[* 1]

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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

CARLOS LOUIS MONTI,

Plaintiff,

- against-

157 WEST 49th STREET REALTY CORP. and VIMAR REALTY CORP.,

Defendants.

INDEX NO. 111101/08

MOTION SEQ. NO. 003

VIMAR REALTY CORP.,

Third-Party Plaintiff,

- against-

701 OPERATING INC. and SBARRO, INC.,

Third-Party Defendants.

The following papers were read on this motion by third-party defendant for summary judgment pursuant to Section 3212 of the Civil Practice Law and Rules.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ☐ Yes ☒ No

Motion sequences 003 and 004 are hereby consolidated for purposes of disposition.[1]

In motion sequence 003, third-party defendant Sbarro, Inc. (Sbarro) moves for summary judgment, pursuant to CPLR 3212, dismissing the third-party complaint against it. In motion sequence 004, third-party defendant 701 Operating Inc. (701) moves for summary judgment, pursuant to CPLR 3212, dismissing the third-party complaint and cross-claims against it. Discovery is complete and Note of Issue has been filed.

BACKGROUND

Plaintiff alleges that, on August 18, 2007, he was walking on the sidewalk in front of a building (the Building) located at 701 Seventh Avenue, New York, New York, when he stepped

[1] Pursuant to an Order of this Court, dated January 5, 2012, Motion Sequences 001 and 002 were restored to this Court's calendar. They had been previously marked off the calendar by an Order dated September 30, 2011, due to third-party defendant Sbarro Inc.'s bankruptcy filing.

in a hole near the curb on 47th Street in front of a Sbarro's restaurant (the Restaurant) in the Building, causing him to fall and injure himself (bill of particulars, items 3-4).

Vimar Realty Corp. (Vimar) is the owner of the Building (Vimar Answer, ¶ 4). Its predecessor entered into a lease dated September 15, 1977 (the Lease) with 701 and, on March 30, 1993, it entered into a lease modification agreement (the Lease Modification Agreement) that extended the term of the Lease until December 31, 2012 and made certain other changes.

On February 1, 1989, 701 entered into a sublease with Sbarro (the SubLease) for the rental of the Restaurant's premises and, on June 30, 1993, 701 and Sbarro entered into a sublease modification agreement (the SubLease Modification Agreement) which extended the SubLease's term until December 30, 2012 and made other changes.

Plaintiff commenced this action on August 14, 2008 by filing a summons and complaint. The action was discontinued against 147 West 49th Street Realty Corp. by stipulation dated January 26, 2009. Vimar commenced a third-party action against 701 and Sbarro in December 2009. Thereafter, 701 and Sbarro moved for summary judgment dismissing the third-party action, but on April 4, 2011, Sbarro filed for bankruptcy in the United States Bankruptcy Court for the Southern District of New York (the Bankruptcy Court). The action was automatically stayed pursuant to the Bankruptcy Code and, in its order dated June 21, 2011, this Court resolved the motions by noting the bankruptcy stay. On December 20, 2011, the Bankruptcy Court granted plaintiff's motion to lift the bankruptcy stay and lifted it by permitting plaintiff to proceed to the extent of any insurance policies which might cover plaintiff's claim. On January 5, 2012, this Court permitted restoration of 701 and Sbarro's motions.

Parties' Allegations

Plaintiff alleges that on August 18, 2007 he along with his wife, daughter and her friend, went to the Restaurant for dinner. After dinner he claims that he stepped into a hole on the

sidewalk in front of the Building, causing him to fall and break his right ankle (plaintiff EBT, at 12-20). He states that the hole was approximately one foot from the curb on 47th Street, that there were no obstructions on the sidewalk and that the street lights were on (*id.* at 17-20, 26, 30-31).

Vimar contends that the Lease and the Lease Modification Agreement make the sidewalk's condition the responsibility of 701 and/or Sbarro. Vimar hired Walter and Samuels (W & S) as the managing agent for the Building and had a superintendent at the Building on a daily basis (Faraci EBT, at 7; Pepushaj EBT, at 6-10). The lease states that the superintendent's duties included the inspection and cleaning of the common areas of the Building, as well as inspecting the sidewalk for any defects which would be reported by the superintendent to his supervisor at W & S (*id.* at 10-19). The superintendent stated that he saw "little cracks" on the sidewalk, but not "any big damage" (*id.* at 15, 19) and that there were no prior incidents or prior complaints (*id.* at 26, 29).

Vimar further asserts that the superintendent was responsible for day-to-day maintenance only, to clean the interior of the Building and to maintain only the portion of the sidewalk in front of the Building's awning, but not the sidewalk in front of the Restaurant or the other stores in the Building (Faraci EBT, at 15, 25-27). It also states that, while it arranged for the repair of the sidewalk in front of the Building after plaintiff's accident, Sbarro agreed to pay one-third of the cost of the repair by letter dated November 1, 2007 (the Sbarro Letter) and that this indicates Sbarro's responsibility for the sidewalk in front of the Restaurant (*id.* at 37-42, 46-48). It further states that, while the superintendent would make repairs to minor cracks in the sidewalk, the hole in this case was significant enough to warrant obtaining a contractor and, consequently, Sbarro shared responsibility (Faraci continued EBT, at 13, 22-23).

701 contends that it had no responsibility for the sidewalk outside the premises, but that to the extent that it had such responsibility, it shifted any responsibility for the sidewalk to

Sbarro under the SubLease and the SubLease Modification Agreement. However, Sbarro contends that it was not responsible for sidewalk maintenance, that there were no prior complaints about the sidewalk's condition and that its responsibility was limited to the Restaurant's interior (Gonel EBT, at 13, 16, 39). It states that it did not oversee the repairs and that it paid the one-third share of the repair cost under the Sbarro Letter as a good will gesture to the landlord, since it wanted an extension of the Lease's term for the Restaurant (*id.* at 51; Missano EBT, at 20-25, 28, 30). It further states that the Restaurant was at that location since 1990, that it paid a million dollars per month in rent for the location and that, in addition to consideration on an issue of signage, it was prudent business practice while it was seeking a lease extension for it to agree to share the expense of the repair (*id.* at 24-25, 28, 30).

STANDARDS OF LAW

Summary Judgment

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; see also *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (see *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

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 (*see 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 (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Landlord's Duty-Abutting Sidewalk

"[A]n owner ... [of a building] has a statutory nondelegable duty to maintain the sidewalk abutting its premises" (*Spector v Cushman & Wakefield, Inc.*, 87 AD3d 422, 423 [1st Dept 2011]; see also *Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 519-521 [2008]; *Cook v Consolidated Edison Co. of NY, Inc.*, 51 AD3d 447, 448 [1st Dept 2008]).

Contract Interpretation

A lease is a contract and, where provisions of a lease are clear and unambiguous, they should be given their plain and ordinary meaning (*see United States Fid. & Guar. Co. v Annunziata*, 67 NY2d 229, 232 [1986]). 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 (*see id.* at 232; *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

The Lease defines the premises as "the store and basement [of the Building]." The Lease Modification Agreement contains a provision that all terms of the Lease "remain in effect ... without any other modifications" except as modified in that document. The SubLease states that it is subject to the Lease and that the Lease's provisions are binding and the SubLease Modification Agreement parallels the Lease Modification Agreement in making all terms continuing except as explicitly modified.

Paragraph 44 of the Lease provides that the tenant agrees "to maintain the demised premises in a condition of proper cleanliness, orderliness and state of attractive appearance at all times." Paragraph 72 provides that the tenant "shall not be required to make structural repairs to the demised premises [unless its own actions or omissions require it]." Additionally, the rules and regulations of the Lease state "the sidewalk ... shall not obstructed or encumbered by any Tenant or used for any purpose other than ingress to and egress from the demised premises and delivery of merchandise and equipment ... [and that ground floor tenants must] keep the sidewalk and curb in front of said premises clean and free from ice, snow, etc."

Regarding post accident repairs, "the general rule [is] that evidence of post-accident repairs is generally inadmissible and may never be admitted to prove an admission of negligence" (*Stolowski v 234 E. 178th St. LLC*, 89 AD3d 549, 549 [1st Dept 2011]; *Fernandez v Higdon El. Co.*, 220 AD2d 293, 293 [1st Dept 1995]). However, post-accident repairs are admissible "to ascertain [a] defendant's ownership and/or control" (*Cooke v City of New York*, 95 AD3d 537, 538 [1st Dept 2012]; *Cortes v Central El., Inc.*, 45 AD3d 323, 324 [1st Dept 2007]; *Fernandez*, 220 AD2d at 293).

Both 701 and Sbarro contend that they had no duty to maintain the sidewalk in front of the Restaurant. Vimar asserts that the Lease and SubLease impose a duty to make nonstructural repairs, such as repairs to the sidewalk for cracks.

The Lease and SubLease generally impose a duty to maintain the premises which is defined as "the store and basement [of the Building]." When the Lease and SubLease were executed, the duty to maintain and repair sidewalks was on the City of New York, modification of the relevant provisions to take account of the change in the law that shifted responsibility for such maintenance and repair of abutting sidewalks to the land's owner was the contracting parties' responsibility (*see Vucetovic,* 10 NY3d at 519-520; *Abramson v Eden Farm, Inc.*, 70 AD3d 514 [1st Dept 2010]). The demised premises as defined in the Lease does not include the sidewalk in front of the Restaurant and the Court declines to rewrite the parties' agreement to expand the definition of the premises (*see Guardian Life*, 70 NY2d at 890; *Nautilus Ins. Co. v Matthew David Events, Ltd.*, 69 AD3d 457, 460 [1st Dept 2010]).

The Lease provision regarding obstructions and encumbrances is inapplicable, since plaintiff stated that there were no obstructions on the sidewalk and there is no claim of ice or snow as the cause of plaintiff's accident (plaintiff EBT, at 31). Accordingly, 701's motion for summary judgment dismissing the third-party complaint asserted against it is granted.

However, as to Sbarro, there is an additional claim of responsibility based upon its

partial payment for the post-accident repair of the sidewalk, as evinced by the Sbarro Letter. Sbarro asserts that the Sbarro Letter may not be considered due to the rule that post-accident repairs are inadmissible to show negligence (*see Stolowski*, 89 AD3d at 549). However, in this case, the Court finds that the Sbarro Letter may be considered as it is being used to allege that Sbarro had a degree of control over the sidewalk and post-accident repairs are admissible for this purpose (*see Cooke*, 95 AD3d at 538; *Fernandez*, 220 AD3d at 293). Moreover, "the construction placed [on an ambiguous term of a contract] ... as established by their conduct may be examined to determine the term's true meaning" (*Harza,* 255 AD2d at 936; *Dubin v Drescher*, 92 AD3d 558, 558 [1st Dept 2012]). While Sbarro claims that its reason for the payment was based upon its desire to ingratiate itself with the landlord (Faraci EBT, at 24, 30), the payment can also be read as an acknowledgment of its responsibility for the sidewalk. Determination of this factual conflict is more properly a matter for a fact finder and is not proper for resolution on a motion for summary judgment (*see Vale v 221 Thompson, LLC*, 82 AD3d 754, 754 [2d Dept 2011]; *Shadlich*, 66 AD3d at 760). Consequently, Sbarro's motion for summary judgment dismissing the third-party complaint asserted against it is denied.

CONCLUSION

It is, therefore,

ORDERED that the motion of 701 Operating Inc. for summary judgment dismissing the third-party complaint and any cross-claims asserted against it is granted, and said third-party complaint and any cross-claim against said party are dismissed in their entirety, with costs and disbursements as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further,

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

ORDERED that the motion of Sbarro, Inc. for summary judgment dismissing the third-party complaint against it is denied; and it is further,

ORDERED that 701 Operating Inc. is directed to serve a copy of this order with notice of entry upon all parties and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 10/11/12

Enter:

Paul Wooten *J.S.C.*

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: : ☐ DO NOT POST ☐ REFERENCE