Law § 240 (1)

Liability under Labor Law § 240 (1) is "absolute" where the failure of a safety device enumerated by the statute is a proximate cause of the plaintiff's accident (*Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 NY3d 280, 287 [2003] [citing *Haines v. New York Tel. Co.*, 46 N.Y.2d 132, 136 (1978) and *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 (1993)]). "The single decisive question [when assessing liability under Labor Law § 240 (1) is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

The plaintiff's testimony is sufficient to demonstrate his entitlement to summary judgment on his Labor Law § 240 (1) claim. Plaintiff was instructed to work on an unsafe elevated platform without safety railings, a fall arrest system, or any other safety device (*see e.g.*

*Ramirez v Metropolitan Transportation Authority*, 106 AD3d 799 [2d Dept 2013]). The absence of adequate safety devices was a proximate cause of his fall (*see e.g. Cevallos v WBB Construction, Inc.*, 227 AD3d 657 [2d Dept 2024]). In opposition, defendants have failed to raise an issue of fact as to whether plaintiff was recalcitrant. The plaintiff testified that there were no harnesses on the site, and Mr. Li's testimony does not demonstrate that plaintiff knew about any harnesses or that plaintiff refused to wear a harness for no good reason (*see Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, 34 NY3d 1166, 1167–1168 [2020]).

Therefore, plaintiff's motion for summary judgment on his Labor Law § 240 (1) claim is granted.

#### Common-Law Indemnification and Contribution

Workers Compensation Law § 11 prohibits a third-party from bringing common-law claims against a plaintiff's employer unless the employee suffered a grave injury (*Tonking v Port Auth.*, 3 NY3d 486, 490 [2004]). In this action, the plaintiff has alleged a traumatic brain injury that has rendered him unemployable (*see bill of particulars at ¶ 10; plaintiff's aff in supp at ¶ 9*). Discovery about this claim is ongoing. In light of questions of fact about whether plaintiff sustained a grave injury, Yu Hua's motion for summary judgment on this claim is denied.

#### Contractual Indemnification and Breach of Contract

Zee-Jay also moves for summary judgment on its contractual cross-claims. This motion is Zee-Jay's second motion for summary judgment; the first was denied on July 3, 2025. Successive motions for summary judgment are not contemplated by the CPLR (*Verizon New York, Inc. v Supervisors of Town of North Hempstead*, 169 AD3d 740 [2d Dept 2019]; *see also Oppenheim v Village of Great Neck Plaza, Inc.*, 46 AD3d 527 [2d Dept 2007]). Zee-Jay elected the timing and the papers on which to file its prior motion; it has not demonstrated entitlement to

a second motion (*see Vinar v Litman*, 110 AD3d 867 [2d Dept 2013]). Additionally, since this decision grants Zee-Jay's motion to amend its answer and assert the cross-claims on which it is seeking summary judgment and allowing co-defendants to serve responsive pleadings, the motion is also fatally premature—issue has not yet been joined (*see* CPLR 3212). Therefore, Zee-Jay's motion for summary judgment is denied.

### **Conclusion**

Zee Jay's motion to amend (Seq. 005) is granted. The new pleadings shall be served on all sides via NYSCEF within 30 days of the notice of entry; responsive pleadings shall be filed in accordance with the CPLR

Plaintiff's motion for summary judgment on his Labor Law § 240 (1) claim and to amend (Seq. 006) is granted. The amended bill of particulars shall be served on all sides via NYSCEF within 30 days of the notice of entry.

Yu Hua's motion for summary judgment (Seq. 007) is denied.

Zee Jay's motion for summary judgment (Seq. 008) is denied.

This constitutes the decision and order of the court.

March 31, 2026

DATE



DEVIN P. COHEN

Justice of the Supreme Court