

**Grande Gusto Ristorante LLC v  
Jerome G. Stabile, III Realty LLC**

2025 NY Slip Op 33759(U)

October 1, 2025

Supreme Court, New York County

Docket Number: Index No. 154346/2024

Judge: Lyle E. Frank

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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. LYLE E. FRANK PART 11M**

*Justice*

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GRANDE GUSTO RISTORANTE LLC,

Plaintiff,

- v -

JEROME G. STABILE, III REALTY LLC, KERMEND CEKAJ,  
CEKAJ CONSTRUCTION CORP., ARBEN KUKA, SHAHIN  
BADALY PE, BADALY ENGINEERING PLLC, MAMC  
CONSULTING REPS LLC, JOHN FENCES CRAFT CORP.,  
JOHN DOES 1-20

Defendant.

-----X

**INDEX NO. 154346/2024**  
**MOTION DATE 04/14/2025**  
**MOTION SEQ. NO. 005**

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198

were read on this motion to/for DISMISSAL.

This action arises out of an alleged breach of a commercial lease. Plaintiff now seeks an order pursuant to CPLR § 3211(a)(1) dismissing the third and fifth counterclaims asserted by defendant/third-party plaintiff Jerome G. Stabile, III Realty LLC (“Stabile”) against Grande Gusto Ristorante, LLC and sixth counterclaim against Kelmend Cekaj. Separately, third-party defendants Shahin Badaly PE and Badaly Engineering PLLC (“Badaly defendants” or “third-party defendants”) cross-move for an order pursuant to CPLR § 3211(a)(1), dismissing the third-party plaintiff’s fourth counterclaim<sup>1</sup>.

Standard of Review

<sup>1</sup> Defendant Stabile answered plaintiff’s second amended complaint and include crossclaims against Shahin Badaly PE and Badaly Engineering PLLC are not named plaintiffs or defendants in the instant action. Accordingly, for clarity the Court will deem those purported cross claims as direct claims as against those defendants in a third-party action, and deem defendant Stabile as a third-party plaintiff and the Badaly defendants as third-party defendants.

Under CPLR Rule 3211(a)(1) documentary evidence provides a basis for dismissing a cause of action “where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]. A written agreement, such as a contract or lease, constitutes documentary evidence for purposes of CPLR § 3211(a)(1). *150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004].

### Discussion

#### *Main Motion*

Defendant’s third counterclaim for breach of contract and indemnification alleges that pursuant to the lease, plaintiff agreed to indemnify and hold it harmless against any and all losses, claims, damages, costs, expenses, or other liabilities. The specific lease provision 8.2 entitled indemnification provides

8.2.1 Tenant shall indemnify, defend and hold harmless Landlord and the other Landlord Indemnified Parties from and against any and all claims, liabilities, losses, damages and expenses (including reasonable attorneys’ fees and disbursements) arising out of, or based upon:(a) (i) any accident, injury or damage whatsoever occurring during the Term in, at or upon the Premises, including, but not limited to, the exterior sidewalks and steps, (ii) the presence or operation of any Tenant Facilities, or (iii) the performance of any Alteration;(b) any negligent or intentionally wrongful act or omission of Tenant or any Tenant Party; (c) the introduction of any Hazardous Materials into the Premises or other portions of the Building by Tenant or any Tenant Party; and/or(d) any default by Tenant under this Lease (including, without limitation, any breach by Tenant of its obligations under Article 14 below).

Specifically, defendant contends that the loss sustained for which payment is owed from plaintiff is the loss of rental income of another tenant, The Farm, that was forced to vacate the premises.

Plaintiff seeks dismissal of this counterclaim arguing that this counterclaim is barred by the release in the section 8.1.4 the lease and is further defective because it was brought pursuant to a lease provision that, plaintiff contends, applies only to claims brought against Stabile by third parties, and none are alleged to exist here.

Section 8.1.4 of the lease that provides in pertinent part

[E]ach party hereto hereby releases the other party with respect to any claim (including a claim for negligence) that the releasing party might otherwise have against the other party for loss, damage or destruction with respect to the releasing party's property (including business interruption and rental loss resulting from such loss, damage or destruction), to the extent that the releasing party is (i) required to insure against such loss, damage or destruction pursuant to any provision of this Lease (a "Required Insurance Claim"), or (ii) elects to insure against (and is actually insured against) such loss, damage or destruction. With respect to any Required Insurance Claim, the release provided for in the preceding sentence shall apply to the full extent of any such claim regardless of whether any portion of such claim shall not be fully insured against by virtue of the existence of a deductible under the applicable insurance policy or the failure to obtain such policy.

Further, plaintiff contends that the damages defendants seek, loss of rental income, are damages that defendant obtained insurance coverage for, and annexes the policy to establish coverage. In opposition, defendant contends that plaintiff did not meet its burden because it did not establish that defendant received insurance payments for the rental loss.

Here, because it is undisputed that the loss that defendant seeks recovery for are losses that are covered pursuant to defendant's insurance policy, the Court finds that plaintiff has established through documentary evidence that third counterclaim is not viable. Moreover, the Court agrees that should the indemnification provision, section 8.2.1 of the lease, require plaintiff to indemnify for claims other than claims initiated by third-parties, it would render the

release in section 8.1.4 meaningless. Accordingly, the third counterclaim is dismissed in its entirety.

Defendant's fifth counterclaim alleges negligence and damages in excess of the amount of policy limits of its insurance coverage. Plaintiff contends that the section 8.1.4 of the lease, bars defendant's fifth counterclaim.

In opposition, defendant Stabile contends that it does not seek to recover the sums recovered through its insurance rather, it contends that the fifth counterclaim seeks to recover losses in excess of the policy limits of its insurance. However, as the Court has held in the related subrogation action and as is evidenced by the plain language of the lease terms, the parties released each other of negligence claims, regardless of whether the claim is fully insured against or **a failure to obtain such policy**. *See* NYSCEF Doc. 181, section 8.1.4, (emphasis added). Accordingly, the fifth counterclaim is dismissed.

Defendant's sixth counterclaim asserts a claim against Kelmend Cekaj for breach of guaranty. Plaintiff contends that this counterclaim should be dismissed to the extent it seeks to hold Cekaj liable for the conduct alleged in the third and fifth counterclaims. The Court agrees and finds that to the extent the breach of guaranty asserts claims related to the now dismissed third and fifth causes of action those portions of the sixth counterclaim are dismissed, however the remaining allegations regarding plaintiff's failure to fulfill its lease obligations remain.

#### *Cross-Motion*

At the outset the Court notes that it is generally improper for a party to cross-move for relief against a non-moving party. *Kershaw v Hospital for Special Surgery* 114 AD 3d 75 [1st Dept 2013](cross-motion improper vehicle for seeking relief against non-moving party). Here, third-party plaintiff Stabile, did not object to the purported motion and timely submitted

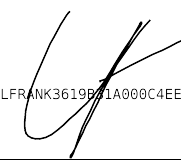
opposition. Accordingly, in the absence of prejudice to the non-movant, Stabile, the Court will address the motion.

Third-party defendants, Badaly, seek an order to dismiss the fourth counterclaim asserted against them on the grounds that Stabile is precluded from asserting a counterclaim based on its wrongful conduct, relying mostly on arguments presented by plaintiff in support of its motion<sup>2</sup>. The Court rejects this argument. At this juncture there has been no determination as to which parties conduct caused the subject loss. Third-party defendants seek to rely on factual arguments that are in dispute and that are inappropriate at the pleading stage. Accordingly, it is hereby

ORDERED that defendant Stabile’s third and fifth counterclaim are dismissed as against the plaintiff; and it is further

ORDERED that the sixth counterclaim is dismissed in part as indicated above; and it is further

ADJUDGED that the cross-motion is denied.

<u>10/1/2025</u> DATE			 20251006114652LFRANK3619571A000C4EE79405FF931B157471 LYLE E. FRANK, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

<sup>2</sup> The Court did not reach those arguments in plaintiff’s motion as the Court limited its reasoning to the legal arguments provided by plaintiff.