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

PRESENT: CAROL EDMEAD J.S.C. PART 50

Justice

Index Number : 100045/2006

GONZALEZ, NIXA

VS

LEWIS FOODS OF 688 EIGHTH AVE.

Sequence Number : ~~001~~ 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 4/14/08

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

his motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED
APR 24 2008
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

The within motion is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the motion of defendants Lewis Foods of 688 Eighth Avenue Inc., d/b/a McDonald's Corporation for summary judgment dismissing the complaint and all cross claims is **granted in its entirety**, and the Clerk of the Court is directed to enter judgment accordingly. It is further

ORDERED that counsel for defendant Lewis Foods of 688 Eighth Avenue Inc., d/b/a McDonald's Corporation shall serve a copy of this order with notice of entry within twenty days of entry.

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

Dated: 4/22/08

CAROL EDMEAD 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 35

x

NIXA GONZALEZ,

Plaintiff,

Index No. 100045/06

-against-

DECISION/ORDER

LEWIS FOODS OF 688 EIGHTH AVENUE, INC., DEE CEE ASSOCIATES, LLC and MCDONALD'S CORPORATION,

Defendants.

x

EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendant Lewis Foods of 688 Eighth Avenue Inc., d/b/a McDonald's Corporation ("McDonald's") moves for an order granting summary judgment in its favor pursuant to CPLR 3212, dismissing the complaint of plaintiff Nixa Gonzalez ("plaintiff"), and dismissing all cross claims.

This action arises from plaintiff's trip and fall in front of 688 Eighth Avenue, owned by defendant Dee Cee Associates ("Dee Cee") and leased to defendant McDonald's. In particular, plaintiff complained that the vault doors were negligently maintained, causing plaintiff to slip and fall.

McDonald's Contentions

The admissible evidence adduced in this action shows that there is no triable issue of fact as to the ownership of the vault doors, or their maintenance, which was solely the responsibility of defendant Dee Cee, and that McDonald's had no responsibility to maintain or repair the doors and had no ownership responsibilities for them.

According to the Standard Form Lease between Dee Cee and McDonald's dated April 4, 1995 (the "Lease"), paragraph 4:

> **Repairs:** 4. Owner shall maintain and repair the public portions of the building, both exterior and interior except that if Owner allows Tenant to erect on the outside of the building a sign or signs, or a hoist, lift or sidewalk elevator for the exclusive use of Tenant.

There was no use of any sidewalk elevator or hoist.

Paragraph 14 states:

> **Vaults, Vault Space or area.** 14. No Vaults, vault space or area/ whether or not enclosed or covered, not within the property line of the building is leased hereunder. Anything contained in or indicated on any sketch, blue print or plan, or anything contained elsewhere in this lease to the contrary notwithstanding. Owner makes no representation as to the location of a property line of the building.

Paragraph 18a states:

> Tenant agrees to keep the sidewalks immediately in front of the Demised Premises free of debris, snow and ice and be responsible for their repair and replacement, except to the extent that repair or replacement is caused by Landlord's negligence or willful acts and provided that Tenant's responsibility for repair and replacement shall only arise after the repairs to the sidewalk described in Schedule II shall have been completed and the Commencement Date shall have occurred. **Tenant shall not be responsible for the maintenance or repair of any vault, vault space or area, whether or not enclosed or covered.** (Emphasis added)

The testimony of Patricia Remer ("Remer"), the former property manager for Surtsey Realty, the property manager for defendant Dee Cee clearly shows she was responsible for the maintenance and repair of the building and sidewalks. And, the testimony of Trevor Loftus, dated May 25, 2007, clearly shows that the building owner was responsible for initiating, ordering and directing the repair work that was performed. The repair of the sidewalk and cellar doors was controlled by the owner and managing agent.

Dee Cee's Opposition

Paragraph VIII, Sidewalk, of the Rider to the Lease provides:

> The sidewalk in front of the building shall be placed in good condition/an in compliance with all New York City regulations and/or codes, including but not limited to curing sidewalk violation 61651 filed July 23, 1992.

Paragraph 4 of the Lease (cited above) read in conjunction with Lease Rider clauses 31 and 32, obligate both the Landlord and the Tenant to each cooperate with the other in the obtaining of necessary permits, for the operation of the premisses and as to all documents required by municipal authority.

Dee Cee takes the position herein that it did all it could to secure necessary permits and make repairs to the tenant's sidewalk area in a timely manner before plaintiff's injury; and if it did not, then the movant could and should have also proceeded to do so under the applicable lease provisions.

Thus, it is Dee Cee's position that questions of fact exist as to whose duty it was under these unique circumstances to effectuate sidewalk alterations for the protection of third parties.

Analysis

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any

material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002] [defendant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212[b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary

relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

Contracts: Clear and Unambiguous

Courts must construe a contract in a manner that avoids inconsistencies and reasonably harmonizes its terms (*James v. Jamie Towers Housing Co., Inc.*, 294 A.D.2d 268, 743 N.Y.S.2d 85 [1st Dept. 2002]; *Barrow v. Lawrence United Corp.*, 146 AD2d 15, 18, 538 NYS2d 363 [3rd Dept. 1989]), (*Barrow v Lawrence United Corp.*, 146 AD2d 15, 18), remaining "consistent[ ] with the over-all manifest purpose of the ... agreement." The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent (*see Slatt v. Slatt*, 64 NY2d 966, 967, 488 NYS2d 645, *rearg denied* 65 NY2d 785, 492 NYS2d 1026 [1985]). "The best evidence of what parties to a written agreement intend is what they say in their writing" (*Slamow v. Del Col*, 79 NY2d 1016, 1018, 584 NYS2d 424 [1992]). Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms *(see e.g. R/S Assoc. v. New York Job Dev. Auth.*, 98 NY2d 29, 32, 744 NYS2d 358, *rearg denied* 98 NY2d 693, 747 NYS2d 411 [2002]; *W.W.W. Assoc. v. Giancontieri*, 77 NY2d 157, 162, 565 NYS2d 440 [1990]).

Furthermore, 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" (*Breed v. Insurance Co. of N. Am.*, 46 NY2d 351, 355, 413 NYS2d 352 [1978], *rearg denied* 46 NY2d 940, 415 NYS2d 1027 [1979]). Thus, if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity (*see e.g. Teichman v. Community Hosp. of W. Suffolk*, 87 NY2d 514, 520, 640 NYS2d 472

[1996]; First Natl. Stores v. Yellowstone Shopping Ctr., 21 NY2d 630, 638, 290 NYS2d 721, rearg denied 22 NY2d 827, 292 NYS2d 1031 [1968]).

Ultimately, the aim is a practical interpretation of the language employed so that there be a realization of the parties' "reasonable expectations" (*see Sutton v. East River Sav. Bank*, 55 NY2d 550, 555, 450 NYS2d 460 [1982]).

"It is a court's task to enforce a clear and complete written agreement according to the plain meaning of its terms, without looking to extrinsic evidence to create ambiguities not present on the face of the document" (*150 Broadway N.Y. Assoc., L.P. v Bodner,* 14 AD3d 1, 6 [2004]). "A contract is ambiguous 'if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings'" (*Feldman v National Westminster Bank,* 303 AD2d 271 [2003], *lv denied* 100 NY2d 505 [2003]). However, mere assertion by a party that contract language means something other than what is clear when read in conjunction with the whole contract is not enough to create an ambiguity sufficient to raise a triable issue of fact (*Ruttenberg v Davidge Data Sys. Corp.*, 215 AD2d 191, 193 [1995]).

In the instant case, the Lease is clear an unambiguous as to the obligations between the co defendants.

Paragraph 14 of the Lease provides that No Vaults, vault space or area/ whether or not enclosed or covered, not within the property line of the building is leased hereunder.

And, Paragraph 18 of the Lease makes it abundantly clear that McDonald's shall not be responsible for the maintenance or repair of any vault, vault space or area, whether or not enclosed or covered.

Again, plaintiff's complaint alleges that the *vault doors* were negligently maintained, causing plaintiff to slip and fall. Paragraph Forty-Second of plaintiff's complaint alleges, in part:

"...as a result of the negligence of the defendants in their ownership, operation, maintenance and/or control of the aforesaid building and the adjacent sidewalk and metal doors located thereat."

Conclusion

Plaintiff does not submit any opposition to this motion.

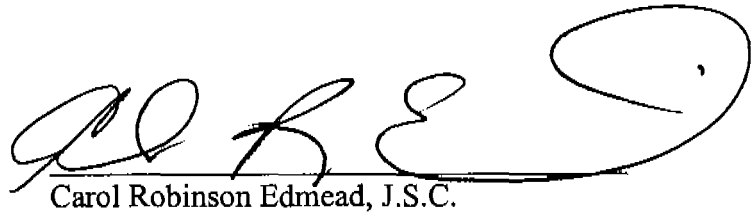
Based on the foregoing, it is hereby

ORDERED that the motion of defendants Lewis Foods of 688 Eighth Avenue Inc., d/b/a McDonald's Corporation for summary judgment dismissing the complaint and all cross claims is **granted in its entirety**, and the Clerk of the Court is directed to enter judgment accordingly. It is further

ORDERED that counsel for defendant Lewis Foods of 688 Eighth Avenue Inc., d/b/a McDonald's Corporation shall serve a copy of this order with notice of entry within twenty days of entry.

This constitutes the decision and order of this case.

Dated: April 22, 2008



Carol Robinson Edmead, J.S.C.