

Wilson v Kimco Realty Corp.
2017 NY Slip Op 30237(U)
January 25, 2017
Supreme Court, Suffolk County
Docket Number: 038423-2012
Judge: John H. Rouse
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Third Party Index: 78-0244

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 12 - SUFFOLK COUNTY

PRESENT:

Hon. John H. Rouse
Acting Supreme Court Justice

MOTION DATE:
ADJ. DATE:
Mot. Seq. 002-MD

MOTION DATE:
ADJ. DATE:
Mot. Seq. 003-MG

WANDA WILSON,

Plaintiffs
-against-

KIMCO REALTY CORPORATION; CENTEREACH MALL ASSOCIATES,
LP; CENTEREACH MALL 605, LLC and MAYNE CONSTRUCTION OF
LONG ISLAND, INC.

Defendants

**AMENDED
DECISION & ORDER**

KIMCO REALTY CORPORATION; CENTEREACH MALL ASSOCIATES,
LP; CENTEREACH MALL 605, LLC,

Third-Party Plaintiff

-against-

MAPLE DINING OF CENTERACH, INC.,

Third-Party Defendant

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Procedural Background: This Court rendered a decision dated August 10, 2016 on motions numbered 002 and 003 which were, respectively, by the Third-Party Plaintiff to compel discovery and the Third-Party Defendant for a protective order. **The Court denied both motions and authorized the parties to reargue their respective motions with a threshold consideration being whether the contract at issue was ambiguous such that discovery of parole evidence was necessary for a determination on the meaning of the contract.** *Gelb v. Elroy Enterprises, Inc.*, 170 A.D.2d 481 (2nd Dept. 1991); and *Federal Deposit Ins. Corp. v. Herald Square Fabrics Corp.*, 81 A.D.2d 168 (2nd Dept. 1981) .

The parties submitted, upon the original motion, the following papers: (1) Notice of Motion by Third-Party Defendant dated June 17, 2016, the Affirmation in Support by William J. Manning, Jr., Esq. affirmed on June 17, 2016 with Exhibits A-L; (2) Notice of Cross Motion dated July 11, 2016, Affirmation of Good Faith by Kenneth M. Labbate, Esq. affirmed on July 11, 2016; Memorandum of Law of Third-Party Plaintiff's in Opposition to Third-Party Plaintiff's Motion to Compel/Strike and in Support of Cross Motion for a Protective Order; and Affirmation in Opposition to Maple Dining's Motion to Strike/Compel, and in Support of Cross Motion (3) Affirmation in Support by William J. Manning, Jr., Esq. affirmed on July 18, 2016 and Exhibits A and B attached thereto; and (4) Letter dated July 26, 2016 by counsel for Third-Party Plaintiffs objecting to Exhibit B attached to Third-Party Defendant's July 18, 2016 Affirmation; and (5) Affirmation in Partial Opposition to the Third-Party Defendant Maple Dining of Centereach, Inc.'s Motion by John P. Grisafi, Esq. affirmed on July 20, 2016; (6) Stipulation of Parties dated July 25, 2016.

However, rather than make motions to reargue and file such motions as provided by 22 NYCRR § 202.8, the parties have submitted the following letters to the court to serve as their respective rearguments: Five page letter dated September 7, 2016 by William Manning Jr., Esq. on behalf of the Third-Party Defendant; Five page letter dated September 8, 2016 with Exhibit 1 attached by Kenneth M. Labbate, Esq. on behalf of Third-Party Plaintiff; Two page letter dated October 10, 2016 by Robert Acker, Esq. on behalf of the Plaintiff; and a Two page letter dated October 17, 2016 by John P. Grisafi, Esq. on behalf of the Defendant Mayne Construction of Long Island, Inc. The filing and retrieval of documents nearly mandate adherence to such protocols particularly, as in this case, when the case has not been filed electronically. Nonetheless, it is

ORDERED that the prior decision on Motions 002 and 003 are vacated to permit consideration of the additional arguments now filed by counsel; and it is further

ORDERED that the Clerk is to let the Court records reflect that the letters identified in the third paragraph above shall be made a part of the record with respect to Motions 002 and 003; and it is further

ORDERED that the motion (Seq. #002) by Third-Party Defendant to strike the Third-Party complaint, or in the alternative to compel discovery is denied; and it is further

ORDERED that this motion (Seq. #003) by Third-Party Plaintiff for a Protective Order and to compel the Third-Party Defendant to provide the bill or particulars with respect to the affirmative defenses it asserts in the Third-Party Action is granted.

DECISION

As noted upon the original decision: this action is a trip and fall alleged to have occurred on December 11, 2011 at about 6:00 o'clock in the morning in the parking lot of the Centereach Mall. It is alleged that the Defendants permitted the parking lot to deteriorate over time and this degradation was exacerbated by the pooling of water that created holes and a depression that caused the Plaintiff to fall and, among other things, fracture her fourth and fifth metatarsals. *See Verified Bill of Particulars Exhibit H.*

Defendants have commenced a Third-Party action against Maple Dining of Centereach, Inc., (Hereinafter referred to as "Tenant-Denny's") Plaintiff, Wanda Wilson, was employed by Tenant-Denny's alleges she fell in the parking lot in front of Tenant-Denny's. Third-Party Plaintiffs contend that Tenant-Denny's has a contractual duty to indemnify Plaintiffs arising out of Tenant-Denny's negligence, or because the trip and fall occurred in the Leased Premises. *See Exhibit F to Third Party Defendant's motion, the Third Party Complaint at par. 23.*

The Re-Arguments

Upon reargument Third-Party Plaintiffs argue that the lease unambiguously assigns maintenance and repair responsibilities to Tenant-Denny's in what is contractually described as the "*Resealed Parking Area*," the location where the Plaintiff fell.

Upon reargument Third-Party Defendant, Tenant-Denny's, like Third-Party Plaintiff argues that the lease is unambiguous, but contends that the lease clearly assigns sole responsibility for the parking lot where Plaintiff fell to the property owner, rather than to it, the tenant. Tenant-Denny's further argues that if the court disagrees then the lease must be ambiguous.

Plaintiff, Wanda Wilson, in a letter by counsel argues that responsibility for the parking lot where she fell was not vested in her employer, but rather remained with first party Defendant, Kimco Realty, Inc., and it was not a managing agent/landlord out of possession. Plaintiff's counsel's counsel requests more discovery rather than the Court rendering a determination on this issue, as a matter of law, prior to further discovery.

First Party Defendant, Mayne Construction of Long Island, Inc., has made a submission for the purpose of making its position clear that it was not hired to remove snow from the "subject parking lot," and never did remove snow from the "subject parking lot." It remains unclear the circumstances under which this Defendant is alleged to be liable to Plaintiff. *Espinal v. Melville*

Snow Contrs., 98 N.Y.2d 136. Beyond that particular, unsworn, representation is accepted by the court only to preserve a factual issue not germane to the particular issue on this motion.

Defendants Kimco Realty Corporation; Centereach Mall Associates, LP; Centereach Mall 605, LLC have quoted extensively from the actual contract that binds the owner together with its codefendant agents and the tenant Maple Dining of Centerach, Inc., Denny's:

39. TENANT'S MAINTENANCE AREA. (A) The Tenant's Maintenance Area shall be the entire Leased Premises ~~less the footprint of land upon which Tenant's Building sits and that portion of the sidewalk and entranceways, all as identified on Exhibit A, which shall include an area of land extending approximately six (6) feet around the perimeter of Tenant's Building.~~ Tenant shall repair, maintain, replace and keep in good condition the entire Tenant's Maintenance Area including, but not limited to, all parking areas (including, without limitation, repaving), lighting fixtures and poles, sidewalks and curbs, driveways, traffic islands, fencing, landscaped areas, truck serviceways, exits, entrances, sewers drainage pipes, and conduits. Tenant shall keep the parking areas, sidewalks, and service areas in the Tenant's Maintenance Area clean and free from all trash, ice, and snow. Tenant shall not permit the accumulation of any garbage, rubbish, or other waste in the Tenant's Maintenance Area or the area adjacent thereto. Landlord shall have absolutely no maintenance, repair or replacement responsibility whatsoever for the Tenant's Maintenance Area, such responsibility being solely that of Tenant. Tenant shall adequately light the

and

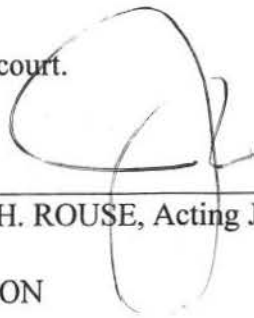
41. (A) MAINTENANCE, REPAIRS AND REPLACEMENTS. Tenant shall repair, replace and maintain the entire Leased Premises and the Tenant's Maintenance Area, Tenant's Building and all other improvements located on the Leased Land including, but not limited to, all required structural repairs, replacements and maintenance. Without limiting the generality of the foregoing, Tenant shall repair, replace and maintain Tenant's Building and all other structures and improvements located on, in or under the Leased Land (including, without limitation, the outside walls, foundations, roofs, gutters, downspouts, all wiring, plumbing, heating, air-conditioning systems) and also including all utility lines, connections, apparatus, meters and equipment which serve the Leased Premises and the Resealed Parking Area ~~Tenant's Maintenance Area~~ exclusively, whether the same is located inside or outside the Leased Premises and ~~Tenant's Maintenance Area~~ the Resealed Parking Area (and all components thereof), in a condition of good order, repair, appearance and cleanliness, and at all times in compliance with all requirements of all applicable laws, including structural and non-structural repairs and all replacements when appropriate. Landlord shall have absolutely no maintenance, repair or replacement responsibility whatsoever for the Leased Premises or the Tenant's Maintenance Area, such responsibility being solely that of Tenant.

The court must examine the entire contract, and it may not distort the plain meaning or make a new contract for the parties under the guise of interpreting the writing. *Matter of Korosh v. Korosh, 99 A.D.3d 909 (2nd Dept. 2012).* Here, it is expressly stated that both the Leased Premises and the Resealed Parking Area (and all components thereof), are the responsibility of the tenant to repair, replace, and maintain. Under all of these circumstances, the Court is not authorized to grant discovery that is directed to extrinsic evidence to create an ambiguity in the contract where there is none. Accordingly, after full consideration of the submissions upon the original motion and the letters submitted in reargument Mot. #004 by Third-Party Defendant, Maple Dining of Centerach, Inc., to compel Defendants Kimco Realty Corporation; Centereach Mall Associates, LP; Centereach Mall 605, LLC to produce additional discovery is denied; and the motion to reargue by Defendants Kimco Realty Corporation; Centereach Mall Associates,

LP; Centereach Mall 605, LLC for a protective order is granted to the extent that no further discovery is warranted to resolve liability arising out of the apportionment of liability arising under the terms of the lease, and the Third-Party Defendant is to provide the Verified Bill of Particulars demanded by Third-Party Plaintiff.

The foregoing shall constitute the decision and order of the court.

Dated: January 25, 2017



JOHN H. ROUSE, Acting J.S.C.

NON-FINAL DISPOSITION