[* 1]

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

PRESENT: JUDITH J. GISCHE, J.S.C. PART 10

Justice

Index Number : 108437/2005

BERG, MARION

vs.

AU CAFE

SEQUENCE NUMBER : 007

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED
APR 18 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4/14/08

J.S.C.

JUDITH J. GISCHE, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

----------x

MARION BERG,

Plaintiff,

-against-

AU CAFÉ, INC., THE SHUBERT FOUNDATION, INC., 1700 BROADWAY CO., 1700 BROADWAY, LLC, 53-54 PARTNERS, L.P., and BRIGHTON LINE CORP. and SCHLOSSEREI J. MEISSL GMBH,

Defendants.

----------x

DECISION/ORDER
Index No.: 108437/05
Seq. No. : 007

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Meissl n/m [3212] w/ JES affirm, exhs	1
Au Café HJB affirm in opp, exhs	2
Meissl JES affirm in further supp, exhs	3

Upon the foregoing papers, the decision and order of the court is as follows:

The underlying action is for personal injury. Defendant Schlosserei J. Meissl GmbH ("Meissl") now moves, pursuant to CPLR § 3212 for: [1] a declaration that Au Café, Inc. ("Au Café") breached a contract between it and Meissl and ordering Au Café to pay consequential damages; [2] a declaration that Au Café is contractually obligated to indemnify Meissl for all costs and any liability that arises from this action, including attorneys fees; and [3] an order dismissing the cross claims brought by Au Café against Meissl. Au Café opposes the instant motion. None of the other parties to this action have otherwise submitted any opposition to this motion.

Since issue has been joined, and the note of issue has not yet been filed, summary judgment relief is available. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

Meissl manufactures specialized outdoor seating areas, herein referred to as "umbrella bars." Au Café owns a restaurant called "Maison," located at 1700 Broadway, New York, New York (the "restaurant"). On October 12, 2002, Au Café contracted with Meissl for the purchase and installation of an umbrella bar for use in the outdoor area adjacent to the indoor portion of the restaurant, pursuant a "Confirmation of Order" which expressly incorporates a document entitled the "General Terms and Conditions of Business and Delivery of the Machine Shop Company J. Meissl GmbH" (collectively herein referred to as the "contract").

In the amended verified complaint, plaintiff alleges that while she was a patron of the restaurant, she tripped and fell "due to a dangerous and hazardous condition at the [restaurant], including, but not limited to a dangerous step and sudden change or drop in the elevation of the floor, without proper warnings or railings." There is no dispute that it is plaintiff's contention that there should have been a ramp, rather than a step, between the edge of the umbrella bar platform and the hallway leading into the indoor portion of the restaurant.[1]

Summary of the parties' arguments

Pursuant to the contract, Au Café was obligated to install a ramp from the edge of the platform of the umbrella bar down to the ground. Meissl contends that Au Café

[1] However, all defendants deny that the absence of the ramp caused plaintiff's injury.

failed to install a permanent ramp and, therefore, breached the contract. Au Café argues that there is an issue of fact as to what type of ramp Au Café was obligated to install under the contract. Au Café claims that it was only required to install "a temporary ramp to assist the Meissl installers with loading the component parts from the container on the ground level onto the elevated bar."

Meissl also contends that Au Café is contractually obligated to indemnify Meissl for any losses that result from this lawsuit. Au Café argues that the indemnification clause in the contract "warrants close scrutiny and should be deemed unenforceable should it indemnify Meissl for its own negligence."

Meissl alternatively contends that Au Cafe's cross claims are untimely, pursuant to a six-month time limit the contract imposes for bringing such claims, pursuant to Paragraph 9.4 of the contract, which provides:

> Any claim against seller is based on any alleged defect or deficiency in seller's performance or in the goods supplied shall be barred if not asserted in an action brought in a court of law within six months after such claim arises, unless seller has by such time acknowledged its responsibility in writing.

Au Café responds with the argument that Paragraph 9.4 of the contract is inapplicable to its cross claims for contribution and/or indemnification because these claims are "not founded on nor [do they] arise from contract."

Au Berg also contends that based on Paragraph 10.3 of the contract which provides that the contract shall be subject to Austrian law, "Meissl's motion fails to make a *prima facie* showing of entitlement to summary judgment as a matter of law since they fail to cite the applicable law governing the contract and therefore should be denied outright."

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Only if it meets this burden, will it then shift to the party opposing summary judgment, who must then establish the existence of material issues of fact, through evidentiary proof in admissible form that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 NY2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 NY2d 223 (1977). The court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film , 3 NY2d 395 (1957). When only issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 AD2d 459 (2nd dept. 2003).

At the outset, the court rejects Au Cafe's contention that this motion must be denied because the contract chooses the law of Austria to govern its terms. In a conflicts of law analysis, the court must first determine whether there is an actual

conflict between the laws of the competing jurisdictions. "If no conflict exists, then the court should apply the law of the forum state in which the action is being heard" [Excess Ins. Co. Ltd. v. Factory Mut. Ins. Co., 2 AD3d 150 (1st Dept 2003)]. Au Café does not contend there is a conflict between Austrian and New York law, therefore, New York law should be applied.

Breach of contract

Meissl contends that Au Café breached the contract by failing to install permanent ramps. The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendants' failure to perform; and (4) resulting damage. Furia v. Furia, 166 AD2d 694 (2nd Dept. 1990). "To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." Express Industries and Terminal Corp. V. New York State Dept. Of Transportation, 93 NY2d 584 (1999).

A contract must be "read as a whole to determine its purpose and intent," and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous. W.W.W. Associates, Inc. v Giancontieri, 77 NY2d 157, 162 (1990); see also Goldberg v Manufacturers Life Ins. Co., 242 AD2d 175, 181 (1st Dept). "A contract is unambiguous if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion.'" Greenfield v Philles Records, Inc., 98 NY2d 562, 569-570 (2002), quoting Breed v Insurance Co. of N. Am., 46 NY2d 351, 355 (1978).

Au Café argues that there is a triable issue of fact as to whether the contract required it to install temporary or permanent ramps. "Extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face." Intercontinental Planning v. Daystrom, Inc., 24 N.Y.2d 372, 379 (1969); see also, Chimart Assocs. v. Paul, 66 N.Y.2d 570, 573 (1986). Unless the court finds ambiguity, rules governing interpretation of ambiguous contracts do not come into play. R/S Associates v. New York Job Development Authority, 98 N.Y.2d 29 (2002).

When a contract term is ambiguous, parol evidence may be considered "to elucidate the disputed portions of the parties' agreement." Blue Jeans U.S .A. Inc. v. Basciano, 286 AD2d 274, 276 (1st Dept 2001). When extrinsic evidence is required interpretation a contract term, the issue becomes one for a jury. However, the determination of whether a writing is ambiguous is a question of law to be resolved by the court. W.W.W. Assocs. v. Giancontieri, *supra* at 162.

Page 4 of the contract provides as follows:

[Au Café] is responsible for the following:
Site preparation
Electrical supply, (3 x 220 V, 3 KW) lightning protection (per installation plan)
Room and board for installation personal
Pick up [Meissl's] installation personal (2 persons) at airport and bring them to the site
Transportation of the container to the site and deliver contents to the place of installation
Supplyment for a fork lift for moving the parts out off the container
Check of the wiring diagram with an electrician or according to the prescriptions in N.Y. City and UL approvement
Interpreter German - English during the time when the umbrella will be mounted
Provide sufficient personal (3-4 people) to help during the installation

> Customs duties and taxes in the USA, transportation of the container to the site
> ***Installation of ramps on the circumference or the umbrella platform***
> Order is subject to our general terms and conditions, which [Au Café] hereby expressly accepts

The court cannot conclude, as a matter of law, that the contract unambiguously obligates Au Café to install a permanent ramp from the edge of the umbrella bar to the hallway leading into the indoors portion of the restaurant. The contract does not employ the word "permanent" nor does it otherwise specify the type of ramps to be installed nor the manner and/or duration in which the ramps were to be utilized. Although Meissl contends that the ordinary meaning of the term "installation of ramps" is unambiguous because it "nearly always" means a "permanent installation", by this argument, Meissl is attempting to add the word "permanent" to the contract. This court may not add or excise terms to a contract "under the guise of interpreting the writing" [Reiss v. Fin Performance Corp., 97 NY2d 195, 199 (2001)]. Because the court is limited to "issue finding," not "issue determination," on this motion, the court cannot draw a conclusion, based on the evidence adduced herein, as to what type of ramps were contemplated by the parties at the time they entered into the contract. Sillman v. Twentieth Century Fox Film , *supra.*

Moreover, Au Café has submitted parol evidence which supports its reading of the subject contract term. While Meissl contends that the contract called for Au Café to install permanent ramps after installation of the umbrella bar, there is a reasonable basis for Au Cafe's alternate interpretation of the subject provision. David Sasson ("Sasson"), a partner of Au Café and a signatory to the contract, stated the following at his deposition:

Q. Do you know what [the contract] refers to when it says "installation of ramps"?

A. As I learn, they ask for to put something, because the pole, how you call it, the poles of the umbrellas, to lift the poles, just to slide it in for the installation.

Q. That's what that refers to?

A. Yeah.

Q. It doesn't refer to any other type of ramp?

A. No, not that I was aware of.

Q. Does it have anything to do with putting a ramp at the location where the step is between the umbrella platform and the concrete?

A. No.

...

Q. The ramp you are referring to in [the contract]; is that a temporary ramp, sir?

A. Yes.

Au Cafe's interpretation of the contract is also supported by the fact that the "installation of ramps" provision is listed amongst Au Cafe's other responsibilities during the delivery and installation of the umbrella bar.

The court rejects Meissl's contention that all of the extrinsic evidence supports its interpretation of the term "installation of ramps." The issue of whether Sasson contradicted his affidavit testimony or his prior deposition testimony by asking "[w]hat is a ramp?" during his deposition is a factual dispute. Meissl has also provided an email dated September 7, 2002, sent from Au Cafe's design firm, Dorf-Reger, to Meissl, which states that Dorf-Reber "will have to create a ramp that slopes up from the existing floor to the new tent floor/platform." This email does not refer to permanent or

temporary ramps, nor does its existence necessarily "confirm that the contract required permanent ramps, as Meissl contends. While Meissl may ultimately prevail at trial, there are material issues of fact from which a reasonable jury could conclude that the contract called for the construction. Therefore, Au Café has established a triable issue of fact as to whether it was obligated to install permanent or temporary ramps around the umbrella bar platform to the hallway.

Indemnification

Meissl seeks contractual indemnification from Au Café. Au Café argues that the indemnification clause in the contract "warrants close scrutiny and should be deemed unenforceable should it indemnify Meissl for its own negligence." Au Café further claims that Meissl is not entitled to summary judgment on its indemnification cross claims because such a claim does not arise "until [Meissl's] obligation to pay has been established."

Paragraph 8.11 of the contract provides, as follows:

> ... NEITHER THE WARRANTY NOR ANY OTHER PROVISION STATED HEREIN ENTITLES BUYER OR ANY THIRD PARTY TO DAMAGES, DIRECT, INDIRECT, CONSEQUENTIAL OR PUNITIVE, FOR PERSONAL INJURY OR PROPERTY DAMAGE ARISING FROM THE INSTALLATION, OPERATION, SERVICING, USE, MISUSE OR INABILITY TO USE THE GOODS, AND BUYER AGREES TO INDEMNIFY, DEFEND AND HOLD SELLER HARMLESS FROM AND AGAINST ANY SUCH DAMAGES, OR ANY CLAIMS IN RESPECT THEREOF.

Meissl's claim for indemnification is not ripe because the issue of negligence has not yet been tried and decided in this case. Not only has plaintiff not yet proved either of these defendants were negligent, neither Au Café nor Meissl has proven its freedom from negligence.

The court similarly rejects Meissl's contention that Au Café brought its cross claim outside the contractually mandated period. The contract limits "[a]ny claim against [Meissl] based on any alleged defect or deficiency in [Meissl's] performance or in the goods supplied... [to] six months after such claim arises, unless [Meissl] has by such time acknowledged its responsibility in writing" (Paragraph 9.4). However, Au Cafe's cross claims are for indemnification and/or contribution, and for Statute of Limitations purposes, do not accrue until payment is made on plaintiff's personal injury claim. McDermott v. City of New York, 50 N.Y.2d 211. With payment not yet made, the claim has not yet accrued.

Accordingly, Meissl's motion is denied in its entirety.

Any requested relief not expressly addressed herein has nonetheless considered by the court and is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
April 10, 2008

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.