SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____ PART _____

Index Number : 103096/2004
PEACH PARKING
vs
346 WEST 40TH STREET LLC.
Sequence Number : 010
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion ~~See~~ is consolidated with motion Sequence 011 and is decided in accordance with the accompanying memorandum decision.

Dated: 12/18/06

_____ J.S.C.

HON. [illegible]

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

THIS CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

---------- X

PEACH PARKING CORP.,

Plaintiff,

- against -

346 WEST 40TH STREET, LLC, KINNEY SYSTEMS, INC., and THE HERTZ CORPORATION,

Defendants.

Index No. 103096/04

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WALTER B. TOLUB, J.:

Motion sequence number 010 and 011 are consolidated for disposition. The defendant Kinney Systems, Inc. (Kinney) moves, pursuant to CPLR 3212, for an order dismissing the complaint and the cross claims asserted against it. The plaintiff Peach Parking Corp. (Peach) moves, pursuant to CPLR 3212, for an order granting Peach summary judgment against the defendants on the first, second, and third causes of action, and dismissing the counterclaims and cross claims interposed by the defendant The Hertz Corporation (Hertz). The defendant 346 West 40th Street, LLC (West 40th Street) cross-moves for an order granting summary judgment against Peach, Kinney, and Hertz, and directing the parties to reimburse West 40th Street the sum of $663,116 for construction expenses.

This action concerns which of the above-captioned parties is responsible for the cost of repairing a turn-of-the-century,

steel frame and concrete slab building, being used as a parking garage. The following facts are basically uncontroverted. Water infiltrated the building owing to lack of maintenance over a long period of time, including: the failure to replace broken windows; a leaking roof; and parked cars bringing in snow and slush. Car washing may also have been performed in the premises. There was no effective drainage system in the building. Because the premises is unheated, the water alternatively froze and thawed, causing the steel beams and concrete slabs to deteriorate. The building's facade and a sidewalk vault also sustained damage. At some point, cosmetic repairs were made, concealing the extent of the damage.

The following is a chronology of events. In 1978, the defendant West 40th Street, as successor owner, leased the property (prime lease) to the defendant Kinney. The prime lease obligates Kinney to keep the premises in good condition and to make all structural and non-structural repairs including, inter alia, walls, roofs, vaults, water mains, sewer connections, and pipes. However, the prime lease restricts Kinney's obligation to make structural repairs to the sum of $50,000. The prime lease also provides that Kinney accepts the premises in their present condition (the "as is" clause).

Additionally, the prime lease entitles Kinney to two options to renew. The first option has been exercised. The second

option, exercisable in 2007, would extend the lease term from 2008 to 2013.

In March 1978, one month after executing the prime lease with West 40th Street, and without ever having occupied the building, Kinney subleased the premises (first sublease) to the plaintiff Peach.

After occupying the premises from March 1978 to November 26, 2001, Peach sub-subleased the building (sub-sublease) to the defendant Hertz. Hertz currently operates a parking garage in the building. Simultaneously with Hertz's execution of the sub-sublease, a consent agreement was executed by both Kinney and West 40th Street. In addition, Hertz had an engineer assess the building's overall condition (Hertz's first engineer's report).

The sub-sublease provides that Hertz:

> shall have no obligation or liability for any structural repairs to the Premises, except to the extent such structural repairs are necessitated by the grossly negligent or willful acts of (Hertz). If structural repairs shall become necessary, in (Hertz's) reasonable judgment (Peach) shall seek to obtain the performance of Kinney and/or (West 40th Street) or (West 40th Street) through (Kinney) in effecting such repairs.

Hertz's sub-sublease also represented that the $50,000 liability of Peach for structural repairs was exhausted.

On January 2, 2002, an engineer's report commissioned by Kinney (Kinney's engineer's report) revealed the structural damage to the building.

Unbeknownst to Hertz, on January 11, 2002, West 40th Street issued an estoppel letter to Kinney and Peach, confirming that no default had occurred under the lease and the subleases which, "with the passage of time and without remedial action, would constitute a default under the Lease and the Premises has been maintained in accordance with the Lease requirements."

Unbeknownst to the other parties, on January 29, 2002, Peach and West 40th Street executed a side agreement (side agreement) whereby, in exchange for a third renewal term commencing after the expiration of Kinney's second renewal term in 2013, Peach paid additional rent to West 40th Street, bypassing Kinney.

In May 2006, after an incident where some concrete fell, Hertz's engineer issued a second report (Hertz's second engineer's report), based on invasive testing, finding that the structural damage constituted an imminent danger to people.

Both the sublease, and the second sublease, by their terms incorporate the language of the prime lease. The prime lease and the subleases provide for the unsuccessful party to pay the successful party's counsel fees in any litigation arising under the lease.

Peach's amended complaint sets forth a total of three causes of action. The first cause of action seeks a judicial determination of the dispute. The second cause of action seeks a judgment declaring that Peach is entitled to reimbursement of its

structural repair costs from West 40th Street. The third cause of action seeks a judgment declaring that Peach is entitled to reimbursement of its non-structural repair costs from its sub-sublessee Hertz.

The defendant West 40th Street in its amended answer, counterclaims against Peach, and cross-claims against Kinney and Hertz, alleging that Peach, Kinney and Hertz all failed to keep the premises in good repair.

The defendant Kinney pleads a combined counterclaim and cross claim against Peach, Kinney, and West 40th Street, alleging that if Kinney is found liable for any repairs, whether structural or non-structural, then Kinney is entitled to full indemnification pursuant to the subject agreements.

The defendant Hertz's second amended answer pleads waiver and laches, and alleges that Peach's claims are barred by the express terms of the agreements. The first counterclaim against Peach seeks an abatement of rent and alleges that Peach breached its agreement to seek the cost of structural repairs from West 40th Street. Hertz also cross-claims against West 40th Street, alleging that as a result of a consent agreement, it is a third-party beneficiary of the prime lease, and that the prime lease requires West 40th Street to pay to repair the structural defects in the building. Finally, Hertz asserts a fraud/rescission claim against Peach, Kinney and West 40th

Street, alleging that the prime lease, the first sublease, the second sublease and the consent agreement all misrepresented that there were no defaults.

In addition to the foregoing, each party seeks to recover its attorney's fees as the successful party in an action filed in relation to the lease.

In support of its motion for summary judgment, the defendant Kinney makes the following arguments. By the lease terms, Kinney had no responsibility to make structural repairs to the building. West 40th Street cannot take Kinney out of the chain of leases with a side agreement, receive additional rent, but still hold Kinney liable for the negative obligations of its lease.

In support of its motion for summary judgment, the plaintiff Peach makes the following arguments. Peach has no obligation to Hertz to make either structural or non-structural repairs to the property. Peach is entitled to indemnification from Hertz, West 40th Street, and Kinney. Hertz is not entitled to an abatement of rent from Peach. Hertz's claim of fraud in the inducement should be dismissed as barred by the sublease's merger clause, and because Peach did not have a confidential relationship with Hertz.

In support of its cross motion for summary judgment, West 40th Street argues that it recognizes its financial obligation to make necessary structural repairs, but that it expects the

tenants to make both all of the necessary non-structural repairs, and any structural repairs caused by their failure to keep the building in good condition.

The defendant Hertz makes the following arguments in opposition to Kinney's motion for summary judgment. Hertz's fraud claim against Kinney is collateral to the sub-sublease. Kinney made affirmative misrepresentations and failed to disclose material facts to Hertz. Whether Hertz's free access to the premises negates its justifiable reliance on Kinney's fraudulent misrepresentations is a question of fact. Kinney cannot excuse its misrepresentations by reference to the estoppel letter. The "as is" clause does not bar Hertz's fraud claim.

The defendant Hertz makes the following arguments in opposition to Peach's motion for summary judgment. Peach is obligated to keep the premises in good repair, and to effectuate structural repairs. Hertz is entitled to an abatement of rent from Peach because Hertz has been unable to use a portion of the premises due to falling concrete. Peach has failed to establish as a matter of law that Hertz failed to adequately maintain the property or that Hertz failed to perform non-structural repairs, justifying indemnification. Hertz was unable to discover the structural defects due to the patch repair work that hid the cracks in the concrete and the underlying structural problems. Peach had an obligation to disclose the January 2, 2002

engineering report. Peach affirmatively misrepresented to Hertz that Peach was not in breach of any of its obligations to either West 40th Street under the prime lease, or to Kinney under the first sublease. Hertz's fraud in the inducement claim, and Hertz's protections and rights contained in the sub-sublease, are not barred by the "as is" clause in the sub-sublease. Peach misrepresented that $50,000 was expended on structural repairs. The cosmetic repairs concealed from Hertz and its engineer the extent of the deterioration.

The defendant Hertz makes the following arguments in opposition to West 40th Street's cross motion for summary judgment. There is no evidence of any gross negligence or willful acts by Hertz. Prior to taking possession, Hertz could not have discovered the extensive structural damage to the garage. The "as is" clause does not bar Hertz's fraud claim.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case (JMD Holding Corp. v Congress Fin. Corp., 4 NY3d 373 [2005]; Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979]). The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once this showing

has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (Zuckerman v City of New York, 49 NY2d 557 [1980]).

The interpretation of the provisions of a lease is governed by the same rules of construction applicable to other agreements (Matter of Missionary Sisters of the Sacred Heart, Ill. v New York State Div. of Hous. & Community Renewal , 283 AD2d 284 [1st Dept 2001]). Where the intent of the parties is clear and unambiguous from the language employed in the agreement, the interpretation of the document is a matter of law for the court (W.W.W. Associates Inc. v Giancontieri, 77 NY2d 157 [1990]). Whether a contract is ambiguous is to be determined by looking within the four corners of the document (Kass v Kass, 91 NY2d 554 [1998]). A contract is unambiguous if on its face it is reasonably susceptible of only one meaning (Greenfield v Phillies Records, 98 NY2d 562 [2002]). On the other hand, a contract is ambiguous if the provisions are reasonably, or fairly susceptible of different interpretations (New York City Off-Track Betting Corp. v Safe Factory Outlet, 28 AD3d 175 [1st Dept 2006]). When a term is ambiguous, the parties may submit extrinsic evidence,

and the resolution of the ambiguity is for the trier of fact (State of New York v Home Indem. Co., 66 NY2d 669, 671 [1985]).

Additionally, in interpreting a contract, the court should aim to arrive at a practical interpretation of the intention of the parties as expressed in all of the language employed in the contract, with an eye to the parties' reasonable expectations (McErlean v Mendelson, 256 AD2d 391 [2d Dept 1998]) and an interpretation which does not leave contractual clauses meaningless (see Two Guys from Harrison-N.Y. v S.F.R. Realty Assoc., 63 NY2d 396 [1984]). A contract should not be interpreted in such a way as would leave one of its provisions substantially without force or effect (T.M. Bier & Assoc. v Piraino, 16 AD3d 578 [2d Dept], lv denied 5 NY3d 707 [2005]).

A written covenant to repair will not be expanded by implication to obligate the landlord to do more than the landlord has expressly agreed to do (Patrick Pontiac Nissan, Inc. v Jotric Land Development, 269 AD2d 803 [4th Dept 2000]). Absent an express clause to the contrary, the tenant has no obligation to make significant structural changes (Josam Associates v General Bowling Corp., 135 AD2d 502 [2d Dept 1987]). Where a lease clause does not clearly allocate the parties' respective obligations, extrinsic evidence may be considered to resolve the issue (Grenadeir Parking Corp. v Landmark Associates, 277 AD2d 117 [1st Dept 2000]). What will constitute a structural

alteration necessarily depends upon the facts of each case and requires that the nature and extent of the proposed repair or alteration be examined in the context of and in relationship to the structure itself. A structural change or alteration is such a change as affects a vital and substantial portion of the premises, as changes its characteristic appearance, the fundamental purpose of its erection, or the uses contemplated, or, a change of such a nature as affects the very realty itself -- extraordinary in scope and effect, or unusual in expenditure (Garrow v Smith, 198 AD2d 622 [3d Dept 1993]).

Here, triable issues of fact are presented, including (1) whether or not the lessees allowed the premises to become structurally unsound by failing to perform the maintenance required by their respective leases, (2) whether the structural damage arose from normal wear and tear in an old building, (3) whether the sum of $50,000 was ever expended, (4) whether the failure to perform routine maintenance was reckless, (5) whether the introduction of water into the building by washing cars was reckless, and (6) what damage is structural in nature and what damage is not structural.

The defendant West 40th Street essentially concedes its liability under the prime lease for structural repairs costing in excess of the sum of $50,000, but contends that the plaintiff Peach and the co-defendants Kinney and Hertz failed to mitigate

the structural damage by performing the required routine maintenance. On these facts, reasonable persons could differ as to whether the tenants intentionally or recklessly caused the structural damage. Contrary to the moving parties' assertions, this case does not involve interpretation of unambiguous leases (Hirsch v Food Resources, Inc., 24 AD3d 293 [1st Dept 2005]). On the contrary, the language of the leases does not clearly provide that one party is legally responsible for the needed structural repairs.

The prime lease requires the tenant to make all repairs, structural and non-structural. However, the prime lease provides that the tenant's obligation to make structural repairs is limited to the sum of $50,000. Although the parties may limit their liability, the limitation does not exonerate them from a reckless or intentional failure to perform maintenance. Although each party contemplated by their repair covenant that the premises should be kept in the same repair that they were in when the premises were leased to that party, it is not possible to see which repairs any one tenant should have made and those which it was not called on to make.

Contrary to Peach, Kinney, and West 40th Street's contention, Hertz's answer and supporting papers state a cause of action to recover damages for fraud. In order to recover damages for fraud, a party must prove a misrepresentation or a material

omission of fact which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury (Lama Holding Co. v Smith Barney, 88 NY2d 413 [1996]). Hertz adequately alleges these elements by setting forth factually based claims that Kinney, Peach and West 40th Street engaged in a scheme to induce Hertz to sign the sub-sublease. Hertz alleges facts, such as the concealment of side agreements, from which scienter may be inferred. Thus, there is evidence that Kinney, Peach and West 40th Street were aware of and concealed the potential liability for structural damage at the time of the negotiation for the sub-sublease. Whether Hertz had the means to discover the true facts, and whether Hertz's reliance was reasonable implicate factual issues whose resolution requires a trial.

Further, general disclaimer and merger clauses in a real estate contract are ineffective to bar a fraud in the inducement claim unless the clauses specifically refer to the particular subject matter as to which the representations are alleged (Danann Realty Corp. v Harris, 5 NY2d 317, 320 [1959]). Here, the merger clause at issue does not refer to any representations related to structural damages. Therefore, Hertz's claim for fraud is not subject to dismissal.

As to Kinney's assertions concerning legal effect of the

side agreement for a direct lease between West 40th Street and Peach, it is uncontroverted that at the end of the term of Kinney's second option, it had no further rights to lease the premises (A.H.A. General Constr., Inc. v New York City Housing Authority, 92 NY2d 20 [1998], rearg denied 92 NY2d [1998]). Therefore, West 40th Street and Peach were free to enter into a lease for the period following the termination of Kinney's lease. Furthermore, such lease between West 40th Street and Peach was neither a novation, nor a cancellation of Kinney's lease with West 40th Street. Novation is defined as a transaction whereby a debtor is discharged from his liability to his original creditor by contracting a new obligation in favor of a new creditor by the order of the original creditor (Griggs v Day, 136 NY 152, 160 [1892]). Here, there is no element answering to this definition.

Finally, these actions are not barred by the prime lease provision in which the tenants agreed to take possession of the premises in its present condition and to make all of the required structural repairs to the demised premises. Giving the parties' evidence every favorable inference, issues of fact are raised as to whether West 40th Street, or the over-tenants Kinney and Peach should be estopped from asserting this "as is" clause (Nassau Trust Co. v Montrose Concrete Prods. Corp., 56 NY2d 175, 184 [1982]).

Accordingly, it is

ORDERED that the motion and the cross motions for summary judgment are denied.

Dated: 1/1/06

WALTER B. TOLUB, J.S.C.