UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 2nd day of November, two thousand twenty-six.

PRESENT:

PIERRE N. LEVAL,
RICHARD J. SULLIVAN,
MARIA ARAÚJO KAHN,
Circuit Judges.

THE FEDERAL SAVINGS BANK,

Plaintiff-Appellant,

v. No. 25-0467

TSYNGAUZ & ASSOCIATES, P.C.,

Defendant-Appellee.

For Plaintiff-Appellant:	Lucas A. Markowitz, Mitchell Sandler, PLLC, Washington, D.C.
For Defendant-Appellee:	Yevgeny Tsyngauz, Austin L. Fincher, Tsyngauz & Associates, P.C., New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (J. Paul Oetken, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the January 27, 2025 judgment of the district court is **AFFIRMED**.

The Federal Savings Bank ("the Bank") appeals from the district court's dismissal of its complaint asserting a claim for common law indemnification under New York law against Tsyngauz & Associates ("T&A"). The Bank's claim stemmed from a loan transaction between the Bank and three entities ("the Borrowers"), in which the Bank issued a $2,625,000 commercial loan, secured in part by liens on parcels of real property owned by the Borrowers. In 2017, one of the Borrowers sued the Bank, alleging that the Bank had fraudulently induced it to enter into the loan by falsely promising that the Bank would not record a lien on its property. The Bank settled that suit and subsequently brought an indemnification claim against T&A – the law firm that had represented the

Borrowers during the loan's closing. We assume the parties' familiarity with the facts, procedural history, and issues on appeal, to which we only refer as necessary to explain our decision.

I. The District Court Properly Dismissed the Bank's Common Law Indemnification Claim.

"We review *de novo* a district court's dismissal of a complaint for failure to state a claim." *Ark. Pub. Emps. Ret. Sys. v. Bristol-Myers Squibb Co.*, 28 F.4th 343, 351 (2d Cir. 2022). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). A claim is plausible if the plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged" and establishes "more than a sheer possibility that a defendant has acted unlawfully." *Id.*

Under New York law, where "there is no express agreement creating a right to indemnification," a plaintiff may establish a common law right to indemnification by showing either an "implied right to indemnification . . . based on the special nature of a contractual relationship between [the] parties" or a relationship between the parties that renders one party vicariously liable for the

acts of the other. *Peoples' Democratic Republic of Yemen v. Goodpasture, Inc*., 782 F.2d 346, 351 (2d Cir. 1986); *see SSDW Co. v. Feldman-Misthopoulos Assocs*., 542 N.Y.S.2d 565, 567 (1st Dep't 1989); *Desena v. N. Shore Hebrew Acad.*, 989 N.Y.S.2d 505, 510 (2d Dep't 2014) ("The key element of a cause of action for [common law] indemnification is not a duty running from the indemnitor to the injured party, but rather, is a separate duty owed [to] the indemnitee by the indemnitor."). But since common law indemnity "is barred altogether where the party seeking indemnification was itself at fault," a plaintiff must *also* establish that he is not responsible for the wrongdoing that gave rise to the liability. *Monaghan v. SZS 33 Assocs., L.P.*, 73 F.3d 1276, 1284 (2d Cir. 1996); *see also SSDW Co.*, 542 N.Y.S.2d at 567 ("[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." (emphasis added) (internal quotation marks omitted)).

Here, the Bank snags on both prongs. *First*, the Bank has not established an implied contractual right to indemnification, and the Bank failed to allege facts establishing the type of relationship in which T&A would be "vicarious[ly]" responsible for the Bank's liability. *See SSDW Co.*, 542 N.Y.S.2d at 567. In

particular, the Bank does not plausibly allege that any special relationship between the parties existed – such as employer-employee or agent-principal. *See id.* According to the complaint, T&A acted solely as counsel to the Borrowers, and T&A did not provide advice or otherwise participate in the Bank's representations to the Borrowers about whether their liens would be recorded. *See* App'x at 7 ("Complaint") (providing example of T&A's legal representation but making no mention of T&A's role in Bank's lien representations)).

Second, even if the Bank had pleaded a relationship sufficient to give rise to indemnity, it is undisputed that the Bank incurred its liability by settling a legal claim involving *intentional* wrongdoing. That is, the suit against the Bank hinged on a claim of fraudulent inducement, which necessarily implies fault. *See Turtur v. Rothschild Registry Int'l, Inc.*, 26 F.3d 304, 310 (2d Cir. 1994) (articulating elements of common law fraud to include a "material, false representation" coupled with "an intent to defraud") (internal quotation marks omitted)). It is of course possible, as the Bank now argues, for a party to "settle" without admitting fault "and then seek indemnification." *Cunha v. City of New York*, 12 N.Y.3d 504, 509 (2009). But that party must be able to establish that it "may not be held liable [for the underlying injuries] in any degree" – a high bar that the Bank has failed to clear

here. *Id.* Indeed, as noted above, the Bank has nowhere claimed that T&A is responsible for the false statements regarding the recording of *liens*. *See* App'x at 7–13. And since those statements were at the heart of the case against it, the Bank has failed to establish that any other party besides itself could possibly "be held responsible" for them. *Buchwald v. Verizon New York, Inc.*, 860 N.Y.S.2d 360, 361 (4th Dep't 2008). Because the alleged wrongdoing necessarily would have derived from the Bank's own act or omission – rather than T&A's – the Bank may not "receive the benefit of" indemnification. *SSDW Co.*, 542 N.Y.S.2d at 567 (internal quotation marks omitted); *see also Consol. Rail Corp. v. Hunts Point Term. Produce Coop. Ass'n*, 783 N.Y.S.2d 30, 30 (1st Dep't 2004) ("Plaintiff has no claim for [common law] indemnification because its liability in the underlying settled . . . action, if any, would not have been vicarious but would have been premised upon its own acts or omissions."). We therefore agree with the district court that the Bank has failed to state a claim.[1]

[1] The Bank also argues that the district court committed reversible error by considering several state court documents that were attached to T&A's motion to dismiss. We disagree. A district court may consider documents not attached to the complaint that are "incorporated by reference" or that are "integral" to the complaint. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002). The documents considered by the district court in this case were incorporated by reference and are clearly integral to the Complaint. Indeed, the state lawsuit was referenced numerous times in the Complaint, and the attached documents contain relevant information about that lawsuit. Furthermore, the district court was permitted under Federal Rule of Evidence 201 to take judicial notice of state court orders for the purpose of determining what claims had been

II. The District Court Correctly Denied Leave to Amend the Complaint.

While "leave to amend shall be freely given when justice so requires," it is "within the sound discretion of the district court to grant or deny leave to amend" if amendment would be "futil[e]." *Broidy Cap. Mgmt. LLC v. Benomar*, 944 F.3d 436, 447 (2d Cir. 2019) (quoting Fed. R. Civ. P. 15(a)). "Futility is a determination . . . that proposed amendments would fail to cure prior deficiencies." *Pyskaty v. Wide World of Cars, LLC*, 856 F.3d 216, 224–25 (2d Cir. 2017) (internal quotation marks omitted). We review *de novo* "a district court's denial of leave to amend for . . . futility." *Id.* at 224 (internal quotation marks omitted).

After T&A filed its motion to dismiss, the Bank included a sentence in its opposition brief requesting leave to file an amended complaint "[s]hould the Court decide the Bank has not adequately pleaded [its indemnification] claim." *Pl.'s Mem. Opp'n Def.'s Mot. Dismiss*, No. 24-cv-03658 (JPO), at 9 (S.D.N.Y. Aug. 8, 2024). But the Bank submitted neither a proposed amended complaint nor a statement proffering any new facts that would cure the deficiencies of its original pleading.

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asserted, and which had been dismissed. *See Dixon v. von Blanckensee*, 994 F.3d 95, 102 (2d Cir. 2021) (noting that under Federal Rule of Evidence 201, a court may take judicial notice of facts as long as those facts are either "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." (internal citation and quotation marks omitted)). Accordingly, the district court properly considered materials outside of the pleadings.

See id. That alone is a sufficient basis for denying the Bank's perfunctory request to amend. *See, e.g.*, *Porat v. Lincoln Towers Cmty. Ass'n*, 464 F.3d 274, 276 (2d Cir. 2006) ("[G]iven that plaintiff's counsel did not advise the district court how the complaint's defects would be cured, . . . we . . . decline to remand for repleading."); *Protic v. Dengler*, 205 F.3d 1324, 1324 (2d Cir. 1999) (seeing "no basis for reversal" of district court's denial of leave to amend where "plaintiff declined to file a pleading containing the [amended] allegations"); *see also* Joint Loc. R. 15.1 (requiring represented party to include both a clean copy of the proposed amended pleading and a redlined or marked-up version showing all differences from the original pleading). Therefore, because the Bank failed to (i) offer any additional facts that would salvage the indemnification claim, or (ii) propose any *other* claim it might bring, we agree with the district court that any amendments would be futile.

* * *

We have considered the Bank's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court