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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

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CACTUS 4, LLC, PRAETORIAN INSURANCE COMPANY and TECHNOLOGY INSURANCE COMPANY, INC., as Subrogees of Cactus 4 Properties, LLC d/b/a Cactus 4, LLC,

Plaintiffs,

-against-

MAYA SWISA, MAXINE SWISA, ALLISON MARGETSON and CHRISTOPHER SOBEL,

Defendants.

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Index No.: 111093/09
DECISION/ORDER

Motion Sequence No.: 007

HON. DORIS LING-COHAN, J.S.C.:

In this insurance subrogation action, defendants Maya and Maxine Swisa move, pursuant to CPLR 2221 (d), for leave to reargue a portion of the court's earlier decision dated January 11, 2012 (motion sequence number 007). For the following reasons, this motion is denied.

BACKGROUND

The court discussed the facts of this case at length in its January 11, 2012 decision, and will not repeat them at length here. The relevant portion of that decision found as follows:

> The fifth and sixth causes of action in the complaint allege breach of contract (i.e., the lease) against Maya and Maxine Swisa, respectively. *See* Notice of Motion, Exhibit 22, ¶¶ 78- 85, 86-93. The proponent of a breach of contract claim must plead the existence and terms of a valid, binding contract, its breach, and resulting damages. *See e.g. Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435 (1st Dept 1988). Here, Praetorian and Technology argue that the Swisa defendants and Margetson (as their licensee) breached paragraphs 7, 8, 10, 11 and 21 of the lease by causing the fire. *See* Memorandum of Law in Support of Motion, at 7-8. They present copies of the lease, an unauthenticated copy of the Fire Department incident report and the instant deposition testimony to support their claims. *Id.* It is undisputed that the parties entered into a lease and a fire occurred in the apartment, not due to the actions of the landlord or another tenant. This would appear to constitute prima facie proof of Praetorian's and Technology's claims.

Nevertheless, the Swisa defendants raise several arguments in opposition. First, they assert that "plaintiffs have failed to proffer admissible evidence to establish the cause of this fire." *See* Notice of Cross Motion (the Swisa defendants), Memorandum of Law, at 15. However, the issue of the precise cause of the fire is not necessarily directly relevant to plaintiffs' breach of contract claim, in contrast to the negligence claims; as indicated below, the Swisa defendants had a duty under the lease to care for the apartment and it is undisputed that they breached such duty since it is conceded that the damage to the apartment was not caused by the actions of the landlord or another tenant in the building.

The Swisa defendants next argue that "the lease provisions on which [the breach of contract claims are based] are mostly inapplicable." *See* Notice of Cross Motion (the Swisa defendants), Memorandum of Law, at 15. The first lease provision that they cite to is paragraph 8, entitled "Care of Your Apartment - End of Lease - Moving Out," which - they assert - applies only where the lease term has expired. *Id.* However, even a cursory perusal of that provision reveals that this is not the case. Paragraph 8 has two subparagraphs, the first of which deals with "care of your apartment," and the second of which governs "end of lease - moving out." The former subparagraph imposed obligations on the tenant by providing that:

> You will take good care of the apartment and will not permit or do any damage to it, except for damage that occurs through ordinary wear and tear. You will ... leave the apartment ... in the same condition as it was when You first occupied it, except for ordinary wear and tear and damage caused by fire or other casualty.

See Notice of Motion, Exhibit 4. It is well settled that "'on a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and ... circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where ... the intention of the parties can be gathered from the instrument itself." *Maysek & Moran, hc. v S.G. Wurburg & Co., Inc.*, 284 AD2d 203,204 (1st Dept 2001), quoting Luke Construction & Development Corp. v City of New York, 211 AD2d 514, 515 (1st Dept 1995). The foregoing language clearly contemplates that the tenant will take "good care" of the apartment by avoiding activities that might lead to "fire and other casualty." Here, by leaving candles unattended on a wicker table or, alternatively, using a discarded lamp, the Swisa defendants and Margetson failed to take such "good care," and thereby breached the lease. (Fn 5 - The question of whether this breach also constitutes a negligent act or omission is separate, and reserved to the trier of fact.) Therefore, the court rejects the Swisa defendants' argument.

> The Swisa defendants also contend that the issue of whether their conduct violated the proscriptions against "objectionable conduct" that are set forth in paragraphs 7 and 11 of the lease presents a question of fact that must be decided by a jury. *See* Notice of Cross Motion (the Swisa defendants), Memorandum of Law, at 16. However, the court disagrees. The lease clearly defines "objectionable conduct" as "behavior which makes or will make the apartment or the building less fit to live in for you or other occupants," or "anything which interferes with the rights of others to properly and peacefully enjoy their apartments, or causes conditions that are dangerous, hazardous, unsanitary or detrimental to other tenants in the building." *See* Notice of Motion, Exhibit 4. As was previously discussed, the interpretation of this language in the context of a summary judgment motion is a legal matter reserved to the court, not the jury. *Maysek & Moran, Inc. v S. G. Warburg & Co., Inc.*, 284 AD2d at 204. Here, it is plain and obvious that a fire constitutes a "condition[] that [is] ... dangerous, hazardous ... or detrimental to [the] other tenants in the building." Thus, the court rejects the Swisa defendants' argument with respect to "objectionable conduct." The Swisa defendants' remaining arguments are likewise unavailing. Therefore, the court concludes that Praetorian and Technology have adequately established their breach of contract claims against the Swisa defendants and Margetson. Accordingly, Praetorian and Technology's motion is granted with respect to those claims on the issue of liability, with the issue of damages to be determined at trial. (Fn 6 - Should plaintiff discontinue the negligence claims, the issue of damages may be decided by a referee, upon application to the court.).

See Notice of Motion, Exhibit I at 14.

In their instant motion, defendants Maya and Maxine Swisa (the Swisa defendants) seek leave to reargue the court's grant of summary judgment on plaintiffs' causes of action for breach of contract.

DISCUSSION

Pursuant to CPLR 2221 (d), a motion for leave to reargue may be granted only upon a showing "'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision.'" *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 (1st Dept 1992), quoting *Schneider v Solowey*, 141 AD2d 813 (2d Dept 1988). "Reargument is not designed to afford the unsuccessful party successive opportunities to reargue

issues previously decided." *182 Ad2d* at 27, citing *Pro Brokerage, Inc. v Home Ins. Co.*, 99 AD2d 971 (1st Dept 1984). Nor does a reargument motion provide a party "'an opportunity to advance arguments different from those tendered on the original application.'" *Rubinstein v Goldman*, 225 AD2d 328, 328 (1st Dept 1996), quoting *Foley v Roche*, 68 AD2d 558, 568 (1st Dept 1979).

Here, the Swisa defendants first argue that the court erred in granting plaintiffs' request for summary judgment against them on their fifth and sixth causes of action for breach of contract because "Cactus 4 did not institute any [such] causes of action against the Swisas," but "simply reiterated its negligence cause of action." *See* Notice of Motion, Shah Affirmation, ¶ 18. Cactus 4 responds that this argument is "frivolous on its face." *See* Jaroslawicz Affirmation in Opposition, at 2 (paragraphs not numbered). The court agrees. As was noted in the January 11, 2012 decision, plaintiffs' amended verified complaint clearly and specifically sets forth one cause of action for breach of contract against Maya Swisa (as a signatory to the lease), and one against Maxine Swisa (as her daughter Maya's guarantor). *See* Notice of Motion, Exhibit I (decision), at 15; Exhibit C (amended verified complaint), ¶¶ 78-85, 86-93. There are simply no grounds for the Swisa defendants' argument.

The Swisa defendants' second argument is that the court erred in granting plaintiffs' prior request for summary judgment on their breach of contract claims because "there are material issues of fact remaining" with respect to those claims. *See* Notice of Motion, Shah Affirmation, ¶¶ 23-31. The Swisa defendants contend that there are issues of fact with respect to: 1) whether the subject fire was caused by something not within Maya Swisa's control (i.e., the apartment's electrical wiring); 2) the interpretation of paragraph 8 of the lease (entitled "care of your

apartment - end of lease - moving out"); and 3) the interpretation of paragraphs 7 and 11 of the lease (which concern "objectionable conduct"). *Id.* However, as Cactus 4 correctly points out, the Swisa defendants asserted these identical contentions in opposition to the earlier summary judgment, and the court specifically rejected them in its January 11, 2012 decision. *See* Memorandum of Law in Opposition to Motion, at 7-9. As was previously noted, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d at 27, *supra*. Therefore, the court rejects the Swisa defendants' second argument as improper. Accordingly, the court finds that the Swisa defendants' motion should be denied.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 2221 (d), of defendants Maya and Maxine Swisa is denied; and it is further

ORDERED that within 30 days of entry of this order, moving defendants shall serve a copy upon all parties with notice of entry.

Dated: New York, New York
October 17, 2012

Hon. Doris Ling-Cohan, J.S.C.

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