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

PRESENT: Hon. George J. Silver PART 10
*Justice*

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EXCELSIOR 57TH CORP.,
Plaintiff,

- v -

EXCEL ASSOCIATES
Defendant.

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EXCEL ASSOCIATES
Third-Party Plaintiff,

-v-

SELECT PARKING CORP.
Third-Party Defendant.

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INDEX NO. 113665-2009

MOTION DATE

THIRD-PARTY INDEX NO. 591175-2009

MOTION SEQ. NO. 001

The following papers, numbered 1 to 6, were read on this motion for

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| Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits — Memorandum of Law | No(s). 1, 2, 3 |
| Answering Affirmation(s) — Affidavit(s) — Exhibits — Memorandum of Law | No(s). 4, 5 |
| Replying Memorandum of Law | No(s). 6 |

Upon the foregoing papers, it is hereby:

Third-party defendant Select Parking Corp. ("Select") moves pursuant to CPLR § 3212 for an order granting it summary judgment and dismissing the third-party complaint of defendant/third-party plaintiff Excel Associates ("Excel"). In the main action, plaintiff Excelsior 57th Corp. ("Excelsior"), the owner of the building located at 301-303 East 57th Street in New York County, alleges that it entered into a lease ("the master lease") with Excel for five floors of commercial space and a four-level garage. Excelsior alleges that under the terms of the master lease Excel was obligated to keep and maintain the premises in good repair, to make all non-structural repairs to the premises and all structural repairs caused by its negligence or the negligence of its subtenants. Excelsior alleges in its complaint that Excel breached its obligation under the master lease to maintain the garage in good repair. Specifically, Excelsior alleges that as a result of Excel's actions or omissions the garage sustained water infiltration and corrosion in numerous areas resulting in the deterioration of the concrete slab, floors, ramps and ceilings in the garage. Excel, who sublet the parking garage portion of the premises to Select,

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

1. Check one: ..... ☐ CASE DISPOSED ■ NON-FINAL DISPOSITION
2. Check as appropriate: MOTION IS: ■ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check as appropriate: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

commenced a third-party action against Select for indemnification.

In moving to the dismiss the third-party complaint Select argues that by the express terms of the its sublease with Excel repairs to the floor and ceiling slabs are Excel's sole responsibility. Select cites section 6.01 [a], of the sublease which states that Excel, as landlord "shall make all structural repairs to the demised premises." The article defines "structural" as "the foundation, bearing walls, bearing columns, floor slabs, ceiling slabs, driveways appurtenant to the Demised Premises and building and garage systems, such as ventilating, sprinkler and utility systems servicing, passing through, or located in, the Demised Premises." Article 6.01 [a] further states that Select, as tenant, "shall have no responsibility for the maintenance or repair of the floor or ceiling slabs except to keep same in a clean condition and to apply the sealer described on Exhibit E annexed hereto to floor slabs every three (3) years. Tenant does not guaranty that the application of such sealer will prevents leaks or deterioration of the slabs." Section 6.01[a] of the sublease also provides that Select, as tenant, "shall make all non-structural repairs to the Demised Premises and shall perform normal day-to-day maintenance in the Demised Premises which shall include, by way of example, fixtures, manlift and machines not the responsibility of the Landlord as stated herein, painting, decorating and keeping the same in clean condition. Tenant shall not be required to maintain building or garage systems or other structural elements of the building or the Demised Premises except for applying a sealer to the slabs as aforesaid."

In opposition, Excel contends that the third-party complaint cannot be dismissed at this juncture because if the Excelsior's claims are found to have legal merit, Select will have to indemnify Excel for any damage award in favor Excelsior. Specifically, Excel contends that the terms of the sublease are made expressly subject to the terms of the master lease, which Excelsior argues contains language that imposes liability upon Select were Excelsior to prevail in its first-party action. Excel also argues that notwithstanding the incorporation by reference of the master lease into the sublease, the sublease itself imposes liability upon Select if Excelsior's first party claims are successful. Excel relies on section 4.01 [c] [i] and [ii] of the sublease. Section 4.01 [c] [i] states that Select "hereunder covenants and agrees to keep and abide by all of the terms, covenants and conditions of the Master Commercial Lease and any other Superior Lease on the part of the tenant thereunder to be kept and performed insofar as they relate to the Demised Premises, and further covenants not to violate or breach any of the terms, covenants or conditions of the Master Commercial Lease and any other Superior Lease." Section 4.01 [c ] [ii] states "[i]n the event any of the terms, covenants or conditions of the Master Commercial Lease or any other Superior Lease conflict with any of the terms, covenants and conditions contained herein, then the terms covenants and conditions of the Master Commercial Lease or such other Superior Lease shall control." Excel contends that these section establish that any provision in the sublease that conflicts with the Excel's obligations under the master lease are not to be given effect and, consequently, if Excel is found to have breached the mater lease Select would be liable for breaching section 4.01 of the sublease.

Excel also cites section 6.01 [b] of the sublease, which states [n]otwithstanding anything to the contrary contained above, Tenant shall be required to make structural repairs to the Demised Premises to the extent required by the negligent or willful misconduct or Tenant, or Tenant's agents, servants, employees, contractors, invitees, licensees or customers." Excel argues that there are issues of fact as to whether Select was negligent by failing to properly clean drains, by periodically washing vehicles within the garage and by failing to install a water proof membrane over the concrete slabs in the garage.

Discussion

It is well-settled that on a motion for summary judgment, the moving party has the initial burden of demonstrating, by admissible evidence, its right to judgment (*Bendik v Dybowski*, 227 AD2d 228 [1st Dept 1996]). The burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists warranting a trial (*id.*). "On a motion for summary judgment, the court should accept as true the evidence submitted by the opposing party" (*Pellegrini v Brock*, 2009 NY Slip Op 6721 [1st Dept]). Summary judgment is a drastic remedy that should only be employed where no doubt exists as to the absence of triable issues (*Leighton v Leighton*, 46 AD3d 264

[1st Dept 2007]). The key to such procedure is issue-finding, rather than issue-determination (*id.*).

The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent (*see e.g. Slatt v Slatt*, 64 NY2d 966, 477 NE2d 1099, 488 NYS2d 645 [1985]), and "[t]he best evidence of what parties to a written agreement intend is what they say in their writing" *Slamow v. Del Col*, 79 NY2d 1016, 1018, 584 NYS2d 424, 425, 594 NE2d 918, 919 [1992]). Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain meaning of its terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous (*see e.g. W.W.W. Assoc. v. Giancontieri*, 77 NY2d 157, 162, 565 NYS2d 440, 443, 566 NE2d 639, 642 [1990]). Courts apply this fundamental rule with even greater force in commercial contracts negotiated at arm's length by sophisticated, counseled businesspeople *(see Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475, 807 NE2d 876, 775 NYS2d 765 [2004]; *R/S Assoc. v New York Job Dev. Auth.*, 98 NY2d 29, 32, 771 NE2d 240, 744 NYS2d 358 [2002]; *Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 67, 869 NYS2d 511 [1st Dept 2008], *affd* 13 NY3d 398, 920 NE2d 359, 892 NYS2d 303 [2009]). In such cases, "'courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include'" (*Vermont Teddy Bear Co.*, 1 NY3d at 475, *quoting Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 72, 385 NE2d 566, 412 NYS2d 827 [1978]). "[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*Reiss v Financial Performance Corp.*, 97 NY2d 195, 199, 764 NE2d 958, 738 NYS2d 658 [2001] [internal quotation marks omitted]). Instead, courts are concerned "with what the parties intended, but only to the extent that they evidenced what they intended by what they wrote" (*Rodolitz v Neptune Paper Prods.*, 22 NY2d 383, 387, 239 NE2d 628, 292 NYS2d 878 [1968] [internal quotation marks omitted]). Lease interpretation is subject to the same rules of construction which are applicable to other agreements (*Star Nissan, Inc. v Frishwasser*, 253 AD2d 491 [2d Dept 1998]). Clear and unambiguous terms in a lease should be interpreted in their plain, ordinary and nontechnical sense and circumstances extrinsic to the agreement should not be considered when the intention of the parties can be ascertained from the four corners of the instrument (*New York Overnight Partners, L.P. v Gordon*, 217 AD2d 20 [1st Dept 1995]).

Applying these principles here, the unambiguous terms of the sublease establish that Excel, as landlord, is responsible for all repairs to the floor and ceiling slabs and that Select bears no responsibility for maintenance or repair of the ceiling and floor slabs except to keep them in clean condition and to apply a sealer to the floor slabs every three years. The clear intent of this language was to shift all burdens associated with structural repairs to the floor and ceiling slabs of the parking garage from Select to Excel, with the exception of any structural repairs arising out of Select's negligence. Section 6.01 [a] is specific provision, while the provisions of section 4.01 are general, and where there is an inconsistency between a specific provision and general one, the specific provision controls and must be given effect (*Aguirre v City of New York*, 214 Ad2d 692 [2d Dept 1995]). A different interpretation of section 6.01 would leave it without force and effect, a result which courts must avoid when interpreting a contract (*FCI Group, Inc. v City of New York*, 54 AD3d 171 [1st Dept 2008]).

Excel's claim that there are questions of fact as to whether Select negligently failed to keep drains free of debris and washed cars is also unavailing The expert reports upon which Excel bases it claims that Select was negligent are unsworn and unnotarized and thus insufficient to raise a triable issue of fact (*see Bernhard v Bank of Montreal*, 41 AD3d 180 [1st Dept 2007]).

Accordingly, it is hereby

ORDERED that third-party defendant's motion for summary judgment is granted and the third-party complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the movant is to serve a copy of this motion on third-party plaintiff within 20 days of entry.

Dated: OCT 17 2013

New York County

George J. Silver, J.S.C.

HON. GEORGE J. SILVER