

**Taylor v Sheradel Assoc., L.P.**

2025 NY Slip Op 31296(U)

April 10, 2025

Supreme Court, Kings County

Docket Number: Index No. 507637/2023

Judge: Anne J. Swern

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This opinion is uncorrected and not selected for official publication.

At an IAS Trial Term, Part 75 of the Supreme Court of the State of New York, Kings County, at the Courthouse located at 360 Adams Street, Brooklyn, New York on the 10<sup>th</sup> day of April 2025.

P R E S E N T: HON. ANNE J. SWERN, J.S.C.

MERLETT TAYLOR,

*Plaintiff,*

*-against-*

SHERADEL ASSOCIATES, L.P., SHERILU MANAGEMENT CORPORATION, SHERLILU MANAGEMENT LLC, DUNKIN' DONUTS INCORPORATED, DUNKIN' BRANDS, INC., DUNKIN' BRANDS GROUP, INC., DUNKIN' DONUTS LLC, DD IP HOLDER LLC, INSPIRE BRANDS, INC., MAR DONUTS NY LLC, and TIMOTHY & SABINA FINE FOODS INC,

*Defendants.*

SHERADEL ASSOCIATES, L.P., SHERILU MANAGEMENT CORPORATION, and SHERLILU MANAGEMENT, LLC

*Third-Party Plaintiffs,*

*-against-*

BOGOPA BG FLATLANDS LLC,

*Third-Party Defendant.*

**DECISION & ORDER**

Index No.: 507637/2023

Calendar No.: 45

Motion Seq.: 002

Return Date: 2/13/2025

*Recitation of the following papers as required by CPLR 2219(a):*

	<b>Papers Numbered</b>
Notice of Motion, Affirmation,	
Affidavits and Exhibits (NYSCEF 68-82).....	1, 2
Affirmations and Exhibits in Opposition (NYSCEF 97-101).....	3, 4
Reply Affirmations and Exhibit.....	5

*Upon the foregoing papers and after oral argument, the decision and order of the Court is as follows:*

**Facts**

Third-party defendant Bogopa GB Flatlands LLC (“third-party defendant/tenant” or “Bogopa”) has moved this Court for an order dismissing the third-party complaint by defendants/third-party plaintiffs SHERADEL ASSOCIATES, L.P., SHERILU MANAGEMENT CORPORATION, and SHERLILU MANAGEMENT LLC (“third-party plaintiffs/landlords” or collectively “Sheradel”) pursuant to (a) CPLR §§ 3211 [a] [1] and [7], or in the alternative, CPLR § 3212,<sup>1</sup> (b) CPLR § 8303-a, awarding costs and reasonable attorneys fees based on third-party plaintiffs allegedly commencing a frivolous third-party action, (c) CPLR § 3212 and §3001 granting summary judgment on third-party defendant’s counter claim, and (d) CPLR § 7503 staying this action and compelling arbitration pursuant to the lease.

This is an action for personal injuries allegedly sustained plaintiff when she slipped and fell on ice in front of 110-10 Flatlands Avenue, Brooklyn, New York (“the premises”) (NYSCEF 70). Plaintiff initially alleged in her summons and complaint that she fell in the parking lot (NYSCEF 1) but later amended the location of the accident to the sidewalk (NYSCEF 98).

Pursuant to the lease dated 2/15/1979 between the predecessors to Sheradel/landlords and Bogopa/tenant, the *third-party plaintiffs/landlords* agreed as follows:

11.7 Landlord shall defend and indemnify Tenant and hold Tenant harmless from and against any and all claims, losses, damages and expenses resulting from personal and bodily injury, death and property damage occurring on the Common Area.

11.9 Any dispute arising out of the provisions of this Article [11] shall be submitted to arbitration in accordance with Article 49. (NYSCEF 81, p.31).

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<sup>1</sup> The branch of the motion seeking dismissing of plaintiff’s amended complaint has been withdrawn.

The lease defined the common area as

11.1 Those portions of the Shopping Center (other than the Demised Premises) intended for common use by tenants of the Shopping Center and their customers, invitees, licensees, subtenants and employees are herein collectively called the "Common Area." The Common Area shall include, without limitation, *the parking and landscaped areas*, roads, streets drives, tunnels, passage ways, stairways, *sidewalks*, walkway, open and enclosed malls, elevators, escalators, exterior ramps, arcades, entrances and exits of the Shopping Center (*id.* at pp.28-29). (*italics added*).

Third-party plaintiffs/landlords and third-party defendant tenant, then executed an amendment to the 1979 lease in July 2018 (NYSCEF 48). This amendment did not alter or modify the indemnification provisions of the 1979 lease as to either party.

Third-party plaintiffs/landlords Sheradel commenced the third-party action seeking indemnification from the third-party defendant/tenant Bogopa. Plaintiff then amended the summons and complaint per CPLR § 1009 to include the Bogopa/tenant as a direct defendant (NYSCEF 78). In its answer to the third-party complaint, Bogopa/tenant asserted cross-claims, and a counter claim to recover attorney fees and costs pursuant to 22 NYCRR §130-1.1 alleging that the third-party action is frivolous and should be dismissed based on the mandatory arbitration clause in the lease between the parties (NYSCEF 81).

The motion is granted to the extent that (1) any claims by the third-party plaintiffs/landlords for indemnification contractual indemnification must be submitted to arbitration per § 11.7 and 11.9; (2) the third-party complaint and all cross-claims in the main action are dismissed per CPLR § 3211 [a] [1] and [7], CPLR § 3212 [a] and [b]; and (3) third-party defendant is granted summary judgment pursuant to CPLR § 3212 and § 3001 on its counter-claim for a declaratory judgment against third-party plaintiffs Sheradel declaring that third-party plaintiffs must defend, indemnify and hold harmless third-party defendant Bogopa in

the main action and any related action pursuant to the express terms of the 1979 lease. The motion is denied in all other respects.

**The arbitration agreement and CPLR § 3211 [a] [1] and [7].**

“A motion pursuant to CPLR § 3211 [a] [1] to dismiss the complaint on the ground that the action is barred by documentary evidence may be [appropriately] granted only where the documentary evidence utterly refutes the plaintiff’s factual allegations, thereby conclusively establishing a defense, as a matter of law” (*Karpovich v City of New York*, 162 AD3d 996, 997 [2d Dept 2018] citing *Mawere v Landau*, 130 AD3d 986, 987 [2d Dept 2015]; see *Goshen v Mutual Life Insurance Co. of N.Y.*, 98 NY2d 314, 326 [2002]). “To constitute ‘documentary’ evidence, the evidence must be unambiguous, authentic, and undeniable, such as...documents reflecting out-of-court transactions...[i.e.,] contracts, and other papers, the contents of which are essentially undeniable” (*Karpovich v City of New York*, 162 AD3d at 997-998; see *Prott v Lewin & Baglio*, 150 AD3d 908, 909 [2d Dept 2017]). The arbitration clause in the lease, the one-way indemnity agreement running from the landlords to the tenant, and the absence of any reciprocal indemnity clause running from the tenant to the landlords is unambiguous and warrants dismissal of the third-party action (*Karpovich v City of New York*, and *Prott v Lewin & Baglio*, *supra*), together with cross-claims asserted by defendants/third-party plaintiffs’ in their answer to the amended complaint (CPLR § 3212 [b], *infra*).

In opposition to the motion, third-party plaintiffs/landlords argue that the indemnity clause is in violation of General Obligations Law § 5-321 because seeks to indemnify third-party defendant/tenant for its own negligence.<sup>2</sup> However, this argument is without merit. Per the plain language of General Obligations Law § 5-321, the statute only invalidates agreements *by*

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<sup>2</sup> NYSCEF 100, ¶¶6, 11-12, 16, 24, 26, 29

*tenants/lessees* to indemnify landlords/lessors that exempt “*lessors from liability for damages resulting from their own negligence...whereby lessors are excused from direct liability for otherwise valid claims which may be brought against [the lessor] by others*” (*Great Northern Ins. Co. v Interior Construction Corp.*, 7 NY3d 412, 419 [2006] [*italics added; internal quotations omitted*]). Further, when a party “is under no legal duty to indemnify another,” it may contract “to provide indemnity to [another] party for its own negligence only where the contractual language evinces an unmistakable intent to indemnify” (*id.* at p.417 [*internal quotations omitted*]).

Here, the indemnity clause is unmistakably a “one-way” indemnity agreement in favor of the tenant/lessee [third-party defendant], not the lessors/landlords [third-party plaintiffs], in “a commercial lease negotiated between two sophisticated parties who included a broad indemnification provision, coupled with an insurance procurement requirement” by the landlords in § 13.3 of the lease (*id.* at p.419; *Service Sign Erectors Co. v Allied Outdoor Advertising, Inc.* 175 AD2d 761, 762 [1<sup>st</sup> Dept 1991]). Pursuant to §13.3, the third-party plaintiffs/landlords agreed “to maintain public liability insurance in respect of the Common Area, naming the Landlord and *Tenant* as insureds, in an amount not less than \$3,000,000, for personal and bodily injury all persons in any one occurrence and for damage to the property” (NYSCEF 81, p.36 at § 13.3). The third-party defendant/tenant only had a reciprocal duty to obtain insurance and name the landlords as an insured (*id.* at § 13.2), without a contractual reciprocal duty to indemnify the landlords. This one-way indemnity agreement extinguished any quasi-contractual and implied reciprocal duty or obligation by the third-party defendant/tenant to indemnify third-party plaintiffs/landlords (*Service Sign Erectors Co. v Allied Outdoor Advertising, Inc.* 175 AD2d 762). Therefore, the landlords and tenant, through the “employment of insurance” allocated to

the landlords “the risk of liability to third parties” occurring in the common area (*Great Northern Ins. Co. v Interior Construction Corp.*, 7 NY3d 419).

Next, when determining a motion to dismiss pursuant to CPLR § 3211 [a] [7], the Court must accept the factual allegations in the complaint as true and “accord [third-party] plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit into any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). Assuming plaintiff’s injuries arose out the tenant’s snow removal in the common area, the landlords are not entitled to indemnification or contribution in the face of the one-way indemnity agreement. Therefore, the third-party complaint fails to state a cause of action.

### **Relief sought per CPLR § 3212**

Third-party defendant Bogopa has established that, as a matter of law, the third-party plaintiffs/landlords are not entitled to contractual, implied or quasi-contractual indemnification contribution. Based on the foregoing, defendant/third-party plaintiffs’ cross-claims for indemnification and contribution against the tenant in their answer to the amended complaint adding the tenant as a direct a defendant are dismissed, *sua sponte*, per CPLR § 3212 [b)].<sup>3</sup>

### **Sanctions and the Counter Claims**

Since the summons and complaint has been properly amended to add the third-party defendant as a direct defendant, the request for sanctions representing the cost of defending this

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<sup>3</sup> **Rule 3212. Motion for summary judgment.**

[b] A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. *The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.* Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion. (emphasis added).

action is now moot. The request for an order pursuant to CPLR § 3212 and §3001 on Bogopa's alleged counter claim for declaratory judgment that defendants/third-party plaintiffs Sheradel must defend, indemnify and hold harmless third-party defendant Bogopa in the third-party action and main action is granted.<sup>4</sup>

The Court has considered defendants/third-party plaintiffs' remaining arguments and find same to be without merit.

Accordingly, it is hereby

ORDERED that the branch of defendant/third-party defendant BOGOPA BG FLATLANDS LLC's motion to dismiss the third-party action pursuant to CPLR § 3211 [a] [1] and [7] and CPLR § 3212 [a] and [b] is granted, and it is further

ORDERED that the branch of defendant/third-party defendant BOGOPA BG FLATLANDS LLC's motion for an order pursuant to CPLR § 8303-a is denied as moot, and it is further

ORDERED that the branch of third-party defendant BOGOPA BG FLATLANDS LLC's motion for an order pursuant to CPLR § 7503, staying the third-party action pending the outcome of arbitration is denied as moot, and it is further

ORDERED that the branch of defendant/third-party defendant BOGOPA BG FLATLANDS LLC's motion for an order pursuant CPLR § 3212 and §3001 for a declaratory judgment that defendants/third-party plaintiffs must defend, indemnify and hold harmless defendant/third-party defendant in the main action and third-party action as to any judgment, attorneys' fees and costs is granted, and it is further

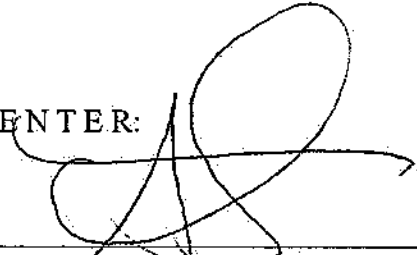
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<sup>4</sup> See NYSCEF 55, p.13 and NYSCEF 105, p12

ORDERED that the branch of defendant/third-party defendant BOGOPA BG FLATLANDS LLC's motion for an order pursuant to CPLR § 7503 compelling arbitration for indemnification pursuant to the lease is granted to the extent that the arbitration concerning the amounts due and owing to defendant/third-party defendant per the indemnification provision of the lease shall be held in abeyance pending the outcome of the main action, and it is further

ORDERED that the motion is denied in all other respects.

This the decision and order of the Court.

ENTER:   
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Hon. Anne J. Swern, J.S.C.  
Dated: 4/10/2025

For Clerks use only:  
MG \_\_\_\_\_  
MD \_\_\_\_\_  
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