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| <b>Burbank v Tabacoff</b>  |
| 2018 NY Slip Op 34327(U)   |
| March 29, 2018   |
| Supreme Court, Westchester County  |
| Docket Number: Index No. 58085/16  |
| Judge: Linda S. Jamieson   |
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NYSCEF DOC. NO. 56

IN NEW YORK  
To commence the statutory time period for appeals as  
of right (GRPC § 5411b), you are advised to serve a  
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Disp \_\_\_ Dec \_\_\_x\_\_\_ Seq. Nos. 1-2\_\_\_ Type \_\_\_SJ\_\_\_

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

**PRESENT: HON. LINDA S. JAMIESON**

-----X  
ROBERT BURBANK, ROSS BURBANK, TODD  
BURBANK and BURBANK MANAGEMENT COMPANY,

Plaintiffs,

Index No. 58085/16

-against-

DECISION AND ORDER

DR. RISA TABACOFF, DR. RISA TABACOFF  
a/k/a A.N.I.C., DR. RISA TABACOFF  
d/b/a DEVELOPMENTAL ASSESSMENT &  
INTERVENTION CENTER, LLC,

Defendants.

-----X

The following papers numbered 1 to 5 were read on these  
motions:

| <u>Paper</u>  | <u>Number</u> |
|---|---------------|
| Notice of Motion, Affirmation and Exhibits                      | 1             |
| Notice of Cross-Motion, Affidavits, Affirmation<br>and Exhibits | 2             |
| Reply Affirmation   | 3             |
| Affirmation and Exhibits in Opposition                          | 4             |
| Reply Affirmation   | 5             |

There are two motions for summary judgment before the Court  
in this case arising out of a lease between Robert Burbank  
("Landlord") and Risa Tabacoff a/k/a A.N.I.C. ("Tenant"). The  
other plaintiffs are Landlord's sons and management company. The

only remaining defendants are Dr. Tabacoff and her companies. Plaintiffs' motion seeks summary judgment in their favor on the issue of contractual indemnification. Defendants' motion seeks summary judgment dismissing the complaint.

The facts set forth herein are not in dispute. Dr. Tabacoff fell in the icy parking lot at the premises and injured herself. She sued plaintiffs, and they settled the litigation. Thereafter, plaintiffs commenced this action for indemnification based on the lease. The lease provides, in relevant part, that the leased premises consist of "Office, evaluation rooms and storage." The lease further provides that Tenant shall indemnify Landlord for liabilities, damages and expenses arising out of injury "and also for any matter or thing growing out of the occupation of the demised premises or of the streets, sidewalks or vaults adjacent thereto." The Rider to the lease states that "The tenant is authorized to have use of three (3) delineated parking spaces. . . ."

Plaintiffs contend that the indemnification provision covers them because "she fell within steps of the entrance to the leased space and within the parameters of the parking spaces designated to the lease space." They argue that the indemnity provision "specifically places an indemnity obligation upon the tenant for 'any and all' liabilities growing out of the occupation of the premises as well as for those growing out of the streets and

sidewalks adjacent thereto." In response, defendants argue that the accident occurred in the parking lot proper, in an area for which Landlord was solely responsible for snow removal, and which was a common area shared by Tenant as well as others.

A review of the language of the lease, set forth above, shows that Tenant is liable for damages "growing out of the occupation of the demised premises or of the streets, sidewalks or vaults adjacent thereto." The accident did not occur in a vault, on a sidewalk or on a street adjacent to the premises - the parking lot is neither a sidewalk nor a street. Indeed, plaintiffs submit to the Court no cases on this point. Rather, plaintiffs argue that the spot in which the accident occurred is part of the "demised premises" because it was in a parking spot. Defendants, naturally, argue that the specific accident site was in the parking lot proper, an area for which Landlord is specifically responsible for snow removal.

Regardless, the Court finds that the "demised premises" does not include the parking lot or spots therein. The lease defines the premises as the "Office, evaluation rooms and storage." The Rider to Lease states that "the tenant is authorized to have use of three (3) delineated parking spaces. . . ." (Emphasis added). This does not make them part of the specifically described "demised premises." If the parties had wanted to include the

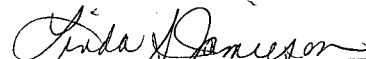
three parking spaces in the description of the premises, they could have done so.

None of the cases cited by plaintiffs require a different result. All of them involve leases with different indemnification provisions covering a much broader area. See, e.g., *Pritchard v. Suburban Carting Corp.*, 90 A.D.3d 729, 731, 934 N.Y.S.2d 460, 462 (2d Dept. 2011) (lease indemnity provision covered "'damage . . . arising, directly or indirectly . . . or occurring in, on or about the Premises or any part thereof' . . . . A phrase such as 'in, on or about the Premises' is not . . . limited in its spatial description to 'in the demised premises,' for then the words 'or about' would have no meaning. This is a phrase of art, frequently used synonymously to mean 'around' or 'on the outside of.'" (emphasis added); *Hogeland v. Sibley, Lindsay & Curr Co.*, 42 N.Y.2d 153, 159 (1977) (same broad language).

Accordingly, the Court denies plaintiffs' motion in its entirety, and grants defendants' motion in its entirety. The action is dismissed.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York  
March 24, 2018

  
HON. LINDA S. JAMIESON  
Justice of the Supreme Court

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