

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2  
Justice

|                                                                      |   |                                         |
|----------------------------------------------------------------------|---|-----------------------------------------|
| STREET RETAIL, INC.,                                                 | x | Index<br>Number <u>8774</u> 2006        |
| Plaintiff,                                                           |   | Motion<br>Date <u>November 21,</u> 2007 |
| - against -                                                          |   |                                         |
| CVS FRESH MEADOWS, L.L.C., FRESH<br>MEADOWS CVS, INC. and CVS, INC., |   | Motion<br>Cal. Number <u>21</u>         |
| Defendants.                                                          |   | Motion Seq. No. <u>1</u>                |
| CVS FRESH MEADOWS, L.L.C.,                                           | x |                                         |
| Third-Party Plaintiff,                                               |   |                                         |
| - against -                                                          |   |                                         |
| YORK INTERNATIONAL CORP.                                             |   |                                         |
| Third-Party Defendant.                                               |   |                                         |
|                                                                      | x |                                         |

The following papers numbered 1 to 26 read on this motion by plaintiff, Street Retail, Inc. (SRI), pursuant to CPLR 3212, for summary judgment as against defendants, CVS Fresh Meadows, L.L.C. (CVSFM), Fresh Meadows CVS, Inc. (FMCVS) and CVS, Inc., (CVS); and on cross motion by defendant third-party plaintiff, CVSFM, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint, and for summary judgment as against third-party defendant, York International Corp. (York).

|                                                    | <u>Papers<br/>Numbered</u> |
|----------------------------------------------------|----------------------------|
| Notice of Motion - Affidavits - Exhibits .....     | 1-8                        |
| Notice of Cross Motion - Affidavits - Exhibits ... | 9-12                       |
| Answering Affidavits - Exhibits .....              | 13-20                      |
| Reply Affidavits .....                             | 21-25                      |
| Other.....                                         | 26                         |

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff, SRI, commenced this action to recover damages, attorneys' fees and costs as against CVSFM and FMCVS, allegedly resulting from these defendants' breach of contract, and as against defendant, CVS, as guarantor of the lease agreement that is the subject of the instant action. Thereafter, CVSFM commenced a third-party action against third-party defendant, York, for breach of contract, contractual and common-law indemnification and attorneys' fees and costs.

The record indicates that landlord, MacArthur Holdings B., Inc. (MacArthur), a non-party to this action, entered into a lease agreement with tenant, FMCVS, on January 17, 1996, which was subsequently amended on November 6, 1996 (Lease). Pursuant to the Lease, FMCVS, rented retail Space No. 26 (Premises) from MacArthur within a shopping mall located at 61-30 188<sup>th</sup> Street in Queens County (Shopping Center). Concurrently executed with the Lease was a guaranty from CVS to MacArthur guarantying the terms and conditions of the Lease (Guaranty). On December 4, 1997, SRI purchased the Shopping Center from MacArthur, and MacArthur assigned the Lease and Guaranty to SRI. On December 18, 1998, FMCVS entered into an agreement assigning the Lease to CVSFM, which assignment became effective as of January 1, 1999.

This action concerns an incident that occurred on September 5, 2004, when a cold water pipe in an air conditioning unit on the Premises ruptured. SRI claims that, upon learning of the condition, defendants did not notify SRI, nor did defendants take any action to prevent water from continuing to flow out of the unit. According to SRI, by the time it was notified of the problem, almost all the water had drained from the unit, causing the air conditioning to malfunction in other tenant spaces. As a result, SRI states that it had to replace the glycol in the air conditioning system at a cost of \$63,133.13, and now seeks reimbursement of this expense.

In the third-party action CVSFM alleges that it had a contract with York to maintain, service and repair the subject air conditioning system. In breach of this agreement, York failed to procure insurance with CVSFM as an additional named insured. Further, CVSFM claims that because York was the only provider to service the subject air conditioning unit, any damage was a result of the negligent work performed by York.

It is the movants' burden to establish their prima facie entitlement to summary judgment as a matter of law. (Alvarez v

Prospect Hosp., 68 NY2d 320 [1986].) Upon making a showing of entitlement to summary judgment, the burden then shifts to the opponent to the motion to produce evidence, in admissible form, to demonstrate the existence of a material issue of fact which requires a trial of the action. (Id.)

Plaintiff has met its initial burden. It has been long held that "[w]hen the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations." (Franklin Apt. Assoc. v Westbrook Tenants Corp., 43 AD3d 860, 861 [2007].) Moreover, "[t]he construction and interpretation of an unambiguous written contract is an issue of law within the province of the court." (Id. at 861.) Here, the terms of the Lease are unambiguous, and although plaintiff has not shown any evidence of defendants' negligence in maintaining the air conditioning unit, Paragraphs 9(b) and 9(d) of the Lease still make defendants liable for the necessary repairs made by SRI. Pursuant to Paragraph 9(b), defendants gave a broad and unconditional promise to repair the air conditioning unit. (See Charles E. S. McLeod v R. B. Hamilton Moving and Stor., 89 AD2d 863 [1982].) The paragraph provides in pertinent part:

Tenant shall also maintain its storefront and agrees to maintain and repair the heating, ventilating, and air conditioning system ("HVAC") located in and servicing the Premises, and, when necessary, at its own cost and expense, to replace the major components of such system, including the unit itself, the compressor, and the fan motor.

Defendants' responsibility to repair the air conditioning unit is not contingent upon any act of negligence. Therefore, the allegations that defendants negligently maintained the air conditioning system, failed to prevent the water from completely draining from the unit and failed to immediately contact plaintiff to advise of the leak, are immaterial. The fact is that a component of the air conditioning unit burst and, to the extent that it needed to be repaired, defendants were obligated to conduct such repair at its sole expense.

Moreover, Paragraph 9(d) of the Lease also obligates defendants to reimburse plaintiff for its repair expenses. The paragraph provides in relevant part:

If, in an emergency, in Landlord's reasonable opinion, any such repairs are immediately necessary for the proper

use and enjoyment of the Premises or to avoid damage to the Premises, no prior Thirty (30) days' notice shall be required, but Landlord shall give Tenant whatever notice is reasonable in the circumstances and may make said repairs on behalf of the Tenant and charge Tenant for the reasonable cost thereof. In either event, such cost shall be due and payable by Tenant within Thirty (30) days after Tenant receives Landlord's invoice therefor with supporting documentation.

It is the court's opinion that the incident in question constituted an emergency plaintiff had to address immediately. Because the leak was so severe, not only did defendants' air conditioning system lose almost all of its water and glycol, but the other tenants in the Shopping Center lost air conditioning in their retail spaces as well. Therefore, plaintiff was justified in making the emergency repairs necessary to render the air conditioning system operable pursuant to Paragraph 9(d) of the Lease, and defendants are obligated to reimburse plaintiff for this expense.

Plaintiff is also entitled to an award of attorneys' fees and costs. Generally, such an award is not appropriate unless authorized by an agreement between the parties, statute or court rule. (Clelland v Lettro, 15 AD3d 874 [2005].) Pursuant to Paragraph 42 of the Lease, plaintiff, as the prevailing party, is entitled to such an award. Defendants, in opposition, failed to raise a triable issue of fact.

Additionally, pursuant to the terms of the Guaranty, plaintiff is also entitled to summary judgment as against CVS. (See Michelin Mgt. Co. v Mayaud, 307 AD2d 280 [2003]; see Terminal Mktg. Co. v Murphy, 296 AD2d 399 [2002].)

Accordingly, plaintiff's motion for summary judgment is granted, and that portion of CVSEFM's cross motion dismissing plaintiff's complaint is denied; and it is further

ORDERED that the portion of CVSEFM's cross motion for summary judgment as against York, for York's alleged failure to procure liability insurance naming CVSEFM as an addition insured, is denied, as York has submitted a copy of the relevant insurance policy establishing that it complied with its insurance obligations; and it is further

ORDERED that the portion of CVSEFM's cross motion for summary judgment as against York for contractual and common-law indemnification is denied with leave to renew pending CVSEFM's

submission of a copy of the agency agreement between CVS Pharmacy, Inc. and CVSFM, dated January 4, 2004, which CVSFM failed to attach to the affidavit of Melanie K. Luker.

ORDERED that the CVSFM cross motion for summary judgment as against York for contractual and common-law indemnification is denied for CVSFM's failure to establish its entitlement to summary judgment as a matter of law. Namely, CVSFM neglected to submit a copy of the agency agreement between CVS Pharmacy, Inc. and CVSFM, dated January 4, 2004, referenced in the affidavit of Melanie K. Luker.

Dated: 2/27/08

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J.S.C.