SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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CAST IRON CO., LLC, Index No.: 655399/2016

Plaintiff, **DECISION & ORDER**

-against-

CAST IRON CORP.,

Defendant.

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JENNIFER G. SCHECTER, J.:

Defendant Cast Iron Corp. (Landlord) moves, pursuant to CPLR 3212, for partial summary judgment against plaintiff Cast Iron Co., LLC (Tenant) and an order declaring that Tenant is required to perform certain repairs. Tenant opposes. For the reasons discussed below, Landlord's motion is denied.

I. Factual Background & Procedural History

The parties submitted a joint statement of undisputed facts (Dkt. 14 [JS]).[1] Unless otherwise indicated, the following facts are undisputed.

Tenant entered into a commercial lease dated December 1, 1985 (Dkt. 18, Lease) entitling it to possession of a portion of the southeast corner of the cellar denoted as Commercial Space #6 (Premises) in a building (Building) located at 67 East 11th Street, which is on the northwest corner of Broadway and East 11th Street in Manhattan (JS ¶ 1; Lease at 4). Landlord is the successor-in-interest to the Lease's prior landlord, Greenwich Village Renovation Company (Prior Landlord) (JS ¶ 2; Lease at 1). The Lease is governed by New York law (Lease at 16).

[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF). Page numbers refer to the e-filed PDF.

This controversy centers on which party bears responsibility to make certain repairs to a sidewalk vault (the Vault) that was previously used by Tenant and its sublessee pursuant to the Lease. The Vault is an underground space adjacent to the Premises, located underneath the sidewalk and outside the footprint of the above-ground portions of the Building. [2] According to an affidavit by James Mehdizadeh (Dkt. 25), a member of Tenant, Tenant's sublessee to the Premises complained about water seepage that caused damage to its merchandise and fixtures in the Vault beginning in 2012, eventually prompting the sublessee to vacate the space. Ever since, Tenant reportedly has been unable to sublease the Premises due to water intrusion and structural issues in the Vault. Landlord retained an engineering firm to assess these issues and a contractor to provide an estimate for repairs, but now maintains that it is Tenant's responsibility under the Lease to procure and pay for the repairs. Tenant disagrees and maintains that the repairs are the Landlord's responsibility.

Paragraph 3 of the Lease ("Care and Repair of Premises") states:

> ***Tenant shall take good care of the Premises. Landlord shall take good care of and maintain and repair the Building both exterior and interior*** (***including sidewalks*** and sewer and utility company connections). Further, ***Tenant shall maintain and make all necessary non-structural repairs to the Premises***, except that it shall be entitled to receive any insurance proceeds collected by the Landlord which are attributable to ***non-structural losses*** occurring within the Premises. The interior of the Premises, storefronts and store doors, ***vaults (if used by Tenant)*** and Tenant installations ***shall be maintained by Tenant, except*** that ***damage caused thereto by Landlord*** or other occupants or tenants in the Building ***shall be***

[2] Vaults under New York City streets or sidewalks are licensed by the City to owners of adjacent buildings, subject to annual vault charges (*see generally 71 Fifth Ave. Co. v City of NY Dep't of Fin.*, 73 NY2d 861, 863 [1989]; *Bd. of Mgrs. of Atrium Condo. v W. 79th St. Corp.*, 2 AD3d 246, 247 [1st Dept 2003] ["[T]he City owns the vaults and they may not be conveyed in fee simple"]; Administrative Code of the City of NY § 11-2701 et seq.).

> ***repaired by Landlord. Violations*** shall be ***cured by Landlord, except*** those ***related to the Premises*** and ***caused by Tenant.***

(JS ¶ 3 [emphasis added]; *accord* Lease at 5).

Paragraph 30 of the Lease ("Vaults") reads as follows:

> Throughout the term hereof, ***Tenant shall have the right to use the vault space***, if any, ***more particularly identified on the diagram attached hereto as Exhibit B***, [3] it being agreed that Tenant shall be obligated to pay __% of the total vault bill for the Building representing Tenant's pro rata share based on the ratio of the floor area of its vault to all the vaults in the Building. Tenant shall pay its pro rata share of the bill within thirty (30) days of the Landlord's presentation of the bill but in no event later than ten (10) days before its due date.

(JS ¶ 4 [footnote and emphasis added]; *accord* Lease at 15 [showing an illegible handwritten number in the blank space preceding the percent symbol]).

Landlord submits two letters by Yakov Weinstein, a professional engineer affiliated with SW Engineering Co. PLLC (SWE). The first letter, dated November 30, 2015, describes the results of SWE's inspection of the sidewalk vault and foundation wall along Broadway and East 11th Street (Dkt. 19 [November Letter]). The November Letter describes damage to the foundation walls (cracking, bowing and erosion), to masonry arches (erosion) and to cast-iron and steel beams (oxidation, deterioration and displacement) that support the concrete structural slabs and masonry arches comprising the ceiling of the inspected vault areas. The second letter, dated February 4, 2016 (Dkt. 20 [February Letter, with November Letter, SWE Letters]), provides the results of SWE's inspection of probes cut into the damaged areas to determine the extent of needed repairs. The February Letter states that the foundation wall cracks had formed due to poor or defective

[3] Exhibit B to the Lease ("Cellar Floor Plan") denotes two distinct areas: (1) in a lighter shade, the Premises, roughly quadrilateral in shape, within the footprint of the building and (2) in a darker shade, the sidewalk vault underneath the Broadway and East 11th Street sidewalks and adjacent to two sides of the Premises (Lease at 26).

original design or construction, and recommends repairs to the wall using steel reinforcement, "stitching," and injection of epoxy grout. It further recommends reinforcing the connections between beams and columns in the masonry wall or installing additional steel beams for more support. [4]

Tenant submits an expert affidavit (Dkt. 38) by David Peraza, a professional engineer of over 40 years' experience, who physically inspected the Vault on three occasions. Peraza testifies that sidewalk vaults are commonly used for storage or utilities access and comprise two structural elements: the roof and the foundation wall. He describes the Vault as part of the Building's "envelope" physically separating the surrounding environment from the Building's interior. Peraza opines that the Vault roof and foundation wall structures are "integral with the Building's structure" and that the remedial work described by the SWE Letters is "structural." [5]

Tenant commenced this action by filing a complaint on October 11, 2016 (Dkt. 1), asserting a single cause of action for a declaratory judgment that, pursuant to the Lease, Landlord is obligated to perform the remedial work prescribed by the November and February Letters. Landlord filed an answer on December 9, 2016 (Dkt. 3), asserting a single counterclaim for a declaratory judgment that (a) Tenant is in breach of the Lease, and Landlord is entitled to recover possession of the Premises; and (b) Tenant is obligated to maintain and repair the Vault. The parties completed document discovery, and in January 2018, Landlord made this motion for partial summary judgment (Seq. 001).

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[4] Landlord also submits a contractor's proposal (reportedly procured by Tenant) to perform some of the recommended work for $18,200, plus tax (Dkt. 22).

[5] Tenant also submits documentation from Landlord dated between 1994 and 1996 showing that Landlord undertook and paid for certain repairs to the sidewalk and the Vault (Dkts. 29-37).

II. Discussion

A. Legal Standards

1. Summary Judgment

Summary judgment may be granted only in the absence of any triable issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The movant bears the burden of making a prima facie showing of entitlement to summary judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The motion must be "supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions" (CPLR 3212[b]). Failure to make the requisite showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]).

Once the movant has laid bare its proof, the opposing party is compelled to do the same (*Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 38 [1st Dept 2011]). One opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the claim rests or must demonstrate an acceptable excuse for failure to offer admissible evidence (*Zuckerman*, 49 NY2d at 562). Failure to contradict facts is an admission (*Costello Assocs., Inc. v Std. Metals Corp.*, 99 AD2d 227, 229 [1st Dept 1984], *appeal dismissed* 62 NY2d 942 [1984]). The evidence on the motion must be examined in the light most favorable to the opponent of summary judgment (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). Summary judgment must be denied if there is any doubt as to the existence of a triable issue of fact following the court's examination of the documents submitted in connection with the motion (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]). Mere conclusions, unsubstantiated allegations or expressions of hope, however, are insufficient to defeat a summary judgment motion (*Zuckerman*, 49 NY2d at 562). Indeed, summary judgment cannot be defeated by the "shadowy semblance of an issue" (*Jeffcoat v Andrade*, 205 AD2d 374, 375 [1st Dept 1994]).

2. Contractual Interpretation

Contracts "are construed in accord with the parties' intent," the best evidence of which is the language of the contract itself, read as a whole (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569, 572 [2002]). "Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*id.* at 569). "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'" (*id.* [brackets in original], quoting *Breed v Ins. Co. of N. Am.*, 46 NY2d 351, 355 [1978]; *see Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 446 [1st Dept 2017] ["To be found ambiguous, a contract must be susceptible of more than one commercially reasonable interpretation"]). Whether a contract is ambiguous "is a question of law to be resolved by the courts" (*W.W.W. Assocs., Inc. v Giancontieri*, 77 NY2d 157, 162 [1990]). Moreover, "provisions in a contract are not ambiguous merely because the parties interpret them differently" (*Mount Vernon Fire Ins. Co. v Creative Hous. Ltd.*, 88 NY2d 347, 352 [1996]). Extrinsic or parol evidence—evidence outside the four corners of the document—is "admissible only if a court finds an ambiguity in the contract" (*Schron v Troutman Sanders LLP*, 20 NY3d 430, 436 [2013]).

As a general rule, if the court finds that a contract is ambiguous, it ***cannot*** be construed as a matter of law on a motion for summary judgment (*NFL Enters. LLC v Comcast Cable Commc'ns, LLC*, 51 AD3d 52, 61 [1st Dept 2008]; *see LoFrisco v Winston & Strawn LLP*, 42 AD3d 304, 307 [1st Dept 2007] ["Since (the provision) is reasonably susceptible to more than one interpretation, and the difficulty is not resolved by reading the agreement as a whole, the provision is ambiguous and neither side is entitled to summary judgment construing it as a matter of law"]). An exception exists, however, when the documentary evidence submitted on summary judgment

resolves the ambiguity (*see Kolbe v Tibbetts*, 22 NY3d 344, 355 [2013]). Conversely, if "the extrinsic evidence in the record is insufficient to resolve the ambiguity, the parties' intent must be determined at trial" (*Chiusano v Chiusano*, 55 AD3d 425, 426 [1st Dept 2008]).

B. Paragraph 3 of the Lease

Landlord argues that it is entitled to partial summary judgment on its counterclaim and a declaratory judgment that Tenant is responsible for the remedial work described in the November and February letters (the Vault Work). Landlord bases its argument on the following sentence of the Lease: "The interior of the Premises, storefronts and store doors, ***vaults (if used by Tenant)*** and Tenant installations ***shall be maintained by Tenant***, except that damage caused thereto by Landlord or other occupants or tenants in the Building shall be repaired by Landlord" (Lease at 5 [¶ 3] [emphasis added]). Thus, Landlord argues, because the Lease obligates Tenant to "maintain[]" the Vault, and the Vault Work is limited to the Vault, Tenant is responsible for carrying out the Vault Work as a matter of law. In Landlord's view, the Lease does not limit Tenant's Vault obligations to "non-structural" maintenance; therefore, that the Vault Work is "structural," as Landlord apparently concedes (*see* Dkt. 42 [Landlord's Reply Br.] at 7-9]), has no effect on Tenant's obligation to make repairs. [6]

Tenant argues that (1) the Vault Work is not "maintenance" within the meaning of ¶ 3 of the Lease; (2) Landlord's obligations to "repair" the Building extend to the Vault Work; (3) it

[6] In its reply papers, Landlord suggests that any ambiguity should be construed against Tenant, because Tenant allegedly drafted the Lease. However, as Tenant and Prior Landlord were allegedly controlled by the same individuals, Prior Landlord might have ***jointly*** drafted the Lease with Tenant. A successor-in-interest (such as Landlord) to a party who drafted a contract is, like his predecessor, also susceptible to the presumption against the drafter (*see Two Guys from Harrison-N.Y., Inc. v S.F.R. Realty Assocs.*, 63 NY2d 396, 403 [1984]; *Greenpoint Mortg. Corp. v Lamberti*, 155 AD3d 1004, 1006 [2d Dept 2017]).

would be commercially unreasonable for the Lease to require Tenant to conduct the Vault Work; [7] (4) Landlord's subsequent conduct and admissions evidence its obligation to conduct the Vault Work; [8] and (5) state and municipal laws require Landlord to conduct the Vault Work [9] unless the lease expressly shifts Landlord's obligations.

While as a general matter, the terms "maintain" and "repair" may overlap in meaning—and the term "maintain" could conceivably include structural repairs [10]—the Vault Work does not unambiguously fall within the scope of Tenant's obligations to "maintain" the Vault under ¶ 3 of the Lease. Paragraph 3 of the Lease provides, in relevant part:

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[7] Tenant cites no evidence or authority suggesting that it is commercially unreasonable for a landlord to require tenants to perform structural repairs to portions of premises demised under a lease while retaining landlord's repair obligations as to other parts of the premises or property.

[8] In reply, Landlord cites the Lease's "no waiver" provision, which states "[t]he failure of either party to insist on strict performance of any covenant or condition hereof, or to exercise any option herein contained, shall not be construed as a waiver of such covenant, condition or option in any other instance" (Lease at 11). This provision of the Lease speaks to potential waiver of contractual obligations rather than to exclusion of evidence of subsequent conduct of the parties as to what those obligations are in the first instance.

[9] Tenant cites Administrative Code of City of NY §§ 19-152, 7-210, and 28-301.1; RCNY § 2-13(1)(2); and New York Multiple Dwelling Law § 78. None of the cited authority ***prohibits*** a lease from obligating the tenant to perform maintenance and repair on a building, sidewalks or other structures. Indeed, the case law cited by Tenant contemplates that a lease ***may*** require the tenant to perform such work (*see Invesco Advisers, Inc. v Marsh & McLennan Co., Inc.*, 92 AD3d 414, 417 [1st Dept 2012] [A "latent structural defect, which requires remediation when exposed, but was not caused by a tenant's alterations, does not fall within those lease provisions requiring a tenant to bear the cost of such remediation ***unless the lease expressly provides otherwise***" (emphasis added)]; *Bush Term. Assoc. v Federated Dept. Stores, Inc.*, 73 AD2d 943, 944 [2d Dept 1980] ["Generally, 'the obligation to comply with legal requirements affecting real property is on its owner' and ***absent an express covenant to the contrary***, the tenant has no obligation to undertake significant structural alterations" (emphasis added), quoting 2 Friedman, Leases, § 11.1 at 471]).

[10] Landlord's reply papers identify two dictionaries that conflate or otherwise acknowledge a relationship between the terms "repair" and "maintain" (or "maintenance"). That the two terms are interchangeable in some contexts does not render them synonymous in all contexts.

> (1) Landlord shall take good care of and ***maintain and repair the Building*** both exterior and interior (including sidewalks and sewer and utility company connections).
>
> (2) Further, ***Tenant shall maintain and make all necessary non-structural repairs to the Premises***, except that it shall be entitled to receive any insurance proceeds collected by the Landlord which are attributable to ***non-structural*** losses occurring within the Premises.
>
> (3) The interior of the Premises, storefronts and store doors, ***vaults (if used by Tenant)*** and Tenant installations ***shall be maintained by Tenant***, except that damage caused thereto by Landlord or other occupants or tenants in the Building shall be repaired by Landlord.

(Lease at 5 [emphasis and numbering added]).[11]

The Lease states that the "vaults (if used by Tenant) … shall be ***maintained*** by Tenant" and does not state that such vaults shall be ***repaired*** by Tenant (Lease at 5). By contrast, the Lease specifies that Landlord and Tenant are obligated to repair ***and*** maintain the Building ("Landlord shall take good care of and ***maintain and repair*** the Building") and the Premises ("Tenant ***shall maintain*** and ***make all necessary non-structural repairs*** to the Premises"), respectively. The canon of contractual construction *expressio unius est exclusio alterus*—"the expression of one thing implies the exclusion of the other" (*see Matter of NY City Asbestos Litig.*, 41 AD3d 299, 302 [1st Dept 2007], citing Black's Law Dictionary 602 [7th ed])—reasonably suggests that Tenant is thereby obligated to "maintain" the Vault, but ***not*** "repair" it.

Further, one may reasonably look to the phrase "[t]enant shall maintain and make all necessary non-structural repairs to the Premises," in sentence (2), above, to help determine what

[11] Neither party addresses the significance, if any, of ¶ 3's final sentence ("Violations shall be cured by Landlord, except those related to the Premises and caused by Tenant").

it means to "maintain" the vaults in sentence (3) [12] (*see State v R.J. Reynolds Tobacco Co.*, 304 AD2d 379, 379-80 [1st Dept 2003]; *Finest Inv. v Sec. Trust Co. of Rochester*, 96 AD2d 227, 229-30 [4th Dept 1983] ["We may presume that the same words used in different parts of a writing have the same meaning"], *affd* 61 NY2d 897 [1984]). The word "maintain" in sentence (2) cannot be reasonably interpreted to obligate Tenant to make ***structural*** repairs to the Premises (*see* Dkt. 23 [Landlord's Opening Br.] at 9 n.4]). Indeed, Tenant's contractual entitlement to Landlord's insurance proceeds is limited to those attributable to "***non-structural*** losses occurring within the Premises." As sentences (2) and (3) both use the word "maintain," one may also reasonably exclude structural repairs from Tenant's obligation to "maintain" the Vault in sentence (3). [13] As the Lease fails to unambiguously obligate Tenant to perform the Vault Work, and Landlord fails to provide extrinsic evidence supporting its desired interpretation, Landlord's motion for partial summary judgment is denied. Accordingly, it is

ORDERED that defendant Cast Iron Corp.'s motion for partial summary judgment is denied; and it is further

ORDERED that a telephonic conference will be held on August 14, 2018 at 5:00pm to set deadlines for the remainder of fact discovery.

Dated: August 6, 2018

ENTER:

Jennifer G. Schecter, J.S.C.

[12] The Vault is outside the "Premises" defined by the Lease; paragraph 30 confers upon Tenant only the "right to use" the Vault (Lease at 4, 15; *see also* Lease at 21 [¶ 39] [referring to "vault space ***adjacent to*** the Premises" (emphasis added)]).

[13] Landlord argues on reply that the only maintenance the Vault ***could*** require is structural in nature. If Landlord is correct, Vault maintenance could conceivably encompass structural repairs from which Tenant would have been exempt as to the Premises. Whether non-structural maintenance ***could*** be performed on the Vault, however, is an unresolved issue of fact.