

<b>Perez v Cammeby's Mgt. Co., LLC</b>
2015 NY Slip Op 32095(U)
March 16, 2015
Supreme Court, New York County
Docket Number: 114186/2011
Judge: Kathryn E. Freed
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3/18/15  
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT

PRESENT: \_\_\_\_\_  
Justice

PART 2

Index Number : 114186/2011  
PEREZ, RAPHAEL  
vs  
CAMMEBY'S MANAGEMENT COMPANY  
Sequence Number : 003  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 003

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s) _____
Answering Affidavits — Exhibits _____	No(s) _____
Replying Affidavits _____	No(s) _____

Upon the foregoing papers, it is ordered that this motion is


**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

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

**FILED**  
MAR 19 2015  
NEW YORK  
COUNTY CLERK'S OFFICE

**RECEIVED**  
MAR 18 2015  
GENERAL CLERK'S OFFICE  
NYS SUPREME COURT - CIVIL

Dated: 3/16/15  
MAR 16 2015

  
HON. KATHRYN FREED, J.S.C.  
JUSTICE OF SUPREME COURT

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 2

-----X

Raphael Perez,

Plaintiff

Index Number:114186/2011

-against-

**DECISION/ORDER**

Cammeby's Management Company, LLC,  
Cammeby's Management Company  
of Long Island, LLC, GSM LI LLC,  
Long Island Industrial Group LLC,  
Scentavision, and California  
Fragrance Company,

Seq. Nos: 003 and 004

**FILED**  
MAR 19 2015  
NEW YORK  
COUNTY CLERKS OFFICE

Defendants.

-----X

**HON. KATHRYN E. FREED, JSC;**

Pursuant to CPLR 2219 (a), the following papers were considered by the court in deciding the motions:

Notice of Motion and Affidavits Annexed-California Fragrance	1-2(Exs. 1-5)
Plaintiff's Affirmation in Opposition	3(Exs.A-F)
Cammeby's Affirmation in Opposition	4(Exs. A-B)
California Fragrance Reply Affirmation	5
Notice of Motion and Affidavits Annexed-Cammeby	6-7(Exs.A-K)
Plaintiff's Affirmation in Opposition	8
California Fragrance's Affirmation in Opposition	9(Exs.1-2)
Cammeby's Reply Affirmation	10

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

California Fragrance Company Co., Inc. i/s/h/a California  
Fragrance Company ("California Fragrance") moves, pursuant to  
CPLR 3212, for summary judgment dismissing plaintiff's complaint

and any cross claims against it. (Seq. No. 003). Cammeby's Management Company, LLC, Cammeby's Management Company of Long Island, LLC and GSM LI LLC (collectively "Cammeby") move for summary judgment, pursuant to CPLR 3212, dismissing plaintiff's complaint and any cross claims against them. (Seq. No. 004). The motions are consolidated for disposition and decided as noted below.

### **Underlying Allegations**

Plaintiff alleges that, on December 22, 2008, between 8 a.m. and 8:30 a.m., as he was ascending the exterior staircase ("the steps") of a building ("the building") located at 171 East 2nd Street, Huntington Station, New York, he slipped on snow and ice on the second or third step. (Bill of Particulars, items 2-3; plaintiff EBT at 25, 43, 54-56, 71). He grabbed at the handrail, twisting his body and avoiding falling but, as a result, he suffered multiple herniated discs and pain in his lower back and both legs. (Plaintiff EBT at 58, 62, 64, 74, 94-95, 97, 121). He further stated that he was entering the building to begin work and that he was working as a chemist for California Fragrance (*Id.* at 17, 26, 141-142). He noted that Sharon Christie was the owner and president of California Fragrance, Scentavision and Aromaflora and that he was working for her, regardless of which corporate entity was involved (*Id.* at 142).

Plaintiff maintains that, although the steps were partially cleared of snow and ice he was unaware who cleared them and did not know who owned the building (*Id.* at 41, 44, 56, 137). He also stated that his paychecks and W-2s were from California Fragrance and not from Scentavision, that he filed a workers compensation claim listing California Fragrance as his employer and that he received workers compensation benefits as a result of his claim (*Id.* at 17-19, 129, 141-142).

Long Island Industrial Group LLC ("LI Group") managed the one story commercial building for GSM LI LLC ("GSM"), the owner of the premises. (Mugford EBT at 8, 10). LI Group asserts that GSM was an out-of-possession owner, that a lease ("the lease") was executed in 1991 between Scentavision and a prior owner, that amendments over the years solely reflected changes in space and rent amounts, and that, under the lease, debris removal, including snow and ice removal on the steps, was the tenant's responsibility (*Id.* at 12, 14, 19, 37, 41-42; Cohen EBT at 11, 18-24, 28, 31-33, 37, 42-43). LI Group hired a snow removal company for the adjacent parking lot, but that work did not include the steps (Mugford EBT at 14-17). Cammeby is a sister company of LI Group, with some of the same owners, but Cammeby was not the managing agent for the building (Mugford EBT at 33-34; Cohen EBT at 12, 14-16).

California Fragrance, a company which manufactured bath,

body and skin care products, operated under the trade name Aromaflora and Scentavision was a related company that no longer actively operates. (Christy EBT at 7, 26-27, 30, 79-80; Flaherty EBT at 8-10). Of these companies, California Fragrance is the only one still active and all of the 20 employees at the building at the time of the incident, including plaintiff, worked for it (Flaherty EBT at 10-11, 22-24, 62; Christy EBT at 30-31, 62, 72).

California Fragrance contends that the Lease was prepared by the owner or its agent and sent to it with Scentavision listed as the tenant, that it was simply easier to execute it and that the lease provided that snow and ice removal on the steps was the landlord's responsibility (Christy EBT at 28-30, 32, 42, 81; Flaherty EBT at 69, 71-72, 76, 90-93). With the exception of three or four occasions, between 1991, when it leased space in the building, and 2008, when the alleged accident occurred, California Fragrance employees cleared, salted and sanded the steps to ensure safe access to its office and other space in the building (Flaherty EBT at 36-38, 40-41, 47-48, 68-69, 79-80, 83-84; Christy EBT at 37-39, 41-43, 45).

The Lease contains the following provisions:

Article 42 "(e) BUILDING CLEANING: Tenant shall, at its cost and expense, keep both the interior and exterior of the building clean and free from debris (skids, pollutants, etc.) including adjacent areas to the building within a reasonable distance.

(f) MAINTENANCE EXPENSES: It is acknowledged by the parties hereto that the maintenance of the driveways, snow removal, sump (if any), parking areas, illumination of said parking areas, buffer area, live planting, fencing, sanding, cesspool and drywall maintenance, outside cleanup, lot sweeping and striping, and painting of outside doors and emergency doors shall be the responsibility of the Landlord, but the Tenant shall pay, as additional rent, its proportionate share."

Plaintiff's claimed injuries do not amount to a "grave injury" under the Workers Compensation Law.

#### **Summary Judgment Standard**

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*Id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material

issue of fact. (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]; *Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990], *lv dismissed* 77 NY2d 939 [1991]). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied." (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]).

### **Premises Liability**

Generally, a landowner must act as a reasonably prudent person in maintaining its property in a reasonably safe condition under all the circumstances, including the likelihood of injury, the potential seriousness of injury and the burden of avoiding the risk. (*Peralta v Henriquez*, 100 NY2d 139, 144 [2003]). Additionally, a party must be aware of the alleged defective or dangerous condition, either through having created it, actual knowledge of the condition or constructive notice of it through the defect's visibility for a sufficient amount of time prior to the accident to enable a defendant to discover and remedy it. (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Moreover, "[a] defendant moving for summary judgment in a slip-and-fall action has the initial burden of showing that it neither created, nor had actual or constructive notice of the dangerous condition that caused plaintiff's injury." (*Ross v*

*Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]; *Amendola v City of New York*, 89 AD3d 775, 775 [2d Dept 2011]; *Schiano v Mijul, Inc.*, 79 AD3d 726, 726 [2d Dept 2010]).

#### **Out-of-Possession Landlord**

"An out-of-possession landlord is generally not liable for the condition of the demised premises unless the landlord has a contractual obligation to maintain the premises, or [the] right to re-enter in order to inspect or repair, and the defective condition is 'a significant structural or design defect that is contrary to a specific safety provision.'" (*Ross*, 86 AD3d at 420 [internal citation omitted]; *Kase v H.E.E. Co.*, 95 AD3d 568, 569 [1st Dept 2012]). Also, "snow or ice is not a significant structural or design defect." (*Bing v 296 Third Ave. Group, L.P.*, 94 AD3d 413, 414 [1st Dept 2012]).

#### **Workers' Compensation Exclusivity**

"As a general rule, when an employee is injured in the course of his employment, his sole remedy against his employer lies in his entitlement to a recovery under the Workers' Compensation Law." (*Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 156 [1980]; see also *Gonzales v Armac Indus.*, 81 NY2d 1, 8 [1993]; *Clifford v Plaza Hous. Dev. Fund Co., Inc.*, 105 AD3d 609, 610 [1st Dept 2013]).

### **Contractual Interpretation**

Where a contract's provisions are clear and unambiguous, they "must be given their plain and ordinary meaning." (*White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007]; *United States Fid. & Guar. Co. v Annunziata*, 67 NY2d 229, 232 [1986]; *Broad St., LLC v Gulf Ins. Co.*, 37 AD3d 126, 131 [1st Dept 2006]). While ambiguities are construed against the drafter, the court should not disregard the plain meaning to create an ambiguity, since this improperly rewrites the parties' agreement. (*Broad St.*, 37 AD3d at 131; *Catucci v Greenwich Ins. Co.*, 37 AD3d 513, 514 [2d Dept 2007]).

However, "[i]n determining the meaning of an indefinite or ambiguous term in a contract, the construction placed upon the term by the parties themselves as established by their conduct may be examined to determine the term's true meaning." (*Harza Northeast v Lehrer McGovern Bovis*, 255 AD2d 935, 936 [4th Dept 1998]; *Surlak v Surlak*, 95 AD2d 371, 375 [2d Dept 1983], *appeal dismissed* 61 NY2d 906 [1984]).

"[T]he rule of construction [is] that ambiguities in contracts must be construed against the drafter." (*Guardian Life Ins. Co. of Am. v Schaefer*, 70 NY2d 888, 890 [1987]; *Shadlich v Rongrant Assoc., LLC*, 66 AD3d 759, 760 [2d Dept 2009]; *Lerer v City of New York*, 301 AD2d 577, 578 [2d Dept 2003]).

### **Discussion**

California Fragrance's motion for summary judgment is based upon plaintiff's status as an employee. It has presented evidence that California Fragrance was the only active entity in the building, that all employees at the building, including plaintiff, were employed by it and it has supported this testimony by annexing plaintiff's W-2 statements for the years 2008, 2009 and 2010, showing he was employed by California Fragrance. While plaintiff asserts that he worked for Christy's companies (plaintiff EBT at 142), his testimony that he was employed by California Fragrance and that he received paychecks solely from it, establish that he was an employee of that entity (*Id.* at 17-19). Since "[t]he sole and exclusive remedy of an employee against his employer for injuries in the course of his employment is compensation benefits", California Fragrance's motion for summary judgment dismissing the complaint against it must be granted. (*Gonzales*, 81 NY2d at 8; *Clifford*, 105 AD3d at 610).

Cammeby's motion for summary judgment is based upon GSM's status as an out-of-possession owner and its contention that the lease assigns responsibility for the condition of the steps to the tenant, California Fragrance or Scentavision. California Fragrance contends that the lease assigns responsibility for snow

and ice removal to the landlord. This Court notes that there is no evidence refuting Cammeby's assertion that GSM was an out-of-possession landlord and that all active management of the building was performed by the managing agent, LI Group, and not by Cammeby's Management Company LLC or Cammeby's Management Company of Long Island, LLC.

Article 42 (e) of the lease provides that debris removal is the tenant's responsibility, including "adjacent areas . . . within a reasonable distance." However, Article 42 (f) specifically provides that the landlord is responsible for snow removal. This conflict creates an ambiguity, which ordinarily is construed against the drafter of the lease. However, in this matter, there is an extensive, 17-year history of assumed responsibility for snow removal on the steps. "In determining the meaning of an indefinite or ambiguous term in a contract, the construction placed upon the term by the parties themselves as established by their conduct may be examined to determine the term's true meaning." (*Harza*, 255 AD2d at 936). While California Fragrance asserts that it made oral complaints, its employees cleared the steps regularly, salted and sanded them to insure safe access to its premises and there were only three or four times over 17 years when the snow removal company hired by LI Group cleared the Steps. The many years of its conduct establish the parties' understanding of the lease's provisions. Under the

circumstances, Cammeby's has established that responsibility for the condition of the steps was assumed by the tenant and, accordingly, it has shown that GSM was an out-of-possession owner and that Cammeby's Management Company LLC and Cammeby's Management Company of Long Island, LLC were not responsible for the condition of the steps. Additionally, it has shown that, since the clearing of the steps was performed by the employees of California Fragrance, Cammeby lacked notice of the condition of the steps (*see Gordon*, 67 NY2d at 837). Therefore, Cammeby's motion for summary judgment dismissing the complaint against it must be granted.

In light of the foregoing, is hereby:

ORDERED that the motion by California Fragrance Co., Inc. i/s/h/a California Fragrance Company for summary judgment dismissing the complaint and any cross claims against it is granted, with costs and disbursements to said defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment in favor of said defendant accordingly; and it is further,

ORDERED that the motion by Cammeby's Management Company, LLC, Cammeby's Management Company of Long Island, LLC and GSM LI

LLC for summary judgment dismissing the complaint and any cross claims against them is granted, with costs and disbursements to said defendants as taxed by the Clerk upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment in favor of said defendants accordingly; and it is further,


ORDERED that the action is severed and continued against the remaining defendants; and it is further,

ORDERED that this constitutes the decision and order of this Court.

Dated: March 16, 2015

**FILED**  
MAR 19 2015  
NEW YORK  
COUNTY CLERK'S OFFICE

ENTER:

  
KATHRYN E. FREED, J.S.C.  
**HON. KATHRYN FREED**  
**JUSTICE OF SUPREME COURT**