

**New York Schools Ins. Reciprocal v
Honeywell, Inc.**

2007 NY Slip Op 31921(U)

June 27, 2007

Supreme Court, Suffolk County

Docket Number: 0023520/2002

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. EMILY PINES
Justice of the Supreme Court

MOTION DATE 1/5/07 (#011,012,013)
2/9/07 (#014)
3/5/07 (#015)
ADJ. DATE 3/5/07

Mot. Seq. # 011 - MD
012 - XMG
013 - XMG
014 - MG
015 - MG

-----X
NEW YORK SCHOOLS INSURANCE :
RECIPROCAL a/s/o MIDDLE COUNTRY :
CENTRAL SCHOOL DISTRICT, :

Plaintiff, :

- against - :

HONEYWELL, INC., HUNT-BIENFANG :
PRODUCTS, NASCO FORT ATKINSON, :
CRESCENT CARDBOARD COMPANY, L.L.C., :
RIEBE'S ARTIST MATERIALS, INC., BELL :
FOAM BOARD AND SPECIALTIES and :
CUNNINGHAM DUCT CLEANING CO., INC., :

Defendants. :

-----X
HONEYWELL INTERNATIONAL, INC., :
Third-Party Plaintiff, :

- against - :

SIMPLEXGRINNELL, LP, :

Third-Party Defendant. :
-----X

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Upon the following papers numbered 1 to 102 read on these motions and cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-10; 42-52; 53-73 ; Notice of Cross Motion and supporting papers 12-28; 29-41 ; Answering Affidavits and supporting papers 74-78; 79-82; 83-84 ; Replying Affidavits and supporting papers 85-88; 89-90; 91-94; 95-96; 97-100; 101-102 ; Other 11 ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motions (sequence #s 011, 014, 015) and the cross motions (sequence #s 012, 013) seeking summary judgment are consolidated for purposes of this determination; and it is

ORDERED that the motion (sequence # 011) by defendant Riebe's Artist Materials, Inc. for summary judgment dismissing the complaint and all cross-claims against is denied, as moot, as such motion was withdrawn by counsel for Riebe's Artist Materials by correspondence dated January 18, 2007; and it is

ORDERED that the motions (sequence #s 012, 014, 014) for summary judgment dismissing all claims against defendants Hunt-Bienfang Products, Bell Foamboard & Specialities, Inc., and Riebe's Artist Materials, Inc. are granted; and it is

ORDERED that the motion (sequence # 015) by defendant Honeywell International Inc., s/h/a Honeywell Inc., for summary judgment dismissing all claims against it is granted.

Plaintiff New York Schools Insurance Reciprocal, as subrogee, commenced this action to recover \$13 million in insurance proceeds paid to its insured, Middle Country Central School District (hereinafter MCCSD), for property damage caused by a fire at New Lane Elementary School. The fire, which occurred during school hours on April 18, 2001, started in a utility closet on the fourth floor of the building. Plaintiff alleges that, while the initial cause of the fire is unknown, flammable foam boards located in the fourth floor hallway caused the fire to rapidly intensify and spread. The foam boards, which measure four feet by eight feet, are comprised of polystyrene foam with paper facing. Used by teachers in the district to display students' artwork, the foam boards had been placed in the hallway in early April 2001 for an art show at New Lane Elementary School. Plaintiff alleges, in part, that the foam boards used for the art show at New Lane Elementary School at the time of the fire were manufactured by defendant Hunt-Bienfang Products (hereinafter Hunt), distributed by defendant Bell Foamboard & Specialities, Inc. (hereinafter Bell), s/h/a Bell Foam Board and Specialities, and sold to MCCSD by defendant Riebe's Artist Materials, Inc. (hereinafter Riebe's Artist), an art supply retailer.

The amended complaint seeks to recover damages under theories of negligence, strict products liability, and breach of warranty. More particularly, plaintiff alleges, among other things, that the foam boards were defective and inherently dangerous, because they are "extremely flammable and easily ignitable." It alleges that Hunt, Bell and Riebe's Artist were negligent, among other things, in failing to adequately warn that the foam boards were combustible and had a propensity to emit large quantities of smoke; in failing to provide accurate warning information about the flammable and toxic nature of the foam boards; and in marketing and selling foam boards that were not appropriate for use in an educational environment. Plaintiff also alleges that these three defendants breached express and implied warranties, as the foam boards were "unsuitable for [their] intended purposes" and not of merchantable

quality.

Further, plaintiff alleges that New Lane Elementary School sustained increased smoke damage due to a defective heating, ventilation and air conditioning (HVAC) system in the building. It is undisputed that the elementary school's pneumatically-controlled HVAC system was designed to activate air circulation fans when the air pressure in the pneumatic lines measured 0 pounds per square inch (psi), and to shut off such fans when the air pressure in the lines rose to 22 psi. Plaintiff alleges that while the HVAC system, which was connected to the school's fire safety system, properly shut down when the fire alarm was activated, the air circulation fans switched back on during the fire after leaks in fire-damaged pneumatic lines caused the air pressure in the lines to drop to 0 psi. The activation of the fans, plaintiff asserts, increased the movement of smoke and fire-generated contaminants within the school building.

At the time of the subject fire, MCCSD had contracted with defendant Honeywell International Inc. (hereinafter Honeywell), s/h/a Honeywell, Inc., to inspect, maintain and service the existing HVAC systems throughout the school district. Plaintiff alleges, among other things, that Honeywell was obligated under the terms of the service agreement with MCCSD to evaluate how New Lane Elementary School's MVAC system would operate in the event of a fire, and to upgrade and/or redesign the school's HVAC system so that the circulation fans would remain off in the event of a fire. It alleges that Honeywell breached its contract with the district by failing to test how the HVAC system would perform in a fire and failing to upgrade the system's equipment, particularly the pneumatic lines. It is undisputed the HVAC system, which was installed during the construction of New Lane Elementary School in 1970, complied with all fire and building codes both at the time of installation and at the time of the subject fire. The Court notes that plaintiff has abandoned claims that Honeywell negligently designed and manufactured the HVAC system in the school, and that it breached the warranty of fitness and merchantability for such system. It also notes that a stipulation discontinuing, without prejudice, a third-party action commenced by Honeywell against SimplexGrinnell, LP, was filed with the Court on February 28, 2007.

Hunt, Bell, and Riebe's Artist now move for summary judgment dismissing the complaint and the cross-claims against them, arguing that there is no evidence that they manufactured, supplied or sold the foam boards that were part of the art display at the elementary school when the subject fire occurred. Alternatively, they argue that there is no evidence that the foam boards were inherently dangerous, or that they were defectively designed or manufactured. Hunt, Bell and Riebe's Artist's submissions in support of the motions include copies of the pleadings; the transcripts of the parties' deposition testimony; the technical guide prepared by Hunt for the foam board products at issue; and the printed warning labels affixed by Hunt on the packaging used for the foam boards. Also included among defendants' submissions are copies of purchase orders and invoices generated in 2000 and 2001 for the sale of foam boards to MCCSD by Riebe's Artist. These invoices indicate that the foam boards sold to MCCSD during the 2000/2001 school year were manufactured by Hunt and supplied by Bell.

Plaintiff opposes the motions, arguing that an issue of fact exists as to whether the foam boards were a substantial cause of the extensive fire-related damages at the New Lane Elementary School. Plaintiff submits fire investigation reports prepared by the Town of Brookhaven and the Suffolk County Police Department as support for its claim that the foam boards "contributed significantly" to the fire

spread at the school. Plaintiff further asserts that deposition testimony by Robert Riebe, owner of Riebe's Artist, creates a material question of fact "as to whether defendant Riebe's, an art supply distributor, provided the Middle Country Central School District with the subject foam core boards which were manufactured by defendant Hunt and subsequently shipped to the District by the foam board distributor, defendant Bell Foam."

Honeywell also moves for summary judgment in its favor on the complaint and the cross-claims, arguing that no duty was owed to MCCSD to evaluate how the HVAC systems in the various schools within the district would operate in the event of a fire. It further asserts that it had no obligation under its contract with MCCSD to redesign or upgrade New Lane Elementary School's HVAC system, or any other HVAC system in the district, with respect to its operation during a fire event. In opposition, plaintiff alleges that summary judgment must be denied, as the terms of the contract between MCCSD and Honeywell are ambiguous with respect to the scope of Honeywell's obligation to maintain the equipment of the HVAC systems. Plaintiff maintains that, as language within the contract requires Honeywell to perform routine checks of the HVAC system equipment for "proper operation of controls, dampers, valves, burners and associated mechanical components," a trier of fact could reasonably conclude that Honeywell had a duty to evaluate how the school's HVAC system, particularly the pneumatic lines, would perform in a fire event, as well as a duty to upgrade the equipment used in the system so that the air circulation fans would not be activated if there was a loss of pressure in the pneumatic lines during a fire.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by tendering proof in admissible form sufficient to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). Once such a showing has been made, the burden shifts to the party opposing summary judgment to present evidence establishing the existence of a material question of fact requiring a trial (*Alvarez v Prospect Hosp.*, *supra*, at 324, 508 NYS2d 923; *Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595 [1980]). The opposing party must meet this burden by producing evidentiary proof in admissible form, or by demonstrating a reasonable excuse for failing to meet the requirement of tender in admissible form (*see, Zuckerman v City of New York, supra; see, W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 565 NYS2d 440 [1990]). "It is incumbent upon a [party] who opposes a motion for summary judgment to assemble, lay bare and reveal his proofs, in order to show that the matters set up in [the complaint] are real and are capable of being established upon a trial" (*Di Sabato v Soffes*, 9 AD2d 297, 301, 193 NYS2d 184 [1st Dept 1959]).

The motions by Hunt, Bell and Riebe's Artist for summary judgment dismissing all claims against them are granted. A manufacturer who places a defective product into the stream of commerce may be liable for injuries or damages caused by such product (*Gebo v Black Clawson*, 92 NY2d 387, 392, 681 NYS2d 221 [1998]; *Liriano v Hobart Co.*, 92 NY2d 232, 235, 677 NYS2d 764 [1998]; *Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 532, 569 NYS2d 337 [1991]). Depending upon the factual circumstances, a person injured by a defective product may maintain causes of action under the theories of strict products liability, negligence or breach of warranty (*see, Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 463 NYS2d 398 [1983]). Whether an action is pleaded in strict products liability,

negligence or breach of warranty, the plaintiff has the burden of establishing that a defect in the product was a substantial factor in causing the injury, and that the defect existed at the time the product left the manufacturer or other entity in the chain of distribution being sued (*see, Clarke v Helene Curtis, Inc.*, 293 AD2d 701, 742 NYS2d 325 [2d Dept 2002]; *Tardella v RJR Nabisco*, 178 AD2d 737, 576 NYS2d 965 [3d Dept 1991]; *see also, Robinson v Reed-Prentice Div. of Package Mach. Co.*, 49 NY2d 471, 426 NYS2d 717 [1980]; *Dickinson v Dowbrands, Inc.*, 261 AD2d 703, 689 NYS2d 548 [3d Dept], *lv denied* 93 NY2d 815, 697 NYS2d 563 [1999]; *James v Harry Weinstein, Inc.*, 258 AD2d 562, 685 NYS2d 471 [2d Dept 1999]).

Under the doctrine of strict products liability, a manufacturer of a defective product is liable to any person injured or damaged if the defect was a substantial factor in causing the injury or damages, provided

- (1) that at the time of the occurrence the product is being used * * * for the purpose and in the manner normally intended, (2) that if the person injured or damaged is himself [or herself] the user of the product he [or she] would not by the exercise of reasonable care have both discovered the defect and perceived its danger, and (3) that by the exercise of reasonable care the person injured or damaged would not otherwise have averted [or her] injury or damages

(*Codling v Paglia*, 32 NY2d 330, 342, 345 NYS2d 461 [1973]; *see, Amatulli v Delhi Constr. Corp.*, *supra*). A product may be defective due to a mistake in the manufacturing process, an improper design, or a failure to provide adequate warnings regarding the use of the product (*Sprung v MTR Ravensburg*, 99 NY2d 468, 472, 758 NYS2d 271 [2003]; *Gebo v Black Clawson Co.*, *supra*, at 392, 681 NYS2d 221; *Liriano v Hobart Co.*, *supra*, at 237, 677 NYS2d 764; *Voss v Black & Decker Mfg. Co.*, *supra*, at 106-107, 463 NYS2d 398).

Further, a plaintiff in a strict products liability action is not required to prove the exact nature of the defect (*Caprara v Chrysler Corp.*, 52 NY2d 114, 123, 436 NYS2d 251 [1981]; *Halloran v Virginia Chems.*, 41 NY2d 386, 388, 393 NYS2d 341 [1977]), and proof of liability may be established by direct or circumstantial evidence (*see, Speller v Sears, Roebuck & Co.*, 100 NY2d 38, 760 NYS2d 79 [2003]; *Pollock v Toyota Motor Sales U.S.A.*, 222 AD2d 766, 634 NYS2d 812 [3d Dept 1995]; *Narciso v Ford Motor Co.*, 137 AD2d 508, 524 NYS2d 251 [2d Dept 1988]). However, a plaintiff seeking to recover under a claim of strict products liability must establish by competent proof that the defendant manufactured the product and/or placed it in the stream of commerce (*see, Healey v Firestone Tire & Rubber Co.*, 87 NY2d 596, 601, 640 NYS2d 860 [1996]; *Hymowitz v Eli Lilly & Co.*, 73 NY2d 487, 504, 541 NYS2d 941 [1989]; *D'Amico v Manufacturers Hanover Trust Co.*, 173 AD2d 263, 265, 569 NYS2d 962 [1st Dept 1991]). The identity of the manufacturer of a defective product may be established with circumstantial evidence, even if the allegedly defective product was destroyed after use (*Healey v Firestone Tire & Rubber Co.*, *supra*, at 601, 640 NYS2d 860; *see, e.g., Otis v Bausch & Lomb*, 143 AD2d 649, 532 NYS2d 933 [2d Dept 1988]). If a plaintiff relies on circumstantial evidence to establish the identity of the manufacturer, such evidence "must establish that it is reasonably probable, not merely possible or evenly balanced, that the defendant was the source of the offending

product [citations omitted]. Speculative or conjectural evidence of the manufacturer's identity is not enough" (*Healey v Firestone Tire & Rubber Co.*, *supra*, at 601-602, 640 NYS2d 860; *see*, *Brown v Elm Plumbing Supply*, 271 AD2d 469, 706 NYS2d 909 [2d Dept 2000] *Escarria v American Gage & Mfg. Co.*, 261 AD2d 434, 690 NYS2d 86 [2d Dept 1999]; *D'Amico v Manufacturers Hanover Trust Co.*, *supra*).

A plaintiff injured by an alleged defective product seeking damages under a negligence theory must, as in any negligence action, establish the existence of a legal duty of care, a breach of that duty, and damages resulting from such breach (*see*, *Micallef v Miehle Co., Div. of Miehle-Goss Dexter*, 39 NY2d 376, 384 NYS2d 115 [1976]; *see generally*, *Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393 [1976]; *Luina v Katharine Gibbs School N.Y.*, 37 AD3d 555, 830 NYS2d 263 [2d Dept 2007]). A manufacturer is under a nondelegable duty to design and produce a product that is not defective, and a defectively designed product is one which "is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use" (*Robinson v Reed-Prentice Div.*, *supra*, at 479, 426 NYS2d 717). Furthermore, liability for breach of the implied warranty of fitness and merchantability under UCC §§ 2-314 requires the plaintiff to show that the product at issue was not reasonably fit for the ordinary purposes for which it was intended, and that such product was the proximate cause of his or her injury (*see*, *Denny v Ford Motor Co.*, 87 NY2d 248, 639 NYS2d 250 [1995]; *Wojcik v Empire Forklift*, 14 AD3d 63, 783 NYS2d 698 [3d Dept 2004]; *Finkelstein v Chevron Chem. Co.*, 60 AD2d 640, 400 NYS2d 548 [2d Dept 1977], *lv denied* 44 NY2d 461, 405 NYS2d 1025 [1978]).

In addition, distributors and retailers who regularly deal with a defective product are subject to potential strict product liability and liability for breach of warranty (*Harrigan v Super Prods. Corp.*, 237 AD2d 882, 654 NYS2d 503 [4th Dept 1997]; *see*, *Joseph v Yenkin Majestic Paint Corp.*, 261 AD2d 512, 690 NYS2d 611 [2d Dept 1999]). Nevertheless, strict product liability or liability for breach of warranty may not be imposed upon a party outside the manufacturing, selling or distributive chain (*Spallholtz v Hampton C.F. Corp.*, 294 AD2d 424, 424, 741 NYS2d 917 [2d Dept], *lv denied* 98 NY2d 611, 749 NYS2d 3 [2002], *quoting Joseph v Yenkin Majestic Paint Corp.*, *supra*, at 512, 690 NYS2d 611; *see*, *Passaretti v Aurora Pump Co.*, 201 AD2d 475, 607 NYS2d 688 [2d Dept 1994]; *DaSilva v Seville Cent. Mix Corp.*, 237 AD2d 244, 655 NYS2d 402 [2d Dept], *lv dismissed* 90 NY2d 935, 664 NYS2d 273 [1997], *lv denied* 92 NY2d 804, 677 NYS2d 779 [1998]).

The deposition testimony of plaintiff's witness, Marc Greene, who was employed by MCCSD as Director of Music and Fire Arts, reveals that since September 1997, the fine arts department would order 200 sheets of 4' x 8' foam board for each school year, and that these supplies would be bought by the district's purchasing department under a competitive bidding process. Mr. Greene testified that the foam boards would be delivered to the high school and kept in a storage area at the school. He testified that the fine arts department kept more than 600 foam boards in stock for the district's annual art show, and that approximately 300 to 400 boards would be distributed each year to all of the schools within the district. Mr. Greene testified that the fine arts department used foam boards to display artwork prior to the time he became director, and that MCCSD purchased the foam boards for his department from Riebe's Artists during the four years before the subject fire. He also testified that he had not seen warnings on any of the foam boards used for the art shows, and that he does not know whether other departments within the school district placed orders for foam boards. Moreover, Mr. Greene testified

that, based on the system that existed within the school district for storing and distributing the foam boards, he is unable to determine who manufactured or sold the specific foam boards distributed to New Lane Elementary School during the 2000/2001 academic year.

Further, Mary Jane Portnoy, a nonparty witness, testified at a deposition that she had been employed by MCCSD as an art teacher since 1971, and had taught at New Lane Elementary School since 1980. Ms. Portnoy, who retired in June 2001, testified that each year she typically requested six or seven foam boards from the fine arts department for use in the annual art show. She testified that she began using the foam boards to create display spaces sometime during the 1990s, and that, depending on their condition, she would re-use the boards for two or three years and then discard them. Ms. Portnoy testified that, if the foam boards were in good shape after the art show, they would be stored in a closet at the school for future use. She also testified that she and another art teacher used 12 pieces of 4' x 8' foam board to create the art display that was in the hallway at the time of the fire. Further, Ms. Portnoy testified that she believed she had approximately six or seven foam boards in storage when she gave Mr. Greene her request for art supplies for the 2000/2001 academic year, and that she did not know the name of the manufacturer, supplier or retailer of the foam boards delivered to New Land Elementary School the year of the fire. She also testified that when the foam boards were delivered to the elementary school, there was no packaging that identified the manufacturer or distributor.

The Court finds that Mr. Greene and Ms. Portnoy's deposition testimony that both the fine arts department and the elementary school stored foam boards for future use, that the boards were re-used by school employees from year to year, and that there were no packaging or warning labels on the boards is sufficient to demonstrate prima facie that plaintiff cannot establish that the foam boards used in the 2001 art exhibit at New Lane Elementary School were manufactured by Hunt (*see, Healey v Firestone Tire & Rubber Co., supra; Brenner v American Cyanamid Co.*, 288 AD2d 869, 732 NYS2d 799 [4th Dept 2001]; *Baum v Eco-Tec, Inc.*, 5 AD3d 842, 773 NYS2d 161 [3d Dept 2004]; *cf., Matter of New York Asbestos Litig.*, 256 AD2d 250, 683 NYS2d 39 [1st Dept 1998], *lv denied* 93 NY2d 818, 697 NYS2d 565 [1999], *cert denied* 529 US 1019, 120 S Ct 1419 [2000]). Likewise, such testimony demonstrates as a matter of law that there is no evidence that Bell or Riebe's Artist was the source of the subject boards. In fact, plaintiff concedes in its opposition papers that there is no direct evidence as to the maker or source of the foam boards.

The burden, therefore, shifted to plaintiff to produce evidentiary proof in admissible form sufficient to raise a triable issue of fact as to whether Hunt, Bell, and/or Riebe's Artist manufactured or sold the foam boards used in the art display. However, plaintiff failed to present any evidence, circumstantial or otherwise, supporting its allegations that Hunt, Bell and Riebe's Artist either produced such foam boards or placed them in the stream of commerce. Absent evidence showing that it is "reasonably probable," rather than mere speculation, that the boards were manufactured by Hunt, sold to MCCSD by Riebe's Artist and distributed by Bell, these defendants are entitled summary judgment dismissing the claims against them (*see, Healey v Firestone Tire & Rubber Co., supra; Jimenez v Iron Master Corp.*, 292 AD2d 426, 738 NYS2d 896 [2d Dept 2002]; *Escarria v American Gage & Mfg. Co., supra; D'Amico v Manufacturers Hanovers Trust Co., supra*).

As to the breach of contract claims against Honeywell, the aim of a court called upon to interpret a contract is to arrive at a construction that gives fair meaning to all of its terms and provisions, and to

reach a “practical interpretation of the expressions of the parties so that their reasonable expectations will be realized” (*Joseph v Creek & Pines*, 217 AD2d 534, 535, 629 NYS2d 75 [2d Dept], *lv dismissed* 86 NY2d 885, 635 NYS2d 950 [1995], *lv denied* 89 NY2d 804, 653 NYS2d 543 [1996]; *see, Petracca v Petracca*, 302 AD2d 576, 756 NYS2d 587 [2d Dept 2003]; *Fetner v Fetner*, 293 AD2d 645, 741 NYS2d 256 [2d Dept 2002]; *Partrick v Guarniere*, 204 AD2d 702, 612 NYS2d 630 [2d Dept], *lv denied* 84 NY2d 810, 621 NYS2d 519 [1994]). It is well settled that “in seeking the intent of the parties, the fact that a construction contended for would make the contract unreasonable may properly be taken into consideration. A court will endeavor to give the construction most equitable to both parties instead of the construction that will give one of them an unfair and unreasonable advantage over the other” (*Fleischman v Fergusson*, 223 NY 235, 241, 119 NE 400 [1918]; *see, Haskin v Mendler*, 184 AD2d 372, 584 NYS2d 851 [1st Dept 1992]; *Hsieh v Pudge Corp.*, 122 AD2d 198, 505 NYS2d 163 [2d Dept 1986]; *Nassau Chapter, Civil Serv. Empls. Assn. v County of Nassau*, 77 AD2d 563, 430 NYS2d 98 [2d Dept 1980], *affd* 54 NY2d 925, 445 NYS2d 152 [1981]). Further, a court may not write into a contract conditions the parties did not insert by adding or excising terms under the guise of construction, and it may not construe the language used in such a way as would distort the contract’s apparent meaning (*see, Salmow v Del Col*, 79 NY2d 1016, 584 NYS2d 424 [1992]) *supra*; *Matter of Kalman v Kalman*, 300 AD2d 487, 751 NYS2d 578 [2d Dept 2002]; *Cohen-Davidson v Davidson*, 291 AD2d 474, 740 NYS2d 68 [2d Dept 2002]; *Matter of Scalabrini v Scalabrini*, 242 AD2d 725, 662 NYS2d 581 [2d Dept 1997]).

Moreover, where the terms of a written contract are clear and unambiguous, the intent of the parties must be found from within the four corners of the contract and without resort to extrinsic evidence (*see, Rainbow v Swisher, supra; Chimert Assocs. v Paul*, 66 NY2d 570, 498 NYS2d 344 [1986]; *Matter of Poznik v Froebel*, 1 AD3d 366, 766 NYS2d 877 [2d Dept 2003]; *Brennan v Brennan*, 300 AD2d 524, 752 NYS2d 557 [2d Dept 2002]). “The best evidence of what parties to a written agreement intend is what they say in their writing” (*Slamow v Del Col, supra*, at 1018, 584 NYS2d 424). As it is a question of law whether or not a contract is ambiguous (*W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 565 NYS2d 440 [1990]), the court must first determine whether the agreement at issue on its face is reasonably susceptible to more than one interpretation (*see, Chimart Assocs. v Paul, supra*). The interpretation of an unambiguous term or provision is a matter of law for the court, and circumstances extrinsic to the contract may not be considered (*see, Teitelbaum Holdings v Gold*, 48 NY2d 51, 421 NYS2d 556 [1979]). If an ambiguity is discerned with respect to the parties’ intent, the court may consider extrinsic evidence (*see, Laing v Laing*, 282 AD2d 655, 723 NYS2d 710 [2d Dept 2001]; *Tirella v Tirella*, 249 AD2d 294, 670 NYS2d 889 [2d Dept 1998]; *see also, Morash v State*, 268 AD2d 510, 703 NYS2d 55 [2d Dept], *lv denied* 95 NY2d 755, 712 NYS2d 447 [2000]; *Seaman Furniture Co. v Seaman*, 267 AD2d 297, 701 NYS2d 82 [2d Dept 1999]). However, “when a term or clause is ambiguous and the determination of the parties’ intent depends on the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence,” then the ambiguity must be resolved by a trial (*Amusement Bus. Underwriters v American Intl. Group*, 66 NY2d 878, 880, 498 NYS2d 760 [1985]; *see, Brook Shopping Ctrs. v Allied Stores Gen. Real Estate Co.*, 165 AD2d 854, 560 NYS2d 317 [2d Dept 1990]).

Documentary and testimonial evidence submitted in support of Honeywell’s motion shows that in August 1987, MCCSD and Honeywell entered into a ten-year agreement wherein Honeywell, in exchange for a monthly payment, agreed, in relevant part, to inspect and maintain the HVAC systems

for the 14 schools located within the district. The contract states that this service, known as Flex Mechanical Maintenance, “is designed to provide the customer with an ongoing maintenance program in which Honeywell on a regular basis performs the routine maintenance essential to keep mechanical HVAC systems in proper operating condition. In addition, periodic efficiency testing and adjustments are performed to ensure energy-effective operation of major mechanical systems.” Under the terms of this contract, Honeywell guaranteed that its maintenance program would create energy savings of \$1,931,562 by the end of the contract period.

The 1987 contract states, in relevant part, that Honeywell, on a quarterly basis, will visually inspect all maintained mechanical equipment and check for proper operation of controls, dampers, valves, burners and associated mechanical components. Lists delineating the HVAC equipment in each school building covered by the service agreement are included as part of the contract. The 1987 contract states that Honeywell, on an annual basis, will provide various maintenance services for each piece of HVAC equipment covered under the agreement, including seasonal start-up and shut-down, calibration of all associated temperature, safety and operational controls, and adjustment of all belts, dampers, set points, water treatment systems, and filter feed systems. It further states that Honeywell, on a semi-annual basis, “will perform efficiency analysis tests and make adjustments to major mechanical equipment to ensure energy-efficient operation.” The Court notes that during the ten-year period of this service agreement, MCCSD purchased from Honeywell a computer system designed to improve efficiency by continuously monitoring the temperatures of the various school and administrative buildings within the district.

After the expiration of the initial contract, MCCSD and Honeywell entered into yearly service agreements for the HVAC systems. In July 2000, MCCSD and Honeywell entered into a renewal agreement (hereinafter the 2000/2001 contract) for the Flex Mechanical service and for other environment-management services. The 2000/2001 contract between MCCSD and Honeywell states, in relevant part, that as part of its maintenance program, Honeywell will “verify operation of pneumatic/electric/ electronic control components for efficient operation,” “lubricate and adjust damper motors, bearings, linkages, and valve systems,” “inspect and clean air compressor and refrigerated air dryer,” and “change filters and oil on air compressor, dryer and air supply.” As with the initial energy-management agreement, the 2000/2001 contract includes lists of the mechanical equipment covered under the agreement. Further, provision 2.9 of the 2000/2001 contract states that “[m]aintenance, repairs and replacement of equipment parts and components are limited to restoring to proper working condition. Honeywell shall not be obligated to provide replacement software, equipment, components and/or parts that represent a significant betterment or capital improvement to customer’s system(s) hereunder.”

The language used in the 2000/2001 contract clearly evidences MCCSD and Honeywell’s intent that Honeywell would provide energy management services for the district, including maintenance of the HVAC systems and electronic monitoring of the temperature levels in the various school buildings, in exchange for a regularly monthly fee. Significantly, there is no language in the 2000/2001 contract, or the initial 1987 contract, evidencing an intent that Honeywell would redesign or service the fire and safety systems, like smoke and fire detection, installed in the school buildings. Thus, plaintiff’s argument that, as part of its contractual obligations to inspect and maintain the efficient operation of the HVAC system at New Lane Elementary School, Honeywell had a duty to evaluate how the HVAC

system would perform in a fire and to redesign or upgrade the system so that the air circulation fans would not activate during a fire event is rejected as an improper attempt to rewrite the contract by adding terms not included by the parties (see, *Matter of Salvano v Merrill Lynch, Pierce, Fenner & Smith*, 85 NY2d 173, 623 NYS2d 790 [1995]; *Tri Messine Constr. Co. v Telesector Resources Group*, 287 AD2d 558, 731 NYS2d 648 [2d Dept 2001], *lv denied* 98 NY2d 606, 746 NYS2d 457 [2002]). Thus, Honeywell is entitled to judgment dismissing the breach of contract claims against it.

Finally, as to plaintiff's tort claim against Honeywell, a simple breach of contract is not considered a tort unless a legal duty independent of the contract has been violated (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389, 521 NYS2d 653 [1987]; see, *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 639 NYS2d 283 [1995]; *Sommer v Federal Signal Corp.*, 79 NY2d 540, 583 NYS2d 957 [1992]). A party to a contract may be liable in tort when it has "breached a duty of reasonable care distinct from its contractual obligations, or when it has engaged in tortious conduct separate and apart from its failure to fulfill its contractual obligations" (*New York Univ. v Continental Ins. Co.*, *supra*, at 316, 639 NYS2d 283; see, *North Shore Bottling Co. v C. Schmidt & Sons*, 22 NY2d 171, 292 NYS2d 86 [1968]; *D'Ambrosio v Engel*, 292 AD2d 564, 741 NYS2d 42 [2d Dept], *lv denied* 99 NY2d 503, 753 NYS2d 806 [2002]). However, the legal duty must arise from circumstances "extraneous to, and not constituting the elements of, the contract, although it may be connected with and dependant on the contract" (*Clark-Fitzpatrick, Inc. v Long Is. R.R.*, *supra*, at 389, 521 NYS2d 653; see, *Rich v New York Cent. & Hudson Riv. R.R. Co.*, 87 NY 382 [1882]; *Krantz v Chateau Stores of Canada*, 256 AD2d 186, 683 NYS2d 24 [1st Dept 1998]). Here, plaintiff does not allege in its pleadings that Honeywell breached a duty independent of its contractual obligations, or that it engaged in tortious conduct separate from its alleged failure to comply with the terms of the 2000/2001 service agreement (see, *Probst v Cacoulidis*, 295 AD2d 331, 743 NYS2d 509 [2d Dept 2002]; *Givoldi, Inc. v United Parcel Serv.*, 286 AD2d 220, 729 NYS2d 25 [1st Dept 2001]; *Massena Town Ctr. Assocs. v Sear-Brown Group*, 255 AD2d 893, 680 NYS2d 349 [4th Dept 1998]; *Bristol-Meyers Squibb, Indus. Div. v Delta Star*, 206 AD2d 177, 620 NYS2d 196 [4th Dept 1994]). Accordingly, summary judgment dismissing all claims against Honeywell is granted.

Dated: 6/27/07

Emily Pines
 J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION

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