SHORT FORM ORDER

NEW YORK SUPREME COURT - COUNTY OF QUEENS

Present: HONORABLE SIDNEY F. STRAUSS
Justice

IA PART 11

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ALICE MIZRACHI,

Plaintiff,

-against-

HILTON WORLDWIDE, INC., ET. AL.,

Defendants.

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ELEGANT AFFAIRS, NYC,

Third-Party Plaintiff,

-against-

VASE SOURCE, INC.,

Third-Party Defendant.

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HILTON WORLDWIDE, INC.,

Second Third-Party Plaintiff,

-against-

ST. ALOYSIUS SCHOOL,

Second Third-Party Defendant.

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Index No.: 4608/2011

Motion Date: May 30, 2013

Seq. No.: 4, 5, 6

3rd Party Index No.: 350264/2011

The following papers numbered 1 to 15 were read on the motion of the defendant/third-party plaintiff, Elegant Affairs NYC ("Elegant"), seeking an order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint and all cross-claims as against it on

the ground it owed no duty. Also read was the motion by the defendant/second third-party plaintiff, Hilton WorldWide, Inc. ("Hilton"), seeking an order pursuant to CPLR 3212, dismissing plaintiff's complaint as well as the cross-claim of co-defendant Elegant, and further, granting summary judgment in Hilton's favor in its third-party action as against St. Aloysius School ("School"). Also read was the motion to reargue of the third-party defendant, Vase Source, Inc.'s ("Vase") prior motion seeking summary judgment dismissing all claims and cross-claims as against it.

	PAPERS NUMBERED
Notice of Motion - Affirmation - Exhibits.....	1 - 3
Notice of Motion - Affirmation - Exhibits.....	4 - 6
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On May 14, 2008, plaintiff, while attending an event at The Hilton located at 1335 Avenue of the Americas in New York, New York, was allegedly injured when a vase shattered in her hand. Defendant/third-party plaintiff Elegant provided the subject vase for the event. Plaintiff subsequently commenced an action sounding in negligence against Hilton and Elegant. Thereafter, Elegant brought a third-party action against Vase, alleging contractual and common-law indemnification, contribution, and breach of contract to procure insurance. Hilton brought a second third-party action against School, also alleging contractual and common-law indemnification and contribution as well as breach of contract.

Summary judgment is a drastic remedy, one which should not be granted where there is any doubt as to the existence of a triable issue of fact. (See, *Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]; *Sillman v Twentieth Century–Fox Film Corp*., 3 NY2d 395 [1957]), with issue-finding rather than issue-determination the focus of the Court in reviewing the submissions. (see, *Sillman v Twentieth Century-Fox Film Corp*., supra.) All evidence must be viewed in a light most favorable to the nonmoving party. (see, *Rotuba Extruders v Ceppos*, supra.) To obtain such disfavored relief a movant must establish his cause of action or defense "sufficiently to warrant the court as a matter of law in directing judgment" in his favor (CPLR 3212[b]), and must do so by tender of evidentiary proof in admissible form (see, *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]). The failure to satisfy that initial burden requires the denial of motion, without considering the sufficiency of the opposing papers. (see, *Winegrad v New York Univ. Med. Ctr*., 64 NY2d 851 [1985].) Conversely, once a movant has satisfied that burden the party opposing the motion would have the burden of showing facts sufficient to require a trial of any issue of fact, or demonstrate an acceptable excuse for the inability to tender such proof in admissible form. (CPLR 3212[b]; *Friends of Animals v Associated Fur Mfrs.,* supra; *Zuckerman*

v. City of New York, 49 NY2d 557 [1980].)

In order to establish a prima facie case of negligence, a plaintiff must demonstrate (1) that defendant owed him or her a duty of reasonable care, (2) a breach of that duty, and (3) a resulting injury proximately caused by the breach. (see, *Boltax v Joy Day Camp*, 67 NY2d 617 [1986].) The threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party. (See, *Espinal v Melville Snow Contractors, Inc*., 98 NY2d 136 [2002].) It is the court's responsibility to determine whether there is a duty, and "involves a very delicate balancing of such considerations as logic, common sense, science, and public policy." (*Blye v Manhattan & Bronx Surface Transit Oper. Auth.*, 124 AD2d 106, 108 [1st Dept. 1987], aff'd 72 NY2d 888 [1988], citing *Bovsun v Sanperi*, 61 NY2d 219 [1984]; *De Angelis v Lutheran Med. Center*, 58 NY2d 1053 [1983].) The scope of any such duty of care varies with the foreseeability of the possible harm (See, *Tagle v Jakob*, 97 NY2d 165 [2001]). Although foreseeability has been called "a critical factor" in defining an alleged tortfeasor's duty, it will not create a duty which does not otherwise exist. (See, *Blye v Manhattan & Bronx Surface Transit Oper. Auth*., supra, citing Pulka v Edelman, 40 NY2d 781[1976].)

Defendant Elegant has sufficiently established that there could be more than one possible cause for plaintiff's injury, "for one or more of which the defendant was not responsible. . . [Since] it is just as reasonable and probable that the injury was the result of one cause as the other, plaintiff cannot have a recovery, since [s]he has failed to prove that the negligence of the defendant[s] caused the injury"(*Ingersoll v Liberty Bank*, 278 NY 1 [1938]; see, *Feblot v New York Times Co.*, 32 NY2d 486 [1973], citing *Digelormo v Weil*, 260 NY 192 [1932]; see also, *Schneider v Kings Highway Hosp. Center*, 67 NY2d 743 [1986].) If "there are several possible causes of injury, for one or more of which defendant is not responsible, plaintiff cannot recover without proving the injury was sustained wholly or in part by a cause for which the defendant was responsible" (*Digelormo v Weil*, supra). It is enough that [s]he shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred."(*Ingersoll v Liberty Bank*, supra, citing *Stubbs v City of Rochester*, 226 N Y 516 [1919].)

Elegant sufficiently established, and plaintiff has failed to submit any proof beyond speculation, that there was no notice on the part of Elegant. It is uncontroverted that the subject vase, initially placed by Elegant, several hours prior to the event, was moved after the event by someone other than Elegant, to a separate hotel room. Further, no evidence was submitted to prove that the subject vase was in disrepair or was inherently dangerous or defective at the time Elegant delivered it to the event. It is undisputed that various individuals, none of whom were under the direction and/or supervision of Elegant, handled the vase after it was initially placed at the event. No testimony was provided to indicate that the vase was leaking, or that there was anything visibly wrong with the vase at the time, prior to the event, when it was delivered and placed by Elegant.

Plaintiff's reliance upon circumstantial evidence, namely that the defendant Elegant

delivered the subject vase to the event, is insufficient to establish negligence. (See, PJI 1:70; *Ingersoll v Liberty Bank*, supra.) Accordingly, Elegant's motion seeking summary judgment dismissing plaintiff's complaint and all cross-claims, is granted.

As to that branch of Hilton's motion seeking summary judgment dismissing plaintiff's complaint and all cross-claims as against it, same is granted. Plaintiff has failed to enumerate any duty that may have arisen from Hilton in connection with the underlying incident. The speculations of plaintiff's counsel alone, cannot establish notice, either actual or constructive, of an allegedly defective condition.

As to that branch of Hilton's motion seeking summary judgment for contractual indemnification from School, the court determines as follows:

"A familiar and eminently sensible proposition of law is that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing." (*W.W.W. Assocs. v Giancontieri*, 77 NY2d 157 [1990].) "The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent" (*Greenfield v. Philles Records, Inc*., 98 N.Y.2d 562 [2002].). Here, the "best evidence of what parties to a written agreement intend is what they say in their writing" (*Id.* [internal quotation marks and citation omitted]). "A contract is unambiguous only if the language it uses has a definite and precise meaning, unattended by danger or misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" ' (*id*. at 569 [citation omitted]). "Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide" (id.). Clearly, existence of a binding contract is not dependent upon the subjective intent of the parties. (See, *Minelli Constr. Co., Inc. v Volmar Constr., Inc*., 82 AD3d 720 [2d Dept. 2011].)

The evidence submitted by Hilton fails to establish that it was the intention of the parties that the contract's terms and conditions were to extend to a separate hotel suite utilized by the School after the event had ended. The terms and conditions of said agreement are specific to the event itself, with no mention of the use of a separate hotel room. The testimony relied upon by Hilton, specifically that of Laurel Senger, an administrator for School present at the time of the incident, along with School's current president, Thomas Harvey, who was neither present at the time, nor affiliated with School, at the time of incident, does not support Hilton's contentions. No evidence was submitted to establish that either was authorized to negotiate or execute the subject contract on behalf of School. In fact, it is not clear how the suite in question came to be included in the agreement since the contract is silent on this issue.

Accordingly, Hilton's motion seeking summary judgment as against the second third-party defendant School is denied.

As to the motion to reargue of the third-party defendant Vase, same is denied as moot. In light of the findings with respect to the motions in connection with this order, the third-party action as between Elegant and Vase is dismissed.

Dated: June 24, 2013

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SIDNEY F. STRAUSS, J.S.C.