

**Slade El. Indus., Inc. v Eretz Group, Inc.**

2013 NY Slip Op 30458(U)

March 5, 2013

Supreme Court, New York County

Docket Number: 116053/10

Judge: Saliann Scarpulla

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

PRESENT: Salvatore Scarpulla  
Justice

PART 19

Index Number : 116053/2010  
SLADE ELEVATOR INDUSTRIES  
vs.  
ERETZ GROUP  
SEQUENCE NUMBER : 004  
SUMMARY JUDGMENT

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

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 determined in  
accordance with the accompanying decision/order.

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

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NYS SUPREME COURT - CIVIL

FILED

MAR 07 2013

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 3/5/13

[Signature], J.S.C.

- 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: CIVIL TERM: PART 19

-----X  
SLADE ELEVATOR INDUSTRIES, INC.,

Plaintiff,

Index No.: 116053/10  
Submission Date: 11/14/12

- against-

ERETZ GROUP, INC., GEDULA 26 LLC, 485 SHUR  
LLC, 26 MAEM LLC, BSD MICHAEL 101 LLC,  
EEGO WEST FEE, LLC, MANHATTAN LW HOTEL  
ASSOCIATES L.P., 1031 155 5<sup>TH</sup> AVE LLC AND  
SHEVA LLC,

**DECISION AND ORDER**

Defendants.

-----X  
For Plaintiff:  
Law Offices of Edward Weissman  
60 East 42<sup>nd</sup> Street, Suite 557  
New York, NY 10165

For Defendants:  
Moshe Assis, Esq.  
485 7<sup>th</sup> Avenue, Suite 717  
New York, NY 10018

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Papers considered in review of this motion for summary judgment:

Notice of Motion . . . . . 1  
Aff in Opp . . . . . 2  
Reply . . . . . 3

HON. SALIANN SCARPULLA, J.:

In this breach of contract action, plaintiff Slade Elevator Industries, Inc. ("Slade")  
moves for summary judgment dismissing defendants Eretz Group, Inc., Gedula 26 LLC,  
485 Shur LLC, 26 Maem LLC, BSD Michael 101 LLC, EEGO West Fee, LLC,  
Manhattan LW Hotel Associates L.P., 1031 155 5<sup>th</sup> Ave LLC and Sheva LLC  
("defendants") counterclaim.

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Pursuant to a maintenance contract dated September 1, 2009, defendant Eretz Group, Inc. ("Eretz") hired Slade to service and maintain elevators at various commercial properties maintained by Eretz. Eretz ultimately defaulted in making payments to Slade, at which point Slade stopped providing services to the elevators.

Slade commenced this action seeking to recover \$55,421.80 in unpaid bills. Defendants interposed a counterclaim seeking \$500,000 in lost rental income suffered when commercial tenants moved out or were given credits due to dissatisfaction with the operation of the elevators in their respective premises.

Slade now moves for summary judgment dismissing the counterclaim, arguing that the counterclaim is barred by the express language of the maintenance contract. Specifically, the maintenance contract provides, in relevant part, that Slade will not be held "responsible or liable for any loss, damage, detention or delay caused by nonoperation of said equipment or authorities, or by insurrection or riot, or by any other cause which is unavoidable or beyond its control, or in any event for consequential damage." Slade maintains that there is no evidence to demonstrate that the parties ever contemplated that defendants would be entitled to consequential damages when the contract was drafted

In opposition, defendants argue that the provision is subject to more than one interpretation in that it does not relieve Slade from all liability for general consequential damages. Specifically, defendants maintain that the contract provision can be read to

exclude liability for consequential damages arising out of events that are “unavoidable or beyond [Slade’s] control.” They maintain that because the provision is susceptible to more than one interpretation, it is ambiguous, and the court can not determine as a matter of law that Slade is relieved from liability.

Defendants further argue that in any event, the contract provision is unenforceable as against New York public policy because it attempts to shield Slade from liability for damages arising out of its own gross negligence. Finally, they maintain that the damages sought in the counterclaim are not consequential in nature, and even if the court finds that they are consequential in nature, they are still actionable because they were reasonably contemplated by the parties at the time the contract was executed.

In reply, Slade argues that (1) defendants did not allege gross negligence in their counterclaim, and in any event, the subject contractual provision does not seek to insulate Slade from gross negligence and is therefore, not unenforceable on those grounds; and (2) defendants’ counsel’s assertion that the contract is open to more than one interpretation and his assertion as to what was contemplated by the parties at the time the contract was executed is based on mere speculation because he is not a party with personal knowledge of the facts.

### **Discussion**

It is well settled that a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. *Greenfield v.*

\* 5]

*Philles Records*, 98 N.Y.2d 562, 569 (2002). Whether a contract clause is ambiguous is a question of law for the court, to determine by looking within the four corners of the document, not to outside sources. *W.W.W. Assocs. v. Giancontieri*, 77 N.Y.2d 157 (1990); *Van Wagner Adver. Corp. v. S & M Enters.*, 67 N.Y.2d 186, 191 (1986). A contract is ambiguous if on its face it is reasonably susceptible of more than one interpretation. *Chimart Associates v. Paul*, 66 N.Y.2d 570, 573 (1986).

Here, defendants' counsel's claim that the subject contract provision is ambiguous is conclusory and without merit. The subject provision clearly states that Slade will not be held liable, "in any event" for consequential damages. *Royal Warwick, S.A. v Hotel Representative, Inc.*, 34 Misc. 3d 1232A (Sup. Ct. N.Y. Co., 2012), cited by defendants in support of their position, does not yield a different result here. In that case, the subject contract provision was found to be clearly ambiguous because it was subject to more than one interpretation. Here, the court finds that the subject clause can only be interpreted to mean that Slade can not be held liable for consequential damages, which are the type of damages sought in defendants' counterclaim.

Defendants' remaining arguments are without merit. Defendants erroneously contend that the subject contract provision is unenforceable as against public policy because it attempts to shield Slade from liability for damages arising out of its own gross negligence. There is no mention of gross negligence in the subject contractual provision,

and in any event, defendants' counterclaim does not allege nor allude to behavior constituting gross negligence on Slade's part.

In accordance with the foregoing, it is hereby

ORDERED that plaintiff Slade Elevator Industries, Inc.'s motion for summary judgment dismissing defendants Eretz Group, Inc., Gedula 26 LLC, 485 Shur LLC, 26 Maem LLC, BSD Michael 101 LLC, EEGO West Fee, LLC, Manhattan LW Hotel Associates L.P., 1031 155 5th Ave LLC and Sheva LLC's counterclaim is granted and the counterclaim is dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: New York, New York  
March 5, 2013

**FILED**

**MAR 07 2013**

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*Salvatore Caspulle*  
J.S.C.